Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 7 of 2021

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Table of contents

Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[2]

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be permissible under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is permissible. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A statement of compatibility for a measure limiting a right must provide a detailed and evidence-based assessment of the measure against the limitation criteria.

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1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

2 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or draw the matter to the attention of the proponent and the Parliament on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[3]

3 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

Chapter 1[1]

New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instrument for compatibility with human rights:

- bills introduced into the Parliament between 11 to 13 May 2021 and 24 May to 3 June 2021; and
- one legislative instrument previously deferred.[2]

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

1.3 The committee comments on the following bills and legislative instrument, 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 7 of 2021*; [2021] AUPJCHR 59.

2 Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], deferred in *Report 6 of 2021* (13 May 2021).

Bills

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021[1]

Purpose	This bill seeks to amend the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* to: • set out requirements and preconditions in relation to the use of restrictive practices; • empower the secretary of the Department of Health to conduct reviews in relation to the delivery and administration of home care arrangements; and • remove the requirement for the minister to establish a committee to be known as the Aged Care Financing Authority
Portfolio	Health
Introduced	House of Representatives, 27 May 2021
Rights	Prohibition against torture and other cruel, inhuman or degrading treatment; rights to health; privacy; freedom of movement; liberty; equality and non-discrimination; rights of persons with disability

Background

1.4 The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019[2] came into force on 1 July 2019. This legislative instrument regulates the use of physical and chemical restraints by approved providers of residential aged care and short-term restorative care in a residential setting. The Parliamentary Joint Committee on Human Rights undertook an inquiry (2019 inquiry) into the instrument, as part of its function of examining legislation for compatibility with human rights, and reported on 13 November 2019.[3] Among other things the committee recommended that there be better regulation of the use of restraints in residential aged care facilities,

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 60.

2 F2019L00511.

3 Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (13 November 2019).

including in relation to exhausting alternatives to restraint, taking preventative measures and using restraint as a last resort; obtaining or confirming informed consent; improving oversight of the use of restraints; and having mandatory reporting requirements for the use of all types of restraint.[4] In response to this report the government introduced amendments to the Quality of Care Principles to make it clear that restraint must be used as a last resort, refer to state and territory laws regulating consent and require a review of the first 12 months operation of the new law.[5] The review, finalised in December 2020, made a number of recommendations, including to clarify consent requirements, strengthen requirements for alternative strategies, require an assessment of the need for restraint in individual cases and for monitoring and reviewing the use of restraint.[6]

1.5 In addition, the Royal Commission into Aged Care Quality and Safety considered the use of restrictive practices. The final report of the Counsel Assisting the Commission recommended new requirements be introduced to regulate the use of restraints in residential aged care and that these requirements should be informed by the report of the independent review, the committee's 2019 inquiry report and the approach taken by the National Disability Insurance Scheme rules.[7] The Royal Commission into Aged Care Quality and Safety's Final Report made a number of recommendations to regulate the use of restraints.[8] The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 is stated to be

4 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), recommendation 2, pp. 54–55.

5 See Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019. See also Australian Government response to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019*, 18 March 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/QualityCareAmendment/Government_Response (accessed 9 June 2021).

6 See Australian Healthcare Associates, *Independent review of legislative provisions governing the use of restraint in residential aged care: Final report*, December 2020, https://www.health.gov.au/sites/default/files/documents/2021/02/independent-review-of-legislative-provisions-governing-the-use-of-restraint-in-residential-aged-care-final-report.pdf (accessed 9 June 2021).

7 See *Royal Commission into Aged Care Quality and Safety Counsel Assisting's Final Submissions*, 22 October 2020, recommendation 29, p. 151, https://agedcare.royalcommission.gov.au/sites/default/files/2021-02/RCD.9999.0541.0001.pdf (accessed 9 June 2021).

8 See Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110, https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf (accessed 9 June 2021).

in response to the recommendations of the Royal Commission and the independent review. [9]

Regulation of the use of restrictive practices in aged care

1.6 This bill seeks to amend the *Aged Care Act 1997* (the Act) to require that the Quality of Care Principles must set out certain requirements regarding the use of restrictive practices. It inserts a definition into the Act of what constitutes a 'restrictive practice' – namely, any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.[10] The amendments in the bill would ensure that the Quality of Care Principles must:

- require that a restrictive practice is only used as a last resort to prevent harm and after consideration of the likely impact of the practice on the care recipient;
- require that, to the extent possible, alternative strategies are used and any alternative strategies used or considered are documented;
- require that a restrictive practice is used only to the extent that it is necessary and in proportion to the risk of harm;
- require that if a restrictive practice is used it is used in the least restrictive form, and for the shortest time, necessary to prevent harm;
- require that informed consent is given to the use of a restrictive practice;
- require that the use of a restrictive practice is not inconsistent with any rights and responsibilities specified in the User Rights Principles; and
- provide for the monitoring and review of the use of a restrictive practice in relation to a care recipient.[11]

1.7 The bill also provides that the Quality of Care Principles may provide that a requirement specified in the Principles does not apply if the use of a restrictive practice is necessary in an emergency.[12]

Preliminary international human rights legal advice

Multiple rights

1.8 Setting out requirements relating to when restrictive practices can be used by aged care providers engages a number of human rights. To the extent that the bill strengthens the responsibilities of approved providers by enhancing safeguards

9 Explanatory memorandum, p. 1.

10 Schedule 1, item 3, proposed new section 54-9.

11 Schedule 1, item 3, proposed new subsection 54-10(1).

12 Schedule 1, item 3, proposed new subsection 54-10(2).

regarding the use of restrictive practices, the measure may assist in ensuring rights are not limited and may promote other rights,[13] including:

- ***the prohibition on torture or cruel, inhuman or degrading treatment or punishment***:[14] the United Nations (UN) Committee on the Rights of Persons with Disabilities has stated that Australia's use of restrictive practices (which includes chemical and physical restraints) on persons with disability may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment and has recommended that Australia take immediate steps to end such practices.[15] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also raised concerns and called for a ban on the use of restraints in the health-care context, noting that such restraint may constitute torture and ill-treatment in certain circumstances;[16]
- ***the right to health***: which includes the right to be free from non-consensual medical treatment.[17] Australia also has obligations to provide persons with disability with the same range, quality and standard of health care and programmes as provided to other persons;[18]
- ***the right to privacy***: which includes the right to personal autonomy and physical and psychological integrity, and extends to protecting a person's bodily integrity against compulsory procedures.[19] Similarly, no person with

13 As identified in the statement of compatibility, pp. 4–6.

14 International Covenant on Civil and Political Rights, article 7; Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

15 United Nations (UN) Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session,* CRPD/C/AUS/CO1 (2013) [35]-[36].

16 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53 (2013) [63]; UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/63/175 (2008) [55].

17 International Covenant on Economic, Social and Cultural Rights, article 12. See UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000) [8].

18 Convention on the Rights of Persons with Disabilities. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health* (2000), [8]. The rights of persons with disabilities are relevant insofar as some aged care residents may have physical or mental impairments that constitute a disability.

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

disability shall be subjected to arbitrary or unlawful interference with their privacy;[20]

- ***the right to freedom of movement and liberty***: the right to liberty prohibits States from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention.[21] The existence of a disability shall also, in no case, justify a deprivation of liberty.[22] The right to freedom of movement includes the right to liberty of movement within a country.[23] A restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present.[24] These rights may be engaged and limited by intentional restrictions of voluntary movement or behaviour by the use of a device, or removal of mobility aids, or physical force, and limiting a care recipient to a particular environment;
- ***the rights of persons with disability***: as set out in the Convention on the Rights of Persons with Disabilities, including the right to equal recognition before the law and to exercise legal capacity;[25] the right of persons with disabilities to physical and mental integrity on an equal basis with others;[26] and the right to freedom from exploitation, violence and abuse;[27] and
- ***the right to equality and non-discrimination***: which provides that everyone is entitled to enjoy their rights without discrimination of any kind, including on the basis of age or disability.[28]

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20 Convention on the Rights of Persons with Disabilities, article 22.

21 International Covenant on Civil and Political Rights, article 9. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

22 Convention on the Rights of Persons with Disabilities, article 14.

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

24 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)* (1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/22.44 (2012) [55] and [57]; *Foka v Turkey*, European Court of Human Rights Application No.28940/95, Judgment (2008) [78]; *Gillan and Quinton v United Kingdom*, European Court of Human Rights Application No.4158/05, Judgment (2010) [54]-[57]; *Austin v United Kingdom*, European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber (2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (2013) [38]-[45].

25 Convention on the Rights of Persons with Disabilities, article 12. This includes an obligation to ensure that all measures that relate to legal capacity provide for appropriate and effective safeguards to prevent abuse.

26 Convention on the Rights of Persons with Disabilities, article 17.

27 Convention on the Rights of Persons with Disabilities, article 16.

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

1.9 As the committee considered in its 2019 inquiry report, noting that the regulation of the use of restraints in the Quality of Care Principles adds a layer of regulation on approved providers, but does not appear to affect existing state and territory laws and the common law regarding the use of restraints and informed consent, this measure may not itself directly limit human rights.[29] However, noting the complex interplay of existing laws regulating the use of restraints by approved providers, if the regulation of restraints for aged care providers leads to confusion as to when restraint is, or is not, permitted in residential aged care facilities, the practical operation and effect of the measure may mean, depending on the adequacy of the safeguards, that in practice this measure could limit the human rights set out above. As such, it is necessary to consider if the safeguards and protections set out in the bill ensure sufficient protection so as not to limit the human rights of aged care recipients.

1.10 In this regard, the bill appears to provide significant protections which are aimed at reducing the use of restraint, in particular the requirements that restraints may only be used: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; and after informed consent is given; and that the use of a restrictive practice is monitored and reviewed. These are important safeguards that are likely to ensure better protection around the use of restraints in aged care facilities.

1.11 However, some questions remain as to how some of these restrictions on the use of restraints will operate in practice. In particular, it is unclear why the bill does not prohibit the use of restrictive practices unless used in accordance with a behavioural support plan, which sets out in an individualised way for each care recipient how any behavioural issues may be dealt with. The Royal Commission into Aged Care Quality and Safety recommended restrictive practices be prohibited unless recommended by an accredited independent expert as part of a behaviour support plan.[30] This is also a requirement under the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (NDIS rules). The explanatory memorandum states that the Quality of Care Principles will 'clarify' that from 1 September 2021 'approved providers will be required to create behaviour support plans to inform the use of restrictive practices on a care recipient'.[31] However, it is not

29 See Parliamentary Joint Committee on Human Rights, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (13 November 2019), pp. 45–47. Note also in relation to this bill that the explanatory memorandum, at p. 10, states 'This Bill is not intended to affect the operation of those state and territory laws, which protect individuals from undue interference with their personal rights and liberties in relation to the use of restrictive practices'.

30 See Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect – Volume 3A, The New System*, 2021, recommendation 17, pp. 109–110, https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf (accessed 9 June 2021).

31 Explanatory memorandum, p. 10.

clear why this is not provided for in this bill, and why the legislation does not state that restrictive practices are prohibited unless done in accordance with such a plan. It is also not clear who makes a decision around when these requirements apply. For example, who determines that use of a restrictive practice is a last resort, the least restrictive and used to the extent that is necessary and proportionate – is it a health practitioner, an aged care worker, or a specialist behaviour support provider (as required by the NDIS rules)? [32]

1.12 Further, there appears to be a gap in protection for the use of restrictive practices when such practices are used in an 'emergency'. The bill provides that the Quality of Care Principles may provide that 'a requirement' specified in those Principles does not apply if the use is necessary in an emergency.[33] What constitutes an emergency is not defined in the bill. The explanatory memorandum provides no further detail in relation to this, simply restating the provision in the bill and adding 'noting that an emergency could be behaviourally based'.[34] Of particular concern is that there is no limit on what aspect of the restraint requirements could be overridden during an emergency. If all of the requirements are stated not to apply in an emergency situation, depending on how an 'emergency' is interpreted, this could undermine the safeguards contained in the bill. It is not clear, in particular, why it is necessary to allow the following requirements to be overridden in an emergency: that the restrictive practice be used only to the extent necessary and in proportion to the risk of harm; be used in the least restrictive form and for the shortest time; and be monitored and reviewed – noting that these appear to be requirements that could still comfortably operate during an emergency situation.

1.13 In addition, while the bill provides that a restrictive practice may only be used when 'informed consent is given to the use', it is not clear if this will require informed consent to be given each time a restrictive practice is used, or whether consent can be given for future uses of a restraint. The Department of Health previously advised the committee in its 2019 inquiry that informed consent must be met for each use of a physical restraint, which could mean, for example, that if bedrails are used because a care recipient is experiencing side effects while on antibiotics for 14 days, consent is given to the use of restraint for this full two week period.[35] In relation to chemical restraints (for example, psychotropic medications such as antipsychotics, benzodiazepines or antidepressants to sedate or subdue residents with dementia), it appears consent is meant to be obtained at the time the chemical restraint is

32 National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018, section 18.

33 Schedule 1, item 3, proposed new subsection 54-10(2).

34 Explanatory memorandum, p. 14.

35 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), p. 39.

prescribed.[36] It is therefore not clear if the bill's requirement for informed consent for the use of a restrictive practice would require consent to be obtained, or at least confirmed, when the chemical restraint is administered.

1.14 Finally, the bill provides that the Quality of Care Principles must make provision for, or in relation to, the monitoring and review of the use of a restrictive practice in relation to a care recipient. However, no information has been provided as to who will monitor the use of the practice, who will undertake a review into the practice, and whether such persons will be independent from the person who uses the restrictive practice. The bill also provides that any alternative strategies that have been considered or used in relation to a care recipient must be documented. However, it does not appear to provide that the use of the restrictive practice itself needs to be documented. It is also noted that the *Aged Care Act 1997* now provides that the use of a restrictive practice in relation to a residential care recipient is a reportable incident (so that the Aged Care Quality and Safety Commissioner is notified of its use).[37] However, this does not apply when the restrictive practice is used in the circumstances set out in the Quality of Care Principles. As such, noting that the Principles can provide that none of the requirements set out in the bill apply to the use of a restrictive practice used in an emergency, it is not clear if such emergency use would be a reportable incident (noting it would be done in accordance with the Principles).

1.15 Therefore, in order to fully assess the compatibility of this bill with human rights, further information is required, in particular:

(a) why the bill does not prohibit the use of restrictive practices unless used in accordance with a behavioural support plan;

(b) who determines that the requirements for the use of a restrictive practice is met, for example who determines that a restrictive practice is the last resort, the least restrictive and used to the extent that is necessary and proportionate;

(c) what are the criteria for determining whether a situation constitutes an 'emergency' and who makes this determination;

(d) why is it appropriate to enable the Quality of Care Principles to override any of the requirements set out in the bill in an emergency, in particular the requirements that the restrictive practice: be used only to the extent necessary and in proportion to the risk of harm; be used in the least restrictive form and for the shortest time; and be monitored and reviewed;

36 Parliamentary Joint Committee on Human Rights, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (13 November 2019), pp. 39–41.

37 *Aged Care Act 1997*, subsections 54–3(2)(g).

(e) in requiring informed consent for the use of a restrictive practice, how long does such consent remain valid and, in the case of chemical restraint, is consent required only when medication is prescribed, or is it also required (or required to be confirmed) when medication is administered;

(f) who will monitor and review the use of restrictive practices, and will they be independent from the person who used the restrictive practice;

(g) why does the bill not appear to provide that each use of a restrictive practice must be documented; and

(h) will a restrictive practice undertaken in an emergency and therefore not in accordance with the requirements be a reportable incident.

Committee view

1.16 The committee notes that this bill seeks to set out certain requirements regarding the use of restrictive practices in aged care facilities. These requirements would strengthen existing requirements, and would provide that restraints may only be used in aged care facilities: as a last resort; after considering all alternative strategies; to the extent necessary and proportionate; in the least restrictive form and for the shortest time; after informed consent is given; and that the use of a restrictive practice is monitored and reviewed. However, these requirements may not apply in 'emergency' situations.

1.17 The committee welcomes these proposed amendments as it considers these offer much stronger protections regarding minimising the use of restraints against vulnerable aged care residents. The committee notes that many of these amendments directly address recommendations made by the committee in its 2019 inquiry into the regulation of restraints under the Quality of Care Principles, particularly that restraints should only be used as a last resort and after all other alternatives to restraint have been exhausted. The committee considers this bill may assist in ensuring there are appropriate safeguards to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment, and may also promote the rights to health, privacy, freedom of movement, liberty, equality and non-discrimination and the rights of persons with disability.

1.18 However, some questions remain as to how some of these restrictions on the use of restraints will operate in practice. As such, it is necessary to consider if the safeguards and protections set out in the bill ensure sufficient protection so as not to limit the human rights of aged care residents.

1.19 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 [1.15].

Appropriation Bill (No. 1) 2021-2022
Appropriation Bill (No. 2) 2021-2022
Appropriation (Parliamentary Departments) Bill (No. 1) Bill 2021-2022[1]

Purpose	These bills propose appropriations from the Consolidated Revenue Fund for services
Portfolio	Finance
Introduced	House of Representatives, 11 May 2021
Rights	Multiple rights

Appropriation of money

1.20 These bills seek to appropriate money from the Consolidated Revenue Fund for a range of services. The portfolios, budget outcomes and entities for which these appropriations would be made are set out in the schedules to each bill.[2]

International human rights legal advice

Multiple rights

1.21 Proposed government expenditure to give effect to particular policies may engage and limit, or promote, a range of human rights, including civil and political rights and economic, social and cultural rights (such as the right to housing, health, education and social security).[3] The rights of people with disability, children and women may also be engaged where policies have a particular impact on vulnerable groups.[4]

1.22 Australia has obligations to respect, protect and fulfil human rights, including the specific obligations to progressively realise economic, social and cultural rights

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Appropriation Bill (No. 1) 2021-2022; Appropriation Bill (No. 2) 2021-2022 and Appropriation (Parliamentary Departments) Bill (No. 1) Bill 2021-2022, *Report 7 of 2021*; [2021] AUPJCHR 61.

2 Appropriation Bill (No. 1) 2021-2022, Schedule 1; Appropriation Bill (No. 2) 2021-2022, Schedules 1 and 2 and Appropriation (Parliamentary Departments) Bill (No. 1) Bill 2021-2022, Schedule 1.

3 Under the International Covenant on Civil and Political Rights and the International covenant on Economic, Social and Cultural Rights.

4 Under the Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination against Women.

using the maximum of resources available; and a corresponding duty to refrain from taking retrogressive measures (or backwards steps) in relation to the realisation of these rights.[5] Economic, social and cultural rights may be particularly affected by appropriation bills, because any reduction in funding for measures which realise them, such as specific health and education services, may be considered to be retrogressive with respect to the attainment of such rights and, accordingly, must be justified for the purposes of international human rights law.

1.23 The statements of compatibility accompanying these bills do not identify that any rights are engaged by the bills, and state that the High Court has emphasised that because appropriation Acts do not ordinarily confer authority to engage in executive action, they do not ordinarily confer legal authority to spend, and as such, do not engage human rights.[6] However, because appropriations are the means by which the appropriation of money from the Consolidated Revenue Fund is authorised, they are a significant step in the process of funding public services. The fact that the High Court has stated that appropriations Acts do not create rights or duties as a matter of Australian law, does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law. As the committee has consistently stated since 2013,[7] the appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and failure to fulfil, Australia's obligations under international human rights laws. Appropriations may, therefore, engage human rights for the purposes of international law, because reduced appropriations for particular areas may be regarded as retrogressive – a type of limitation on rights.

5 See, International Covenant on Economic, Social and Cultural Rights.

6 Statements of compatibility, pp. 3 and 4.

7 Parliamentary Joint Committee on Human Rights, *Report 3 of 2013,* (13 March 2013), pp. 65-67; *Report 7 of 2013,* (5 June 2013), pp. 21-27; *Report 3/44,* (4 March 2014), pp. 3-6; *Report 8/44,* (2014), pp. 5-8; *Report 20/44*, (18 March 2015), pp. 5-10; *Report 23/44*, (18 June 2015), pp. 13-17; *Report 34/44*, (23 February 2016), p. 2; *Report 9 of 2016,* (22 November 2016), pp. 30-33; *Report 2 of 2017,* (21 March 2017), pp. 44-46; *Report 5 of 2017,* (14 June 2017), pp. 42-44; *Report 3 of 2018,* (27 March 2018), pp. 97-100; *Report 5 of 2018,* (19 June 2018), pp. 49-52; *Report 2 of 2019,* (2 April 2019), pp. 106-111; *Report 4 of 2019,* (10 September 2019), pp. 11-17; *Report 3 of 2020,* (2 April 2020), pp. 15-18 and *Report 12 of 2020,* (15 October 2020), pp. 20-23.

1.24 There is international guidance about reporting on the human rights compatibility of public budgeting measures.[8] For example, the Committee on the Rights of the Child has advised that countries must show how the public budget-related measures they have chosen to take result in improvements in children's rights,[9] and has provided detailed guidance as to implementation of the rights of the child, which 'requires close attention to all four stages of the public budget process: planning, enacting, executing and follow-up'.[10] It has also advised that countries should 'prepare their budget-related statements and proposals in such a way as to enable effective comparisons and monitoring of budgets relating to children'.[11]

1.25 Without an assessment of human rights compatibility of appropriations bills, it is difficult to assess whether Australia is promoting human rights and realising its human rights obligations. For example, a retrogressive measure in an individual bill may not, in fact, be retrogressive when understood within the budgetary context as a whole. Further, where appropriation measures may engage and limit human rights, an assessment of the human rights compatibility of the measure would provide an explanation as to whether that limitation would be permissible under international human rights law.

1.26 Considering that appropriations may engage human rights for the purposes of international law, in order to assess such bills for compatibility with human rights the statements of compatibility accompanying such bills should include an assessment of the budget measures contained in the bill, including an assessment of:

8 See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017); South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016); Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014); Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006); and Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney*, Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

9 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [24].

10 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [26].

11 Committee on the Rights of the Child, *General Comment No. 19 on public budgeting for the realization of children's rights (art. 4)* (2016) [81].

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);[12]
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, First Nations Peoples, people with disability and children);[13] and
- key individual measures which engage human rights, including a brief assessment of their human rights compatibility.

1.27 In relation to the impact of spending or reduction in spending on vulnerable groups, relevant considerations may include:

- whether there are any specific budget measures that may disproportionately impact on particular groups (either directly or indirectly); and
- whether there are any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for particular groups.[14]

Committee view

1.28 The committee notes that these bills seek to appropriate money from the Consolidated Revenue Fund for services. The committee considers that proposed

12 This could include an assessment of any trends indicating the progressive realisation of rights using the maximum of resources available; any increase in funding over time in real terms; any trends that increase expenditure in a way which would benefit vulnerable groups; and any trends that result in a reduction in the allocation of funding which may impact on the realisation of human rights and, if so, an analysis of whether this would be permissible under international human rights law.

13 Spending, or reduction of spending, may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

14 There are a range of resources to assist in the preparation of human rights assessments of budgets. See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) https://www.ohchr.org /Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf; South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016) http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf; Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014) https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf; Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (2006) https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

government expenditure to give effect to particular policies may engage and promote, or limit, a range of human rights.

1.29 The committee acknowledges that appropriations bills may present particular difficulties given their technical and high-level nature, and as they generally include appropriations for a wide range of programs and activities across many portfolios. As such, it may not be appropriate to assess human rights compatibility for each individual measure. However, the committee considers that the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility, namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups.

1.30 The committee considers that statements of compatibility for future appropriations bills should contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1* and addresses the matters set out at paragraphs [1.26] and [1.27].

1.31 The committee draws this matter to the attention of the minister and the Parliament.

National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021[1]

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

NDIS Provider Register

1.32 The *National Disability Insurance Scheme Act 2013* (NDIS Act) currently provides that the NDIS Provider Register must include certain information, including personal information, in relation to persons who are current or former NDIS providers or persons against whom a banning order is, or was, in force.[2] This bill proposes to expand the information that must be included on the NDIS Provider Register in relation to each person who is a registered NDIS provider.[3] Specifically, the NDIS Provider Register would be required to include information about a compliance notice if the person is, or was, subject to a compliance notice.[4] A compliance notice may be given to an NDIS provider by the NDIS Quality and Safeguards Commissioner (Commissioner) if the Commissioner is satisfied than an NDIS provider is not complying with the NDIS

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 62.

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

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

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

Act or is aware of information that suggests that an NDIS provider may not be complying with the Act.[5] The compliance notice must include the information specified in subsection 73ZM(2) of the NDIS Act, including the name of the provider and the details of (possible) non-compliance.[6] This bill also proposes to amend the definition of 'protected Commission information' to exclude any information covered in whole or part by a publication on the NDIS Provider Register.[7]

Preliminary international human rights legal advice

Rights of people with disability

1.33 Insofar as this bill facilitates greater information sharing and authorises the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports, it appears to promote the rights of people with disability. The right to be free from all forms of violence, abuse and exploitation is enshrined in article 16 of the Convention on the Rights of Persons with Disabilities, which requires that States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse.[8] Further, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'.[9]

1.34 The statement of compatibility states that the bill proposes to make various amendments to the NDIS Act in order to strengthen support and protections for people with disability by ensuring a clear and effective legislative basis for: the Commissioner's powers; compliance and enforcement arrangements; provider registration provisions; and efficient information sharing across governments and government agencies.[10] In particular, the statement of compatibility notes that the amendments that broaden information sharing arrangements and expand the type of information that can be disclosed, shared and published on the NDIS Provider Register, will support the transparent exercise of the Commissioner's powers to ensure NDIS providers and workers are suitable to deliver supports to NDIS participants and comply with the required standards.[11] It explains that publishing and maintaining compliance

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

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

7 Schedule 1, item 1, proposed section 9.

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

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

10 Statement of compatibility, p. 17.

11 Statement of compatibility, p. 20.

and enforcement information, including publishing information about current or previous compliance notices against a person, will allow NDIS participants to make informed decisions about the services and supports they access, which will support their right to exercise choice and control.[12] As such, the statement of compatibility states that these provisions, as well as the bill more generally, promote the rights of people with disability, particularly the right to be free from exploitation, violence and abuse.[13]

Right to privacy

1.35 However, by broadening the circumstances in which information can be published on the NDIS Provider Register and excluding any information published on the Register from being classified as 'protected Commission information', the measure also engages and limits the right to privacy. This is because the measure would authorise publishing on a public website the personal details (including personal reputational information) of persons who are, or have been, subject to a compliance notice. By amending the definition of 'protected Commission information' to exclude any information published on the NDIS Provider Register, such information would no longer be protected by the relevant privacy safeguards, including the use and disclosure provisions in the NDIS Act and the *Privacy Act 1998* (Privacy Act).[14] Any information published on the NDIS Provider Register is accessible to the public, noting that an internet search of the person's name would bring up search results in relation to information contained on the Register. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation. It includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life.[15]

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

1.37 The statement of compatibility recognises that the bill engages and limits the right to privacy insofar as it broadens the circumstances under which information can be shared and allows the Commission to record, publish and share information in relation to NDIS providers and workers, including information about past compliance

12 Statement of compatibility, p. 21.

13 Statement of compatibility, p. 19.

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

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

activity.[16] It states that while these provisions limit the privacy of workers identified by this information, it is a justified limitation because the information shared allows the rights of people with disability to be upheld, particularly article 16 of the Convention on the Rights of Persons with Disabilities.[17] The statement of compatibility notes that where personal information about workers is made public, it is necessary to ensure that people with disability are able to make informed decisions about the services and supports they use.[18]

1.38 Ensuring that NDIS participants are able to make informed decisions about their providers and supports, thereby facilitating the realisation of the rights of people with disability, is a legitimate objective for the purposes of international human rights law. Making information about NDIS providers, including compliance and enforcement information, publicly accessible is likely to be effective to achieve (that is, rationally connected to) that objective.

1.39 The key question is whether the measure is proportionate to achieving that objective. In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. In this regard, it is unclear whether this measure is accompanied by sufficient safeguards, noting that the existing privacy safeguards in the NDIS Act and the Privacy Act would no longer apply to information contained on the NDIS Provider Register as a result of the amended definition of 'protected Commission information'. It is noted that the statement of compatibility did not identify any safeguards accompanying this measure specifically.

1.40 The scope of personal information published is relevant in considering whether the limitation is only as extensive as is strictly necessary. The measure provides 'if the person is, or was, subject to a compliance notice', 'information about the compliance notice' must be included on the NDIS Provider Register. As drafted, it is unclear what level of detail must be published in relation to the compliance notice. The information that must be included in a compliance notice under the NDIS Act is quite broad, including the name of the person or NDIS provider, the details of the (possible) non-compliance and the action that the person must take, or refrain from taking, to address the non-compliance.[19] If the NDIS Provider Register were to include all information set out in a compliance notice, the scope of information may be quite broad and thus the potential interference with the right to privacy may be extensive. This is of particular concern in relation to persons who are subject to a compliance notice where that notice was given by the Commissioner on the basis of information

16 Statement of compatibility, pp. 20–21.

17 Statement of compatibility, p. 21.

18 Statement of compatibility, p. 21.

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

that suggested the person may not be complying with the NDIS Act (as opposed to the Commissioner being 'satisfied' that the person is not complying with the NDIS Act).

1.41 Another relevant consideration in determining the proportionality of the measure is whether there are other less rights restrictive ways to achieve the same objective. The effect of this measure would mean any person who is, or was, subject to a compliance notice would have their name and information about the compliance notice published on the NDIS Provider Register, and that information would not be classified as protected information and thus be subject to existing privacy safeguards. It is not clear that publishing all of this information on a public website, in the absence of privacy safeguards, would be the least rights restrictive way of achieving the objective. There may be other methods by which an NDIS participant could determine whether a person is subject to a compliance notice, rather than publishing those details on a public website.[20] For example, it may be possible for the NDIS Provider Register to be available on request by individuals (including people with disability and their supports) or potential employers, rather than being publicly available by default. In relation to equivalent sectors such as the aged care or child care sectors, it is noted that it does not appear that there is an equivalent process to search for the names of employees who have been subject to sanctions in those industries.[21]

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

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

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

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

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

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

Committee view

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

1.44 The committee considers that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considers that this measure specifically promotes the rights of persons with disabilities by facilitating greater information sharing and authorising the publication of compliance information about NDIS providers on a public website, thereby supporting NDIS participants to make informed decisions about their providers and supports. However, the committee notes that in order to achieve these important objectives, the measure also necessarily limits the right to privacy by publishing on a public website the details of persons who are, or have been, subject to a compliance notice. The right to privacy may be permissibly limited if it is shown to be reasonable, necessary and proportionate. The committee notes that while the measure pursues a legitimate objective and appears to be rationally connected to that objective, there are questions as to whether the measure is proportionate.

1.45 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 [1.42].

Banning orders

1.46 The NDIS Act currently provides that the Commissioner may make a banning order prohibiting or restricting specified activities by current or former NDIS providers and persons currently or formerly employed or engaged by an NDIS provider.[22] A banning order may also be made to prohibit or restrict a person from being involved in the provision of specified supports or services to people with disability.[23] The grounds on which a banning order may be made are set out in section 73ZN of the

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

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

NDIS Act, including where the Commissioner reasonably believes that the person is not suitable to be involved in the provision of supports or services to people with disability.

1.47 The bill seeks to broaden the circumstances in which the Commissioner may make a banning order, so as to allow an order to be made against a person who is or was a member of the key personnel of an NDIS provider, such as current or former board members and chief executive officers of NDIS providers.[24] Where a banning order is made against a person who is a member of the key personnel of an NDIS provider, the bill proposes that the continuity of the order is not affected by the person ceasing to be such a member.[25] For instance, if a banning order is made against a board member of an NDIS provider, that banning order remains in force even when the person ceases to be a board member.

1.48 In addition, the bill seeks to amend the NDIS Act to enable banning orders to be made subject to specified conditions.[26] The NDIS Act currently provides that a banning order may apply generally or be of limited application and be permanent or for a specified period.[27] The bill proposes to allow the variation of a banning order by imposing new conditions on the order or varying or removing existing conditions.[28] The bill also proposes to make it a civil penalty offence to contravene a condition of a banning order, with a penalty of up to 1,000 penalty units ($222,000).[29]

Preliminary international human rights legal advice

Rights of people with disability

1.49 As these amendments seek to expand the Commissioner's powers to make a banning order, including subject to specified conditions where appropriate, against a broader range of people who may pose a risk of harm to people with disability, it appears to promote the rights of persons with disabilities. In particular, the measure may promote right to be free from all forms of violence, abuse and exploitation as enshrined in article 16 of the Convention on the Rights of Persons with Disabilities (as outlined above at paragraph [1.33]).

1.50 The explanatory memorandum states that the amendment to allow a banning order to be made against key personnel of an NDIS provider strengthens protections for NDIS participants by ensuring that all responsible personnel are accountable in

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

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

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

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

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

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

circumstances where a participant may become at risk of harm.[30] More generally, the statement of compatibility notes that the bill ensures the Commission has clear and consistent compliance and enforcement powers to operate an effective regulatory system and safeguard NDIS participants against exploitation, violence and abuse.[31]

Rights to privacy and work

1.51 However, by allowing the Commissioner to make a banning order subject to potentially broad conditions against a wide range of people, including those who have ceased to be key personnel of an NDIS provider, the measure also engages and limits the rights to privacy and work. The content of the right to privacy is set out above at paragraph [1.35]. Banning orders limit the right to privacy by authorising interference with a person's private and work life, noting that the extent of interference will depend on the scope of the banning order and the conditions imposed. The publication of banning orders on the NDIS Provider Register also limits the right to privacy, particularly the right to control the dissemination of information about one's private life, as such data contains personal reputational information that may affect an individual's ability to get employment in other, unrelated sectors.[32] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[33] This right is limited to the extent that the measure adversely interferes with a person's work and results in the unfair deprivation of work. The statement of compatibility does not address these potential rights limitations in relation to this specific measure, and as such, there is no compatibility assessment provided.

1.52 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.53 The statement of compatibility notes that the general objective of the bill is to strengthen support and protections for people with disability by ensuring a clear and effective legislative basis for the Commissioner's powers and for compliance and enforcement and information sharing arrangements.[34] Regarding amendments to the banning order provisions, the explanatory memorandum explains that imposing banning orders on key personnel of NDIS providers ensures that all personnel are held

30 Explanatory memorandum, p. 11.

31 Statement of compatibility, pp. 17, 21–22.

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

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

34 Statement of compatibility, p. 17.

accountable in circumstances where a participant may become at risk of harm.[35] It states that the Commissioner's powers to impose, vary or remove conditions on a banning order are intended to enable the Commissioner to adjust and apply necessary regulatory action where circumstances change or new information supports the need for an adjustment to provide effective safeguards to participants.[36] The objectives of protecting people with disability from harm, holding responsible persons accountable in circumstances where an NDIS participant is at risk of harm, and minimising the risk of banned individuals from working with people with disability, are capable of constituting legitimate objectives for the purposes of international human rights law. Expanding the Commissioner's powers in relation to banning orders would likely be effective to achieve (that is, rationally connected to), these objectives.

1.54 In assessing the proportionality of this measure, it is necessary to consider whether the proposed limitation is sufficiently circumscribed; the extent to which the measure interferes with rights; and the availability of review. The breadth of conditions that may be imposed on a banning order are relevant in considering whether the measure is sufficiently circumscribed. The explanatory memorandum states that there is no limit on the kinds of conditions that may be imposed.[37] It notes that, without limiting the kinds of conditions that may be imposed, a condition may require the person who is the subject of the banning order to provide a copy of the banning order to prospective employers where the banning order restricts them from engaging in some but not all activities related to disability service provisions.[38] The explanatory memorandum notes that such a condition would assist the prospective employer to ensure the person is not involved in those banned activities.[39] Another condition suggested by the explanatory memorandum is requiring the subject of the banning order to undertake and successfully complete specified training or skill development and provide evidence of this to the Commissioner.[40] While the explanatory memorandum provides some guidance as to the kinds of conditions that may be imposed on a banning order, the legislation itself is drafted in broad, non-exhaustive terms. Without any legislative guidance or limit on the kinds of conditions that may be imposed, there are concerns that the measure may not be sufficiently circumscribed. This also creates a risk that any interference with rights may be more extensive than is strictly necessary to achieve the stated objective.

1.55 Furthermore, depending on the breadth of conditions imposed, there may be a significant interference with the rights of the person who is the subject of the

35 Explanatory memorandum, p. 11.

36 Explanatory memorandum, p. 12.

37 Explanatory memorandum, p. 11.

38 Explanatory memorandum, p. 11.

39 Explanatory memorandum, p. 11.

40 Explanatory memorandum, p. 11.

banning order. The greater the interference with rights, the less likely the measure is to be considered proportionate. This is particularly so where the person has ceased to be a member of the key personnel of an NDIS provider. For instance, as currently drafted, the measure would allow a banning order to be imposed against a board member of an NDIS provider and may include conditions requiring the person to undertake and successfully complete specified training as well as provide a copy of the banning order to prospective employers. If the board member resigned and was no longer engaged by the NDIS provider or working in the disability service sector, noting that the banning order would remain in force regardless of where they now worked, it would appear that the person would still be required to comply with the conditions of the banning order. Where the person was required to comply with the banning order conditions in circumstances where they have left the disability service sector and failure to comply resulted in a civil penalty of up to $222,000, this may constitute a significant interference with their rights to work and privacy.

1.56 Another relevant factor in assessing whether a measure is proportionate is whether there is the possibility of oversight and the availability of review. Under the NDIS Act, a person against whom a banning order is made may apply to the Commissioner for the order to be varied or revoked.[41] If such an application is lodged and the Commissioner proposes not to vary or revoke the order in accordance with the application, the Commissioner must provide the person with an opportunity to make submissions regarding the matter.[42] The Commissioner's decisions to make, vary, or refuse to vary or revoke a banning order are reviewable decisions under the NDIS Act.[43] Access to internal review and external merits and judicial review in relation to banning order decisions would serve as an important safeguard and assist with the proportionality of this measure. It is unclear, however, whether the measure is accompanied by other safeguards or whether it is the least rights restrictive option to achieve the stated objective, noting that the statement of compatibility did not provide a compatibility assessment in relation to this specific measure.

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

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

(b) how the conditions would likely operate in practice in relation to a banning order against a person who has ceased to be a member of the key personnel of an NDIS provider. For example, would a former member

41 *National Disability Insurance Scheme Act 2013*, section 73ZO.

42 *National Disability Insurance Scheme Act 2013*, section 73ZO.

43 *National Disability Insurance Scheme Act 2013*, section 99.

be required to comply with banning order conditions, such as a requirement to undertake training or provide a copy of the banning order to prospective employers, if they are no longer engaged or involved in the disability service sector;

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

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

Committee view

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

1.59 The committee considers that the bill generally, which is designed to help prevent the violence, abuse, neglect and exploitation of persons with disabilities, promotes and protects the rights of persons with disabilities. The committee considers that this measure specifically promotes the rights of persons with disabilities by expanding the Commissioner's powers to make banning orders, thereby strengthening protections for NDIS participants and ensuring that responsible personnel are held accountable in circumstances where a participant may be at risk of harm. However, the committee notes that in order to achieve these important objectives, the measure also necessarily limits the rights to privacy and work for persons against whom a banning order is made. These rights may be permissibly limited if it is shown to be reasonable, necessary and proportionate. The committee notes that while the measure pursues a legitimate objective and appears to be rationally connected to that objective, there are questions as to whether the measure is proportionate.

1.60 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 [1.57].

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

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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 63.

Participation requirements

1.61 Schedule 1 of the bill seeks to set out the requirements for 'employment pathway plans' in the *Social Security Act 1991* (Social Security Act) and *Social Security (Administration) Act 1999* (Social Security Administration Act), which some social welfare recipients must comply with to qualify for a social welfare payment. While the requirement to enter into an employment pathway plan already exists,[2] Schedule 1 would re-make this requirement by establishing a single set of 'employment pathway plan requirements' relating to Job Seeker, Parenting Payment, Youth Allowance and Special Benefit.[3] These would require that a person must:

(a) satisfy the employment pathway plan requirements (by entering into a plan and complying with it),[4] and satisfy the Employment Secretary that they are willing to actively seek and to accept and undertake suitable paid work in Australia; or

(b) have an exemption from their requirements,[5] and satisfy the Employment Secretary that were it not for the circumstances giving rise to the exemption, they would be willing to actively seek and to accept and undertake suitable paid work in Australia.[6]

1.62 In addition, the bill would make several other amendments. It would permit a person to use 'technological processes' where entering into or varying an employment pathway plan,[7] and so self-manage their employment plan (as opposed to the current

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

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

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

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

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

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

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

1.63 In addition, the bill would insert a new provision to provide that 'paid work' will not be considered 'unsuitable' for a person merely because the work is not the person's preferred type of work; the work is not commensurate with the person's highest level of educational attainment or qualification; or the level of remuneration for the work is not the person's preferred level of remuneration.[10] In addition, the bill would amend the existing exemptions from the employment pathway plan requirements, including by establishing a new general exemption provision whereby the Employment Secretary may make a determination that a person is not required to satisfy the employment pathway plan requirements if they are satisfied in all the circumstances that the person should not be required to satisfy these requirements, whether or not the circumstances were in the person's control (although not circumstances attributable to the person's misuse of alcohol or drugs).[11]

1.64 Compliance with an employment pathway plan is compulsory, and subject to the application of the Targeted Compliance Framework.[12] Currently, where a person fails to comply with their employment pathway plan (that is, commits a 'mutual obligation failure'),[13] the Secretary must suspend (or, where applicable, cancel) their welfare payment.[14] Schedule 3 of the bill seeks to amend the Targeted Compliance Framework by providing that the Secretary 'may' (as opposed to must) suspend or cancel their payments.

Preliminary international human rights legal advice

1.65 Provisions establishing a requirement to enter into an employment pathway plan as a condition of receiving social welfare payments already exist in the Social

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

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

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

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

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

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

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

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

Rights to work and education

1.66 Entering into an employment pathway plan may, in and of itself, promote the right to work by helping individuals gain employment. The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[15] It requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.[16] The right to work also requires that, for full realisation of that right, steps should be taken by a State, including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.[17] This is recognised in the statement of compatibility.[18] In addition, entering into an employment pathway plan may also promote the right to education where a person completes further study as part of their plan.[19] The right to education provides that education should be accessible to all.[20]

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

1.67 However, by establishing that particular recipients of Job Seeker, Parenting Payment, Special Benefit and Youth Allowance *must* enter into and undertake an employment pathway plan in order to qualify for their respective social welfare payment (meaning that their payments may be suspended or cancelled for a failure to comply), this measure engages and appears to limit a number of rights, including the rights to social security and an adequate standard of living. There may also be a risk that aspects of the measure have a disproportionate impact on certain persons, and so engage and limit the right to equality and non-discrimination. This is because Youth Allowance operates with respect to young people; Parenting Payment is a payment

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

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

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

18 Statement of compatibility, p. 16.

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

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

specifically for parents (and so may disproportionately impact on women); and Special Benefit is a payment which may be made to non-Australians (and so may disproportionately impact people based on their race). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute (including race, gender and age).[21] In addition, by requiring that persons engage in an employment pathway plan—which may require the ongoing monitoring of the person's educational and job search activities, and permit the Employment Secretary to have regard to their other personal activities—the measure may also engage and limit the right to privacy. The right to privacy includes a requirement that the state does not arbitrarily interfere with a person's private and home life.[22] A private life is linked to notions of personal autonomy and human dignity.

1.68 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.[23] Social security benefits must be adequate in amount and duration.[24] States must have also regard to the principles of human dignity and non-discrimination so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.[25] They must guarantee the equal enjoyment by all of minimum and adequate protection, and the right includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.[26] In addition, public authorities are responsible for ensuring the effective

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

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

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

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

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

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

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

1.69 UN bodies have established specific guidance with respect to the permissibility of welfare conditionalities and associated sanctions (such as cancelling payments for failure to meet certain requirements). The UN Committee on Economic, Social and Cultural Rights (CESCR) has advised that, in administering such a system, States Parties must 'pay full respect to the principle of human dignity…and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided'.[29] States Parties are obliged to monitor the adequacy of benefits to ensure that beneficiaries can afford the goods and services they require to realise their other economic, social and cultural rights.[30] The CESCR has also highlighted that 'social protection floors'—which call for a set of basic social security guarantees that ensure universal access to essential health services and basic income security—are a core obligation, without which economic and social rights are rendered meaningless.[31] In this regard, it has stated that welfare conditionalities will only be compatible with the right to social security where they are reasonable, proportionate and transparent, stating: 'the withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law'.[32] It has stated that '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum

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

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

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

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

31 UN Committee on Economic, Social and Cultural Rights, *Social protection floors: an essential element of the right to social security and of the sustainable development goals* (15 April 2015) E/C.12/2015/1 [7]–[10].

32 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [24]. The UN Committee on Economic, Social and Cultural Rights has also stated that sanctions in relation to social security benefits should be used proportionately and be subject to prompt and independent dispute resolution mechanisms. See, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (14 July 2016) E/C.12/GBR/CO/6 [41].

essential level of benefits'.[33] This minimum essential level of benefits must enable individuals and families to 'acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.[34]

1.70 The CESCR has stated that qualifying conditions for social welfare payments must be reasonable.[35] UN bodies have also made specific observations with respect to Australian welfare conditionalities and sanctions. In 2009, and again in 2017, the CESCR expressed concern about conditionalities such as mutual obligations within Australia's social security system on the basis that they may have a punitive effect on disadvantaged and marginalised families, women and children (including Indigenous families).[36] The former Special Rapporteur on extreme poverty and human rights has stated that States have an obligation to immediately meet minimum essential levels of the rights to food, health, housing, education and social security, and the enjoyment of these rights 'is not conditional on the performance of certain actions or the meeting of requirements', rather, these are inherent rights essential to the realisation of human dignity. In this context, the Special Rapporteur said non-compliance with conditionalities attached to social protection programmes must not result in the exclusion of beneficiaries from programmes and services which are essential to their enjoyment of minimum essential levels of basic human rights.[37]

1.71 The UN Commission on the Status of Women has also urged States Parties to assess the need for (and promote the revision of) conditionalities to avoid reinforcing gender stereotypes and exacerbating women's unpaid work; and ensure that they are adequate, proportional and non-discriminatory and that non-compliance does not

33 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [78]. This approach has also been echoed in the European context. The European Committee on Social Rights has stated that the European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. ECSR Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN.

34 UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008) [59(a)]. There are varying perspectives as to what sum of money would be required to meet these essential needs in Australia today. In 2017–2018, the Australian Council of Social Service stated that the poverty line for a single adult in Australia was $457 per week, and for a couple with two children it was $960 per week. See, ACOSS and University of New South Wales, *Poverty in Australia 2020* (2020) p. 9.

35 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [24].See also

36 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on Australia*, E/C.12/AUS/CO/4 (12 June 2009) [20]; *Concluding observations on the fifth periodic report of Australia* E/C.12/AUS/CO/5
(11 July 2017) [31].

37 Magdalena Sepúlveda Carmona, Carly Nyst and Heidi Hautala, 'The Human Rights Approach to Social Protection' (Report, Ministry for Foreign Affairs of Finland, 1 June 2012, p. 49.

lead to punitive measures that exclude women and girls who are marginalised or in vulnerable situations.[38] In addition, the CESCR has recommended that Australia review its existing and envisaged conditionalities for eligibility for social assistance and unemployment benefits and penalties for non-compliance, and ensure that all beneficiaries receive adequate benefits, without discrimination.[39]

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

Prescribed by law

1.73 The requirement that interferences with rights must be prescribed by law includes the condition that laws must satisfy the 'quality of law' test. This means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[40] In this regard, some specific questions arise as to the meaning of the proposed requirement that a person who is subject to employment pathway plan requirements must also 'satisfy the Employment Secretary that they are willing to actively seek and to accept and undertake suitable paid work in Australia'. Further, where a person is subject to an exemption from the requirement to satisfy their employment plan requirements, they may be required to satisfy the Employment Secretary that, but for the exemption, they would otherwise be willing to actively seek and accept and undertake paid work.[41]

1.74 The explanatory memorandum states that this requirement reflects that 'in rare cases a person may be going through the motions of complying with their employment pathway plan but not actually willing to seek or accept work'.[42] It states that a person may, for example, be focused on a business which is not generating much income, volunteer work or some other project, and in rare cases these other activities

38 UN Commission on the Status of Women, *Social protection systems, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls – agreed conclusions* (25 March 2019) E/CN.6/2019/L.3 [47(mm)].

39 UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia* (11 July 2017) E/C.12/AUS/CO/5 [32(c)].

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

41 Schedule 1, item 19, proposed subsection 500(2A) (relating to qualification for Parenting Payment); item 28, proposed subsection 540(2) (relating to qualification for Youth Allowance); item 70, proposed subsection 593(1AC) (relating to qualification for Job Seeker); item 85, proposed subsection 729(2B) (relating to qualification for Special Benefit).

42 Explanatory memorandum, p. 47.

may be being pursued at the expense of making genuine attempts to find paid work.[43] However, it is not clear how, and based on what criteria, the Employment Secretary would determine that although a person was technically meeting their employment pathway plan requirements or was otherwise subject to an exemption,[44] they were not genuinely willing to actively seek and to accept and undertake paid work in Australia. For example, it is not clear if this would be established by having regard to the number of hours per week a person appeared to be spending undertaking volunteer work, or some other personal project. In addition, it is not clear when a person who was subject to an exemption (including because of caring responsibilities, domestic violence, the death of a partner, or other circumstances beyond their control)[45] may nevertheless be at risk of failing to satisfy the Employment Secretary that they would otherwise be willing to actively seek and to accept and undertake paid work in Australia. It is not clear how such an assessment could be based on any kind of discernible conduct by the individual.

1.75 This lack of clarity means that questions arise as to whether this specific proposed requirement is sufficiently certain, such that people may understand the legal consequences of their actions when subject to an employment pathway plan and the circumstances under which authorities may restrict the exercise of their right to social security and an adequate standard of living.

Legitimate objective

1.76 With respect to a legitimate objective, article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that countries may limit economic, social and cultural rights *only* insofar as 'this may be compatible with the nature' of those rights, and 'solely for the purpose of promoting the general welfare in a democratic society'. This means that the only legitimate objective in the context of the ICESCR is a limitation for the 'promotion of general welfare'. The CESCR appears to indicate that minimum essential levels and corresponding minimum core obligations under each right represent the nature of economic, social and cultural rights.[46] That is, even if a limitation were for the promotion of general welfare, if it was regarded as constituting a non-fulfilment of the minimum core obligations associated with economic, social and cultural rights, then it would go against the nature of those rights, and would not be a permissible limitation.[47] The term 'general welfare' is to be

43 Explanatory memorandum, p. 50.

44 Schedule 1, item 123.

45 The exemptions from employment pathway plan requirements are set out at Schedule 1, item 123, proposed sections 40L –40U.

46 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: the nature of states parties' obligations* (14 December 1990) E/1991/23(Supp) [10].

47 For further discussion see, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, pp. 580–581.

interpreted restrictively in this context, and should not be taken to impliedly include reference to public order, public morality and respect for the rights and freedoms of others.[48] Rather, 'general welfare' refers primarily to the economic and social well-being of the people and the community as a whole, meaning that a limitation on a right which disproportionality impacts a vulnerable group may not meet the definition of promoting 'general welfare'.[49] In this regard, the CESCR has indicated that references to broad concepts like 'economic development' cannot easily justify limitations of economic, social and cultural rights, particularly noting that policies directed towards economic development often limit these rights of certain individuals or groups without 'promoting general welfare'.[50]

1.77 Noting that failure to satisfy employment pathway plan requirements may result in the suspension or cancellation of a person's welfare payment, this raises questions as to whether the proposed limitation may result in the non-fulfilment of the minimum core obligations associated with economic, social and cultural rights (by depriving that person of their minimum essential level of benefits).

1.78 While the statement of compatibility provides some information as to the objective behind proposed amendments to the *administration* of the requirement to engage in an employment pathway plan, it does not address the core question of the objective behind providing that receipt of these four social welfare payments is contingent on a recipient entering into and engaging in an employment pathway plan.

Rational connection

1.79 In addition, it is incumbent on the state to demonstrate that the proposed limitation is rationally connected to (that is, effective to achieve) a legitimate objective. The statement of compatibility states that proposed digital servicing for people subject to an employment pathway plan will support 'effective evidence-based mutual obligation requirements, which maximise the likelihood that job seekers will

48 Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573. See also, Phillip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* vol. 9 no. 2, 1987, pp. 201–202.

49 Limburg Principles on the Implementation of the ICESCR, June 1986 [52]. See also, Amrei Muller, 'Limitations to and derogations from economic, social and cultural rights', *Human Rights Law Review* vol. 9, no. 4, 2009, p. 573; Erica-Irene A Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, *Study of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/432/Rev.2 (1983), pp. 123–4.

50 See, for example, UN Committee on Economic, Social and Cultural Rights, *Concluding observations: Egypt* (23 May 2000) E/C.12/1/Add.44 [10]; and *Concluding observations: Kyrgyzstan* (1 September 2000) E/C.12/1/Add.49 [29].

find work as quickly as they are able'.[51] It highlights, in particular, that as at 31 January 2021, over 400,000 referrals to Online Employment Services since 20 March 2020 have exited and not returned to employment services.[52] It states that this demonstrates that 'job-ready job seekers are willing and able to self-manage their search for employment and can effectively achieve their pathway back to employment using online job services'.[53] However, it remains unclear how requiring that a person must participate in an employment pathway plan in order to qualify for a social welfare payment is rationally connected (that is, effective to achieve) a legitimate objective. While the information contained in the statement of compatibility relates to the ease with which such conditions may be complied with (by a job-ready job seeker),[54] this does not explain how making the provision of social welfare payments conditional on complying with an employment pathway plan would itself be effective to achieve a legitimate objective.

Proportionality

1.80 With respect to proportionality, it is necessary to consider whether a proposed limitation: is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review. In this regard, it is noted that decisions relating to employment pathway plans may be subject to both internal and external review,[55] which may serve as an important overarching safeguard. However, questions arise with respect to the proportionality of different aspects of the proposed measure.

Proposed amendments to the mutual obligation scheme

1.81 Schedule 3 seeks to amend the Targeted Compliance Framework in Division 3AA of the Social Security (Administration) Act to provide that the Employment Secretary may impose sanctions (such as suspending, reducing or cancelling a person's participation payment) in response to a failure to meet requirements. Currently, the Social Security Administration Act requires that the Secretary must suspend the person's payment for a certain period (typically until they reconnect with their employment services provider).[56] The explanatory memorandum notes that this requires the Secretary to suspend a person's payment even if they have a reasonable

51 Statement of compatibility, p. 18.

52 Statement of compatibility, p. 18.

53 Statement of compatibility, p. 18.

54 The explanatory memorandum also states that this will ensure that job service provider resources can better target individual who need that added support. See, p. 5.

55 See, explanatory memorandum, p. 5.

56 *Social Security (Administration) Act 1999*, section 42AF.

excuse for a mutual obligation failure, and they will be back paid for any period during which they were suspended.[57]

1.82 The explanatory memorandum states that this amendment is intended to give the Secretary greater flexibility and discretion concerning when compliance action should be taken in response to failure.[58] As to suspensions, it states that for failures relating to refusing work or becoming voluntarily unemployed, where there is evidence that a person has become voluntarily unemployed or refused suitable work without a reasonable excuse, compliance action will still be taken.[59] The statement of compatibility states that this will better support 'the ability for these consequences to only apply to those who are disengaging from their requirements and need an incentive to re-engage'.[60]

1.83 This discretion to impose, or not impose, financial sanctions on individuals for non-compliance with their employment pathway plan requirements, as compared to the current mandatory requirement, has the capacity to serve as an important safeguard and assist with the proportionality of the limitation on the rights to social security and an adequate standard of living, as contained in Schedule 1 of the bill.[61] However, this potential for flexible application raises questions as to how, and in accordance with what guidelines and criteria, such discretion would be exercised in practice. For example, it is not clear whether a person who has failed to meet a number of their employment pathway plan requirements over a period of time, without an exemption, will have their payments suspended, reduced or cancelled or whether such a series of events would instead trigger inquiries as to whether their circumstances warranted an exemption from their requirements.

1.84 In addition, the statement of compatibility notes that the Targeted Compliance Framework includes both the payment suspension and cancellation provisions, as well as an additional set of administrative processes known as demerits.[62] These 'demerits' are used to determine the course of action which may be taken in response to a series of mutual obligation failures within specified periods of

57 Explanatory memorandum, pp. 28–29.

58 Explanatory memorandum, p. 29.

59 Explanatory statement, p. 29.

60 Statement of compatibility, p. 30.

61 The Parliamentary Joint Committee on Human Rights has previously concluded that the current Targeted Compliance Framework is likely to be incompatible with the rights to social security and an adequate standard of living. See, *Report 11 of 2017* (17 October 2017), Social Services Legislation Amendment (Welfare Reform) Bill 2017, pp. 138–194.

62 Statement of compatibility, p. 29.

time.[63] The statement of compatibility notes that where a person commits a mutual obligation failure, and the Employment Secretary determines not to suspend their payment for that failure, this will not preclude the application of a 'demerit' in relation to that failure.[64] This would have the effect that, although individual instances may not lead to a suspension of payment, over time a person may still be exposed to the risk of the suspension, reduction or cancellation of their social welfare payment by virtue of the penalty 'zone' within which they have been placed under this demerit framework.[65]

1.85 The manner in which it is proposed that the Targeted Compliance Framework would be applied to employment pathway plan requirements is a core consideration in assessing the proportionality of the proposed measures. This is because the suspension, reduction or cancellation of a person's social welfare payment may render them unable to meet their basic needs.[66] In this regard it is not clear whether, in exercising their proposed discretion to suspend a person's social welfare payments, the Employment Secretary would make enquiries as to how the individual would meet their basic needs if their payment were to be suspended, or whether a person advising the Secretary of their inability to meet their basic needs if their payment were suspended would be a factor influencing their decision about whether or not to suspend the payment. As set out at paragraph [1.69], the UN Committee on Economic, Social and Cultural Rights has stated that welfare conditionalities will only be compatible with the right to social security where they are reasonable, proportionate and transparent, stating: 'the withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and

63 See, Department of Employment, *Targeted Compliance Framework: Mutual Obligation Failures (Version 3.0)* (September 2020). For a visual guide of the Targeted Compliance Framework, see page 37.

64 Statement of compatibility, p. 29.

65 Under the Targeted Compliance Framework, as a person accrues demerits for mutual obligation failures, they may progress through three penalty 'zones', and be penalised as they continue to accrue successive demerits. See, Department of Employment, *Targeted Compliance Framework: Mutual Obligation Failures (Version 3.0)* (September 2020).

66 This issue is noted in regular media coverage. See, for example, 'Adelaide single mum forced to eat from bins documents life on the edge of homelessness', *ABC News* (2 June 2021); Gladys Serugga, 'ParentsNext program leaves single parents wondering about next steps to secure rental properties' *ABC News*, 24 May 2021. See also Maani Truu, ' More than 40 per cent of Australians seeking emergency assistance forced to skip meals, survey reveals', *SBS News* (26 May 2021).

provided for in national law'.[67] It has stated that '[u]nder no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.[68] Consequently, the extent to which suspensions would be applied in practice if this discretion is established, and the extent to which an assessment of the person's capacity to meet their basic needs would occur in the event of a discretionary suspension, are key questions relating to the permissibility or otherwise of the welfare sanctions.

Use of technological processes

1.86 The bill would provide that the Employment Secretary may arrange for the use of 'technological processes' in relation to persons entering into, or varying, employment pathway plans.[69] This term is not defined in the bill. The explanatory statement refers to the provision of 'on-screen guidance' with respect to such processes,[70] which would appear to indicate that it refers to an online process using a digital platform. In addition, the explanatory memorandum states that such technological processes may include the use of telephones or email by delegates and job seekers to communicate in traditional ways about the content of a plan.[71]

1.87 The meaning of the term 'technological processes' is relevant to an assessment of the proportionality of the proposed limitation on human rights because, depending on what technological devices and internet or mobile signal may be required, this may impact on individuals' ability to comply with this welfare conditionality. Indeed, it would appear probable that the use of such digital processes would require regular access to a computer or smart phone, and a viable internet and/or mobile telephone signal. This may negatively impact on people living in rural areas with poor (or no) mobile phone and internet signal at their home, and people

67 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [24]. The UN Committee on Economic, Social and Cultural Rights has also stated that sanctions in relation to social security benefits should be used proportionately and be subject to prompt and independent dispute resolution mechanisms. See, UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (14 July 2016) E/C.12/GBR/CO/6 [41].

68 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [78]. This approach has also been echoed in the European context. The European Committee on Social Rights has stated that European Social Charter requires that 'reducing or suspending social assistance benefits can only be in conformity with the Charter if it does not deprive the person of his/her means of subsistence'. ECSR Conclusions, decision of 06 December 2017, Norway, 2013/def/NOR/13/1/EN.

69 Schedule 1, item 123, proposed section 40B. The provision specifies that such an arrangement would not be a legislative instrument.

70 Explanatory memorandum, p. 61.

71 Explanatory memorandum, p. 57.

experiencing poverty more generally. The explanatory memorandum notes that the availability of such digital processes is intended to operate only as an alternative to the current means by which employment pathway plans are administered (via a 'human delegate'), and that a person can elect to switch from an online plan at any time.[72] This would appear to be an important safeguard, and may reduce the likelihood that a person may be required to use this new method where they would likely be disadvantaged by engaging in their employment pathway plan using technological processes. However, it is unclear what information would be given to individuals to ensure they are aware of their ability to select either method, and would not be disadvantaged by being inappropriately directed to an online servicing mechanism. In addition, it is not clear that a person's capacity to regularly access the devices necessary to use a digital platform would be part of the assessment of a person's suitability for the use of technological processes. Rather, based on the explanatory materials accompanying the bill the assessment appears merely to be whether the person is 'job ready'.[73]

1.88 In addition, Schedule 8 of the bill would make amendments to specify the start day for a Job Seeker or Youth Allowance claimant where they have entered into an employment pathway plan using digital services.[74] This would provide that in these cases, payments will not commence until the person has entered into an employment pathway plan online.[75] Proposed subclause 4B(3) would provide that if the person had intended to accept an employment pathway plan online, and had failed to do so

72 Explanatory memorandum, p. 4.

73 Explanatory memorandum, p. 20. Further, the Employment Secretary would have the power to arrange for the completion of a questionnaire to establish under which section a person is able to enter into an employment plan (Schedule 1, item 123, proposed section 40C). Such a questionnaire would not constitute a legislative instrument. In this regard it is also relevant that the roll-out of digital processes in this context appears to be predicated only by a small local trial (which does not appear to have been independently evaluated), and the expanded use of online servicing due to an increase in demands on the social welfare system during the COVID-19 pandemic (during which time mutual obligations have been periodically suspended). See explanatory memorandum, p. 4 and Department of Education, Skills and Employment, *New Employment Services Trial* https://www.dese.gov.au/new-employment-services-model/nest (accessed 2 June 2021). It is also noted that while the explanatory memorandum states that departmental evidence shows that digital servicing is effective, highlighting the numbers of people who were referred to Online Employment Services from 20 March 2020 who had subsequently exited and not returned because they had found employment or study. this data would appear to include a number of individuals who were unemployed due to the economic impacts of the COVID-19 pandemic, and so may not be representative of the cohort in relation to whom these participation requirements may typically apply, including vulnerable persons.

74 Schedule 8, item 14, proposed section 4B.

75 The statement of compatibility states that this would align the start day provisions with those who are referred to a job services provider. Statement of compatibility, p. 35.

because of circumstances beyond their control, then the start date would be back dated. The statement of compatibility states that this would ensure that a person is not disadvantaged by being unable to complete an online pathway plan through no fault of their own.[76] The explanatory memorandum states that this may include medical, caring and other personal circumstances, as well as technical difficulties which prevent the person from entering into a plan, but is not intended to cover things that were in the person's control (including experiencing foreseeable and reasonably avoidable circumstances or technical difficulties where the person made no effort to address them or seek assistance despite being able to do so).[77] This raises some questions as to how this flexibility relating to the start date of a person's social welfare payment may be calculated. For example, it is not clear whether a person who intended to accept their job plan, but found that the website was not working, and who could have telephoned a support line for assistance but failed to do so, would be found to have not made efforts to address their technical difficulties.

Unsuitable work

1.89 The bill would also provide that compliance with an employment pathway plan may require a person to actively seek, accept (and be willing to accept) offers of, or undertake (or be willing to undertake) paid work in Australia, except work which is 'unsuitable to be done' by them.[78] Proposed section 40X lists the circumstances in which particular paid work will be considered unsuitable to be done by a person.[79] These include where: the person lacks the particular skills required and no training will be provided; they have an illness or injury that would be aggravated by the conditions in which the work would be performed; they are the principal carer of one or more children and do not have access to appropriate care and supervision during required work times; the work requires the person to move to another place; or for any other reason, the work is unsuitable to be done by the person.[80] In addition, where a person has sought work in a new area outside their home area, and is offered a permanent full-time job, the work will not be unsuitable except in specified limited circumstances.[81] Setting out the circumstances in which paid work will be considered unsuitable has the capacity to serve as an important safeguard and ensure that welfare recipients may not be exposed to the risk of a financial penalty for declining a job offer

76 Statement of compatibility, p. 35.

77 Explanatory memorandum, p. 100.

78 Schedule 1, item 123, proposed subsection 40G(1).

79 Schedule 1, item 123.

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

81 Schedule 1, item 123, proposed subsection 40X(2). For example, if the person or their partner is pregnant; the person or the person's partner has a child under the age of 16 who is living with them or in their existing home area; or the person would suffer severe financial hardship if they were to accept the offer.

and consequently being exposed to the risk of their social welfare payment being suspended or cancelled for a mutual obligation failure. However, it is not clear whether the residual unsuitability category set out in proposed subparagraph 40X(1)(i) would capture circumstances such as being principal carer of an elderly relative, or having a moral objection to particular kinds of work (for example, a vegetarian not wanting to work in an abattoir).

1.90 The bill would also provide that paid work is: not unsuitable merely because it is: not the person's preferred type of work; or the work is not commensurate with the person's highest level of educational attainment or qualification; or the level of remuneration for the work is not the person's preferred level of remuneration.[82] The explanatory memorandum states that:

> At times a person with significant qualifications, or who considers that their skills warrant greater pay than that offered to them, will need to accept work that is not their preferred work or pays a lower wage than they would prefer, rather than continue to be supported by the taxpayer. This is consistent with longstanding practice and policy that job seekers must do all that they are able to support themselves through paid work.[83]

1.91 It appears that each item in a job plan is required to be quantifiable and specific, and job search requirements typically require 20 job applications per month.[84] It is not clear whether the effect may be that some individuals apply for positions for which they are over-qualified, or which are otherwise unsuitable for them, in order to comply with their employment pathway plan requirements. This raises questions as to what safeguards are in place to ensure that people are not required to agree to an employment pathway plan that effectively requires them to apply for work that may be unsuitable. The information set out in the explanatory memorandum appears to indicate that such scenarios may arise, hence the qualification that these matters will not render paid work 'unsuitable' for these purposes. This, in turn, raises questions as to why other less rights restrictive alternatives may not be as effective to achieve the objective of the employment pathway plan. For example, no information is provided as to why the requirement to enter into an employment pathway plan could not arise after a period of time during which receipt of the relevant payment would be unconditional, providing the individual with the opportunity to undertake a job search on their own without the

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

83 Explanatory memorandum, p. 77.

84 See, See, Social Security Guide, *3.11.2 Job Plans* (Version 1.282, 10 May 2021) https://guides.dss.gov.au/guide-social-security-law/3/11/2#:~:text=2%20Job%20Plans,Overview,requirements%20under%20social%20security%20law [Accessed 4 June 2021].

threat of their payment being suspended, reduced or cancelled (particularly where the individual has been assessed as being 'job-ready').

1.92 In addition, the majority of the circumstances in which work will be deemed to be 'unsuitable' relate to the circumstances of the individual, not of the potential workplace or employer. They do not appear to contemplate that some workplaces are unsafe for particular people, not necessarily because of some characteristic inherent in the work itself, but because of the other people who work there, or whom the role would require the person to engage with. This may especially be the case for women, people from culturally and linguistically diverse backgrounds, or Lesbian, Gay, Transgender, Queer and Intersex (LGBTQI) people. For example, it is not clear whether a female who attended a job interview but felt unsafe in the environment due to sexual harassment from another employee (or the employer themselves) could decline a job offer from that organisation without exposing themselves to the risk of a payment suspension or cancellation for a mutual obligation failure. While work may be deemed unsuitable if performing the work in the conditions in which the work would be performed would constitute a risk to health or safety, it is not clear how a potential employee could adduce evidence as to those circumstances, or whether it may be deemed suitable if the person was unlikely to work directly for the person who may have sexually harassed them in the interview.

Exemptions from employment pathway plan requirements

1.93 The bill would also establish a series of circumstances in which a person will be exempt from the requirements under their employment pathway plan.[85] This would include a general exemption provision providing that the Employment Secretary may determine that a person is not required to satisfy employment pathway plan requirements if satisfied that circumstances exist that are beyond the person's control and that in those circumstances it would be unreasonable to expect the person to comply with those requirements.[86] This would also be accompanied by further specific exemption provisions (including for the death of a partner, domestic violence and certain caring responsibilities).[87] In addition, proposed section 40T would provide that in exceptional circumstances, the Employment Secretary may determine that a class of persons will not be required to satisfy their employment pathway plan requirements. The explanatory memorandum states that the proposed general exemption provision in section 40L is intended to provide a greater safeguard for individuals, noting that it does not require relevant circumstances outside the person's control to be 'special'.[88] Rather, it states, they may include commonplace matters such as illness or injury, which nevertheless make it unreasonable for the person to comply

85 Schedule 1, item 123, proposed Subdivision C.

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

87 See, Schedule 1, item 123, proposed sections 40M–40T.

88 Explanatory memorandum, p. 22.

with their employment pathway plan requirements.[89] In addition, the explanatory memorandum states that the retention of some specific exemption provisions is intended to provide individuals with reassurance.[90]

1.94 Taken together, these proposed exemptions have the capacity to serve as significant safeguards, and would empower the Employment Secretary to determine the period of time during which the exemption would be in effect. However, this potential for flexible application then raises questions as to how, and in accordance with what guidelines, that discretion would be exercised in practice. An employment pathway plan may require that a person engage in a range of activities, including paid work, voluntary work, study or training, and may include additional requirements related to health and education of children where the person is receiving Parenting Payment.[91] It is not clear whether an individual could seek an exemption from their employment pathway plan requirements on the basis that for example, they are residing in a rural area and are unable to secure employment because of a depressed local labour market (that is, a factor beyond their control). In such cases, it is not clear whether the Employment Secretary may nevertheless determine that it would be reasonable for the person to continue to comply with their requirements, such as by applying for jobs further away from their home.

1.95 In addition, proposed subsection 40L(4) states that a person cannot be exempted from their employment pathway plan requirements due to circumstances which are wholly or predominantly attributable to the person's misuse of alcohol or other drugs, unless they are a declared program participant.[92] However, where a person's drug use rises to that of dependence or addiction, the person is recognised under international human rights law as having a disability, which is not only considered an 'other status' for the purposes of the general right to equality and non-discrimination[93] but is also protected from discrimination under the Convention on the Rights of People with Disabilities.[94] The provision may also have a disproportionate impact against Indigenous people, who may experience higher levels of drug and alcohol use. In addition, it is not clear whether 'circumstances wholly or predominantly attributable to' misuse of drugs and alcohol would encompass ongoing drug and alcohol misuse *and* diseases that may result from past misuse such as Alcoholic Liver

89 Explanatory memorandum, p. 22.

90 Explanatory memorandum, p. 24.

91 Schedule 1, item 123, proposed section 40G.

92 Schedule 1, item 123, proposed subsection 40L(4). The explanatory memorandum notes that currently, declared program participants are participants in the Community Development Program. See, p. 68.

93 See, UN Report of the Human Rights Committee, Vol 1, A/55/40 (10 October 2000): *Concluding Observations on Ireland* (2000) [422]-[51], [29e].

94 Convention on the Rights of People with Disabilities, article 2.

Disease or brain damage. In these circumstances, a person may have already done all they can to address 'the underlying cause of their incapacity'. In addition, it is not clear whether this may also cover injuries resulting from accidents when intoxicated, where again, the cause cannot be addressed as the misuse occurred in the past. This raises questions as to whether, and to what extent, this provision may have a discriminatory impact. Under international human rights law, differential treatment[95] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving it. The statement of compatibility does not recognise the engagement of this right in relation to this matter, and so no information has been provided to address these questions.

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

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

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

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

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

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

(i) on what basis, and in accordance with what guidelines and criteria, is it likely that the Employment Secretary would determine that a

95 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

person's welfare payments should be suspended, reduced or cancelled;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

1.97 The committee notes that this bill would re-make the requirements for 'employment pathway plans', which some social welfare recipients must comply with in order to qualify for a social welfare payment. It would also introduce the

ability to use technological processes to enter into employment pathway plans and make amendments as to what will constitute a suitable offer of employment, and the circumstances in which a person may be exempted from their employment pathway plan requirements. In addition, the bill would amend the Targeted Compliance Framework by introducing a discretion for the Employment Secretary to suspend a person's social welfare payments for a mutual obligation failure (noting that they are currently required to suspend payments in these circumstances).

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

1.99 The committee notes that engagement in an employment pathway plan may, in and of itself, promote the rights to work and education, as it may assist individuals to gain employment or undertake study. However, because the bill links engagement in such a plan with eligibility for social welfare payments, the committee notes that it may also engage and limit a number of human rights including the rights to social security, an adequate standard of living, equality and non-discrimination and privacy. The committee notes that the explanatory memorandum and statement of compatibility deal with the provisions of this bill that would vary the current legal framework. However, the committee notes that because this bill would repeal those existing provisions and separately re-establish the requirement to enter into an employment pathway plan (with some amendments), it is necessary for the committee to examine all the provisions sought to be introduced by this bill itself, not merely those provisions which would amend existing legislative provisions. It is for this reason that the committee seeks a range of information, which will assist to inform its consideration of the bill as a whole. [96]

1.100 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 [1.96].

96 The committee further notes its expectations as to the content of statements of compatibility with human rights are contained in its *Guidance Note 1*.

Legislative Instruments

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

Purpose	This instrument allows the minister to specify that certain bridging visas are subject to specified visa conditions
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 11 May 2021). Notice of motion to disallow must be given by 23 June 2021 in the House of Representatives and 11 August 2021 in the Senate[2]
Rights	Liberty; privacy; freedom of movement; freedom of association; freedom of assembly; freedom of expression; work; people with disability; social security; rights of the child; criminal process rights

Additional discretionary bridging visa conditions

1.101 This instrument permits the minister to impose a range of additional discretionary conditions on Subclass 050 (Bridging (General)) visas,[3] and Subclass 070 (Bridging (Removal Pending)) visas, where the visa is being granted to a person in immigration detention by the minister exercising their personal power under section 195A of the *Migration Act 1958* (Migration Act) (for example, to allow for the release of a person in immigration detention).

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

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 6 of 2021*; [2021] AUPJCHR 64.

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

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

- not become involved in activities disruptive to the Australian community or a group within the Australian community, or engage in violence that threatens to harm the Australian community;
- not become involved in activities that are prejudicial to security;
- obtain the minister's approval before taking up specific kinds of employment (including in aviation), undertaking flight training, or obtaining specific chemicals;
- not acquire any weapons or explosives, or associate with terrorist organisations; and
- notify the minister of any changes in their personal circumstances or contact details.[4]

1.103 Further, during the period of the visa, there must be no material change in the circumstances on the basis of which it was granted.[5]

1.104 In the case of a Subclass 070 visa, the instrument provides that the minister may impose four additional discretionary visa conditions, requiring that the holder must: remain at the same address, notifying the department at least two days in advance of any change in address; not engage in criminal conduct; and/or notify the department within 14 days of any changes in personal contact information.[6]

Preliminary international human rights legal advice

Rights engaged by imposing visa conditions

Right to liberty

1.105 The explanatory materials state that this measure strengthens the community placement options available to the minister when considering whether to release an individual from immigration detention in cases where the individual poses a risk to public safety.[7] The statement of compatibility notes that the measure supports the management of non-citizens in the community wherever possible and helps to ensure immigration detention is used as a last resort.[8] If this measure has the effect of facilitating the release of individuals from immigration detention, it would appear to promote the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[9] The notion of 'arbitrariness' includes elements of

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

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

6 Schedule 1, item 5, subclause 070.612.

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

8 Statement of compatibility, p. 12.

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

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.

1.106 In the context of immigration detention, the UN High Commissioner for Refugees has made clear that alternatives to detention, such as reporting requirements, designated residence and community supervision, are 'part of an overall assessment of the necessity, reasonableness and proportionality of detention', and ensure immigration detention is a 'measure of last, rather than first, resort'.[10] In this case, the additional discretionary conditions may operate as an alternative to detention for individuals held in immigration detention who are considered to pose a higher level of security risk. The statement of compatibility notes that without these additional conditions, the public safety risk posed by these individuals would not be mitigated and the individuals may remain in immigration detention.[11]

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

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

- requiring the provision of personal information (including the visa holder's name, address, phone number, email address, employment and online profile and user name);
- restricting the activities which the person can do (such as activities that are disruptive to the Australian community);
- restricting the employment which the person may undertake; and
- requiring that the person conduct themselves in a particular manner or not communicate or associate with particular people.[12]

1.108 Consequently, this instrument may engage and limit: the right to privacy; right to work; freedom of movement; freedom of assembly; freedom of association; and freedom of expression. The right to privacy prohibits arbitrary and unlawful

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

11 Statement of compatibility, p. 9.

12 Statement of compatibility, pp. 4–9.

interferences with an individual's privacy, family, correspondence or home.[13] This includes a requirement that the state does not arbitrarily interfere with a person's private and home life, as well as the right to control the dissemination of information about one's private life .[14] The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[15] The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[16] The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds.[17] The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[18] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[19] These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

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

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

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

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

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

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

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

Rights engaged by consequences for breach of a visa condition

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

1.109 In addition, if a visa holder breaches a condition, their visa may be subject to cancellation action and they may be detained in immigration detention.[20] While acknowledging the intent of the measure is to facilitate release from detention (noting that the additional conditions may increase the likelihood that the minister will exercise their existing discretionary powers under section 195A), as a matter of law, insofar as the consequence of a breach of a visa condition is detention in immigration detention, the instrument may also engage and limit the right to liberty. The consequence of detention following visa cancellation is of particular concern in relation to individuals who may have been rendered stateless, may not be accepted by another country, or have been found to engage Australia's protection obligations. This is because it gives rise to the prospect of prolonged or indefinite detention, noting that a person will be subject to mandatory immigration detention following visa cancellation.[21] The UN Human Rights Committee has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[22] Detention may become arbitrary in the context of mandatory detention where individual circumstances are not taken into

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

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

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

account, and a person may be subject to a significant length of detention.[23] In addition, where the measure applies to children, it may also engage and limit the rights of the child.[24] Children have special rights under international human rights law taking into account their particular vulnerabilities.[25] In the context of immigration detention, the UN Human Rights Committee has stated that:

> children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[26]

1.110 Furthermore, return to detention as a consequence of breaching a visa condition may be construed as imposition of a criminal penalty for the breach, given the seriousness of that consequence. If this were the case, then this would engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. In assessing whether a penalty may be considered criminal, it is necessary to consider:

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

1.111 While the penalty is not classified as criminal under domestic law, this is not determinative as the term 'criminal' has an autonomous meaning in international human rights law. As to the nature and purpose of the penalty, it would apply to Subclass 050 and 070 visa holders rather than the public in general and appears likely

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

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

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

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

to be intended to deter visa holders from engaging in specified conduct. Given that visa cancellation and detention in immigration detention, potentially for a protracted or even indefinite period, would result in a deprivation of liberty, there appears to be a risk that the consequences of breaching a visa condition may be so severe as to constitute a 'criminal' penalty for the purposes of international human rights law. If it were to be considered a 'criminal' penalty, this would mean that the relevant provisions,[27] which empower the minister to cancel a visa and re-detain a person who has not complied with a visa condition, must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,[28] and the right to be presumed innocent until proven guilty according to law.[29]

1.112 As to the right to be presumed innocent until proven guilty according to law, this requires that the case against a person be demonstrated on the criminal standard of proof (beyond all reasonable doubt).[30] However, the criminal standard of proof does not apply to visa cancellation powers under the Migration Act. If the minister is considering cancelling a visa under section 116 because a visa holder has not complied with their visa conditions, they must notify the holder that there appear to be cancellation grounds; give the holder particulars of those grounds; and invite the holder to show that the grounds do not exist or that there are reasons why the visa should not be cancelled.[31] Even where such notification is provided to the visa holder and a tribunal decides that the cancellation ground does not exist or decides not to cancel the visa despite the existence of the ground, the minister may still set aside that tribunal decision and cancel the visa if they consider the ground exists, the visa holder has not satisfied the minister that the ground does not exist, and the minister considers it to be in the public interest to cancel the visa.[32] As regards the minister's

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

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

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

30 International Covenant on Civil and Political Rights, article 14(2). See UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [30]: 'The presumption of innocence, which is fundamental to the protection of human rights… guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

31 *Migration Act 1958*, section 119.

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

personal power to cancel a visa under section 133C(3), the minister may do so whether or not: the holder was notified of the cancellation grounds; the holder responded to any such notification; the tribunal decided that the ground did not exist or decided not to cancel the visa; or a delegate of the minister decided to revoke the visa cancellation.[33] Having regard to these provisions, the standard of proof that applies to visa cancellation decisions does not appear to comply with the right to be presumed innocent or to the minimum guarantees in criminal proceedings (such as time to prepare a defence, right to be tried in person, present relevant witnesses and examine witnesses against them).

1.113 The statement of compatibility acknowledges that the measure engages the rights to privacy, work and freedom of assembly, association, and movement.[34] It does not, however, recognise that the conditions may also engage and limit the right of freedom of expression, or address the rights engaged by the consequences of breaching a visa condition, including the rights to liberty, the rights of the child and criminal process rights.

Assessment of the limitation on rights

1.114 As noted above, all of the rights engaged may be permissibly limited if it can be demonstrated that the limitation on rights is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Prescribed by law

1.115 Interferences with human rights must have a clear basis in law (that is, they must be prescribed by law).[35] This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[36] The UN Human Rights Committee has stated that the 'relevant legislation must specify in detail the precise circumstances in which

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

34 Statement of compatibility, p. 10.

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

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

such interferences may be permitted'.[37] In the context of alternatives to detention, the UN High Commissioner for Refugees has also observed:

> Like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. The principle of legal certainty calls for proper regulation of these alternatives…Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.[38]

1.116 Some of the restrictions and prohibitions contained in the additional conditions are drafted in somewhat broad and imprecise terms. For example, in relation to Subclass 050 visa holders, condition 8303 provides that the holder must not become involved in 'activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community'. It is not clear what activities would be considered 'disruptive to' the Australian community. For instance, it is unclear whether peaceful public protest would constitute a disruptive activity. In relation to Subclass 070 visa holders, condition 8564 provides that the holder must not engage in criminal conduct. It is not clear whether this condition would be considered to be breached only if the visa holder has been convicted of a criminal offence, or whether it might be interpreted as applying if a person has been arrested for, or charged with, but not yet convicted of, an offence. The use of broad and ambiguous terms raises concerns as to whether the conditions are sufficiently precise to enable visa holders to understand what is expected of them and in what circumstances a breach is likely to occur.

1.117 To meet the quality of law test, the law must be 'accessible to the persons concerned and formulated with sufficient precision to enable them…to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.[39] In this case, noting that the consequences of breaching a condition may be severe (involving the loss of liberty), it is important that holders understand how conditions are to be interpreted, applied and enforced so that they may regulate their conduct. The visa cancellation powers in the Migration Act confer a broad discretion on the minister, authorising them to cancel a visa if they are satisfied that the holder has not complied with a visa condition.[40] It is unclear what

37 UN Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)* (1988) [8]; *General Comment No. 27, Freedom of Movement (Art. 12)* (1999) [13].

38 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [36].

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

40 *Migration Act 1958*, subsections 116(1)(b) and 133C(3).

standard of proof must be met in order for the minister to be satisfied that a condition has been breached, and in what circumstances the minister will elect to exercise their discretion to cancel a visa. As noted by the UN Human Rights Committee, laws should not confer 'unfettered discretion on those charged with their execution' and should indicate 'with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities'.[41] There appears to be a risk that the measure may not meet the quality of law test, as it is not clear that all the additional conditions satisfy the minimum requirements of legal certainty and foreseeability.

Legitimate objective and rational connection

1.118 Any limitation on a right must also be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. The statement of compatibility states that the objective of the instrument is to strengthen the community placement options available to the minister when considering whether to release an individual from immigration detention in cases where the individual poses a risk to public safety.[42] It notes that a stricter set of discretionary conditions are necessary to mitigate the public safety risk posed by such individuals and that without such conditions, these individuals may remain in immigration detention.[43] Regarding the conditions that restrict the rights to freedom of movement and privacy, the statement of compatibility states that the conditions are necessary as they allow the department to closely monitor the circumstances of visa holders and respond appropriately (including commencing compliance action if necessary) if the individual engages in behaviour that may put the Australian community or public order at risk.[44]

1.119 While the objectives of protecting public safety and strengthening community placement options are generally capable of constituting a legitimate objective, questions remain as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. While the statement of compatibility states that the conditions are intended to mitigate the risk posed to public safety by individuals in immigration detention, it does not articulate the extent or level of risk posed by such individuals and how that risk is assessed. Without further information in relation to this, it is difficult to assess whether the public safety risk cited in the statement of compatibility is a public concern that is pressing and substantial enough to warrant limiting rights.

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

42 Statement of compatibility, p. 4.

43 Statement of compatibility, p. 9.

44 Statement of compatibility, p. 10–11.

1.120 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to, that is effective to achieve, the objective. Insofar as the measure provides the minister with the discretion to impose additional, stricter conditions on individuals who pose a risk to public safety, thereby assisting the department to monitor such individuals and mitigate any public safety risk, the measure would appear to be rationally connected to the objectives sought to be achieved.

Proportionality

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

1.122 As noted above, some of the additional conditions are drafted in broad and ambiguous terms and it is unclear how these conditions will be interpreted, applied and enforced in practice. In particular, while the statement of compatibility notes that the conditions will only be applied to high risk cases, it is unclear how this public safety risk is assessed, noting that the legislation neither restricts the imposition of conditions to high risk cases nor sets out the risk assessment criteria. The statement of compatibility provides some guidance in this regard. It states that conditions that limit privacy are intended to be applied to individuals who have previously demonstrated that they may pose a public safety or national security risk, for example, where they have previously had their visa cancelled as a result of character or security concerns or where there has been a history of non-compliance with migration laws. Under the Migration Act, 'character concern' is broadly defined. For instance, a non-citizen is of character concern if, having regard to their past and present general conduct, they are not of good character.[45] There may be circumstances where an individual is of character concern but does not necessarily pose a risk to public safety or national security. The breadth of the measure, including the lack of precise criteria as to how public risk is assessed and the failure to articulate circumstances in which conditions will be imposed, raise concerns that the measure may not be sufficiently circumscribed.

1.123 As the conditions are intended to apply only in high risk cases, the statement of compatibility states that the additional conditions are the least rights restrictive measure available to enable the grant of Subclass 050 and 070 visas.[46] In particular, regarding the conditions that limit the right to privacy, the statement of compatibility states that it is intended these conditions would only be imposed where it is considered that there is no less rights restrictive way of achieving the objective and

45 *Migration Act 1958*, subsection 5C(1)(c)(ii).

46 Statement of compatibility, p. 10.

only for cases where the individual has previously demonstrated that they may pose a public safety or national security risk.[47] It notes that without these stricter conditions, such individuals may remain in immigration detention.[48] In this way, the statement of compatibility notes that the measure supports the management of non-citizens in the community wherever possible and helps to ensure immigration detention is used as a last resort.[49] The explanatory statement also notes that permission to reside temporarily in the community on a bridging visa is a privilege granted subject to satisfactory compliance with Australian laws and respect for the Australian community. It states that the additional conditions reinforce this fundamental requirement.[50]

1.124 While it may be the intention to apply the conditions only in high risk cases and, in relation to conditions that limit privacy, only where it is considered that there is no less rights restrictive way of achieving the objective, it is not a legislative requirement to do so. Where a measure limits a human right, discretionary safeguards alone may not be sufficient for the purposes of international human rights law.[51] This is because discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. Without a legislative requirement to apply conditions only to individuals who pose a real risk to public safety and to apply the minimum conditions necessary to mitigate that risk, such assurances in the statement of compatibility would appear to be insufficient to guarantee that the discretionary powers will be exercised in the least rights restrictive manner.

1.125 The statement of compatibility also notes that that the granting of bridging visas is a privilege and the exercise of the minister's discretion to grant these visas with conditions is a less rights restrictive alternative to detention. While it is acknowledged that the measure may facilitate the release of individuals who would otherwise remain in detention, it is noted that Australia's human rights obligations require the government, as a matter of law, to ensure that individuals are not detained arbitrarily. To that end, releasing people on bridging visas, pending removal from Australia or finalisation of their immigration matter, is a way of meeting those obligations by ensuring that individuals are not detained beyond a period that is strictly necessary and justifiable, consistent with the right to liberty. The fact that the granting of Subclass 050 or 070 visas is a less rights restrictive alternative to mandatory detention is not a sufficient safeguard to ensure that the conditions imposed on such visas are

47 Statement of compatibility, p. 11.

48 Statement of compatibility, p. 9.

49 Statement of compatibility, p. 12.

50 Explanatory statement, p. 1.

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

the minimum necessary and least invasive or coercive means of mitigating the public safety risk.

1.126 A related consideration is whether the measure provides sufficient flexibility to treat different cases differently.[52] The statement of compatibility notes that the conditions would be imposed by the minister at their discretion and it is intended that the conditions would be applied on a case by case basis and be proportionate to the potential risk posed by the individual.[53] As the imposition of conditions is discretionary, there is flexibility to treat different cases differently. However, where a measure confers broad discretion on the executive, the scope of discretion and manner of its exercise should be sufficiently precise.[54] As noted above, there are concerns that the measure may not be sufficiently circumscribed and it is unclear how the measure will be interpreted and applied in practice. For instance, it is unclear the extent to which the individual circumstances of detainees would be considered in deciding whether to grant a visa and attach conditions to that visa. The UN High Commissioner for Refugees has urged States to closely consider the circumstances of particular vulnerable groups, such as children or people with disability, in designing alternatives to detention.[55] Thus, while there is some flexibility contained in the measure, it is not apparent that this would necessarily assist with the proportionality of the measure.

1.127 Another relevant factor in assessing proportionality is whether there is the possibility of oversight and the availability of review. The UN High Commissioner for Refugees has stated that alternatives to detention that restrict a person's liberty should be 'subject to human rights standards, including periodic review in individual

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

53 Statement of compatibility, p. 4.

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

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

cases by an independent body'.[56] Such individuals 'need to have timely access to effective complaints mechanisms as well as remedies, as applicable'.[57] The minister's powers to grant a visa under section 195A of the Migration Act and impose the additional conditions set out in this instrument are discretionary, non-compellable and non-reviewable powers, and they do not attract the requirement of procedural fairness.[58] There is therefore no independent oversight of the exercise of the minister's discretionary powers and there does not appear to be an ability to seek review of the minister's decision to impose a particular condition on a visa. If a visa holder breaches a condition and consequently a decision is made personally by the minister to cancel their visa under sections 116 or 133C, that decision is not subject to merits review.[59] It is unclear whether a decision made by a delegate of the minister to cancel a visa under section 116 would be reviewable.[60] A decision will also not be subject to merits review if the minister issues a conclusive certificate on the basis that it would be contrary to the national interest to change the decision or for the decision to be reviewed.[61] The committee has previously concluded that judicial review without merits review is unlikely to be sufficient to fulfil the international standard required of effective review.[62] This is because judicial review is only available on a number of restricted grounds and does not allow the court to conduct a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to

56 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [37].

57 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [37].

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

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

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

61 *Migration Act 1958*, section 339.

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

determine whether the decision is the correct or preferable decision.[63] While judicial review is available with respect to the lawfulness of administrative decisions made under the Migration Act, there are serious concerns that, in the absence of merits review, this is not effective in practice to allow the individual to challenge the decision in substantive terms and so does not appear to assist with the proportionality of this measure.

1.128 A further consideration in assessing proportionality is the extent of any interference with human rights. The greater the interference, the less likely the measure is to be considered proportionate. The length and conditions of detention (since breaching a visa condition may lead to visa cancellation and immigration detention) are relevant in this regard. As the UN High Commissioner for Refugees has observed:

> The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.[64]

1.129 This measure may result in a significant interference with human rights, especially where the consequence of breaching a condition is visa cancellation and detention. The risk of indefinite detention is of particular concern for Subclass 070 visa holders. This is because they are owed protection obligations and therefore cannot be removed from Australia but are ineligible for a grant of a visa and are therefore subject to ongoing immigration detention while they await removal.[65] Without any legislative maximum period of detention and an absence of effective safeguards to protect against arbitrary detention, there is a real risk that detention may become indefinite, particularly where the circumstances in the relevant country are unlikely to improve

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

64 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [44].

65 Statement of compatibility, p. 14.

in the reasonably foreseeable future. Where a measure results in the indefinite detention of certain persons, it would not appear to be proportionate.[66]

Concluding remarks

1.130 While the ability to impose additional visa conditions on those granted bridging visas may promote the right to liberty to the extent that it provides an alternative to detention, it also engages and limits a number of other rights. There appears to be a risk that as currently drafted, the regulations may not meet the quality of law test as it is not clear that all the additional conditions satisfy the minimum requirements of legal certainty and foreseeability. Further, while the objectives of protecting public safety and strengthening community placement options may be capable of constituting a legitimate objective, questions remain as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. As regards proportionality, there are concerns that the measure may not be sufficiently circumscribed and include sufficient safeguards, noting that discretionary safeguards and assurances alone are unlikely to be sufficient to guarantee that discretionary powers will always be exercised consistently with human rights. While judicial review is available, it appears that there is limited, if any, access to merits review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

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

1.134 The committee notes that while the measure is prescribed by law, it is unclear whether it meets the quality of law test because some of the conditions appear to be drafted in broad and imprecise terms and may not meet the minimum requirements of legal certainty and foreseeability. Further, while the objectives of protecting public safety and strengthening community placement options are generally capable of constituting a legitimate objective, there are questions as to

whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. The committee also notes that there are questions as to whether the measure is proportionate and therefore compatible with multiple rights.

1.135 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 instrument, and as such seeks the minister's advice as to the matters set out at paragraph [1.131].

Code of behaviour

1.136 Before exercising the power under section 195A of the Migration Act to grant a Subclass 070 visa (that is, a bridging visa pending the person's removal from Australia), the minister will decide whether a code of behaviour must be signed by the non-citizen (unless they have already signed the code of behaviour in relation to a previous visa grant).[67] If the code of behaviour is signed, then the regulations confer discretion on the minister to attach condition 8566 to Subclass 070 visa, which requires the visa holder to not breach the code.[68] The code of behaviour requires that a person comply with certain expectations, including:

- not disobeying any laws (including road laws) or becoming involved in any criminal behaviour;
- not harassing, intimidating or bullying any other person or group of people or engaging in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- not refusing to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer to undertake treatment for a health condition for public health purposes; and
- co-operating with all reasonable requests from the department or its agents in regard to the resolution of the person's status, including requests to attend interviews or to provide or obtain identity and/or travel documents.[69]

67 Statement of compatibility, p. 6.

68 Schedule 1, item 6, subclause 070.613.

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

1.137 The consequences of breaching the code may include reduction of income support or visa cancellation and subsequent return to immigration detention, including potential transferral to an offshore processing centre.[70]

Preliminary international human rights legal advice

Multiple rights

1.138 The requirements in the code of behaviour may engage and limit the rights to freedom of expression and assembly (as outlined above at paragraph [1.107]).[71] They may also engage and limit the right to a private life, which requires the state to not arbitrarily interfere with a person's private and home life.[72] Requiring that a person must undergo medical treatment engages and may limit the right to privacy, which includes the right to personal autonomy and physical and psychological integrity, and protects against compulsory procedures.[73] To the extent that this requirement has a disproportionate impact on people with disability, it may also engage and limit the rights of persons with disability, particularly the rights to equality and non-discrimination and equal recognition before the law; the right to respect a person's physical and mental integrity; the right to consent to medical treatment; and

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

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

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

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

the right to be free from involuntary detention in a mental health facility and not to be forced to undergo mental health treatment.[74] The Committee on the Rights of Persons with Disabilities has emphasised that prior to the provision of medical treatment or health care, health and medical professionals must obtain the free and informed consent of persons with disabilities.[75] Consent should be obtained through appropriate consultation and not as a result of undue influence.[76] As drafted, the code of behaviour requires a person not to refuse to comply with any health treatment for a health condition for public health purposes. Refusal to comply with this requirement will constitute a breach of the code, which may result in a reduction of social security payments or visa cancellation and detention.[77] While the requirement to comply with health treatment may not necessarily result in forced medical treatment without consent, the severe consequences of refusing to comply (such as deprivation of liberty) raises questions as to whether consent to health treatment in this context is genuinely free and not the result of undue influence.[78]

1.139 In addition, to the extent that breach of the code results in the reduction of social security payments or the cancellation of an individual's visa and their return to immigration detention, the measure also engages and limits the right to liberty and the rights of the child (as outlined above at paragraph [1.109]), criminal process rights (as outlined above at paragraphs [1.110] to [1.112]) and the right to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.[79] The UN Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and

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

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

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

77 Statement of compatibility, p. 4.

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

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

duration having regard to the principles of human dignity and non-discrimination.[80] It has stated that the adequacy of social security 'should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require' to realise other human rights.[81] The statement of compatibility does not recognise that the code of behaviour and the consequences of breaching the code may engage and limit these rights.

1.140 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Prescribed by law

1.141 As discussed at paragraph [1.115], interferences with human rights must have a clear basis in law and satisfy the 'quality of law' test,[82] such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[83] The expectations in the code of behaviour are drafted in broad and ambiguous terms. For example, it is unclear whether a person who is charged but not convicted of an offence would be considered to have disobeyed an Australian law or been involved in criminal behaviour. It is also unclear what activities would be considered 'anti-social' or 'disruptive'; when behaviour may be considered 'inconsiderate' or 'disrespectful'; or what threshold must be crossed for 'the peaceful enjoyment of other members of the community' to be threatened. The vague and open-ended nature of these expectations, which potentially encompass a broad range of behaviours and activities, raises concerns that the measure may not be sufficiently precise to enable visa holders to understand what is expected of them and to foresee the consequences of their actions. It is also unclear what standard of proof must be met in order for the minister to be satisfied that the code of behaviour has been breached, and in what circumstances the minister will elect to exercise their discretion to either reduce income support or take visa cancellation action. This uncertainty makes it difficult for visa holders 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to

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

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

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

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

regulate their conduct'.[84] As such, there are serious questions as to whether the code satisfies the requirements of legal certainty and foreseeability.[85]

Legitimate objective and rational connection

1.142 The statement of compatibility states that the objective of the instrument generally is to strengthen the community placement options available to the minister.[86] Regarding the code of behaviour, it notes that the original policy intention of the code was to hold persons granted a visa by the minister using their discretionary powers under section 195A to a higher level of accountability than was previously required for these visa holders.[87] In general terms, as discussed at paragraph [1.119], the objectives of protecting public safety and strengthening community placement options may be capable of constituting legitimate objectives for the purposes of international human rights law. However, with respect to this measure specifically, the statement of compatibility does not articulate the pressing or substantial concern the measure addresses as required to constitute a legitimate objective for the purposes of international human rights law. It is noted that the general policy intention to hold visa holders to a higher level of accountability would appear to pursue the objective of meeting community expectations rather than addressing a pressing and substantial concern. If the primary objective is addressing public safety, it is not clear what particular public safety risk Subclass 070 visa holders pose to justify the necessity of this measure and why the additional conditions set out above, as well as the already expansive powers under the Migration Act to respond to public safety risks, are not adequate to address any public safety concerns.[88] Noting that the statement of compatibility does not address the human rights compatibility of this specific measure, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

1.143 The measure must also be rationally connected to, that is effective to achieve, the stated objective. Noting the breadth of the measure, it is not apparent that all expectations set out in the code are rationally connected to the general public safety objective sought to be achieved by the regulations. For instance, it is not clear that the expectations of co-operating with the department or its agents to resolve an individual's immigration status, or not engaging in anti-social behaviour that is inconsiderate or disrespectful, are directly connected to the public safety outcome.

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

85 The committee has previously raised concerns to this effect: Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (February 2014), pp. 107–120.

86 Statement of compatibility, p. 4.

87 Statement of compatibility, p. 6.

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

Proportionality

1.144 In considering the proportionality of the code of behaviour, the proportionality analysis above in relation to the additional conditions (at paragraphs [1.121] to [1.129]) is highly relevant. There are similar concerns that the measure may not be sufficiently circumscribed. As discussed at paragraph [1.141], the expectations in the code of behaviour are similarly drafted in broad and ambiguous terms, and there is no guidance on how the expectations will be interpreted or applied in practice, including which, if any, consequence will apply if a visa holder breaches the code. The discretionary nature of the measure could mean that there is flexibility to treat different cases differently, which may assist with the proportionality of the measure. However, given the breadth of the discretion conferred on the minister, it is important that the scope of the discretion and the manner of its exercise are sufficiently precise and confined. In the absence of this, there are concerns that the measure may not be sufficiently circumscribed. In addition, as noted above at paragraph [1.124], discretionary safeguards alone are unlikely to be sufficient to ensure that the minister's powers are exercised consistently with human rights.

1.145 It is also not evident from the statement of compatibility that this specific measure is the least rights restrictive option to achieve the stated objective, particularly in light of the existing expansive powers under the Migration Act to address public safety concerns as well as the additional conditions imposed by this instrument. The fact that the granting of a Subclass 070 visa with the code of behaviour and related conditions attached is a less rights restrictive alternative to ongoing detention does not assist with the proportionality of this specific measure, noting the UN High Commissioner for Refugees' recommendation that alternatives to detention must observe the principle of minimum intervention and be the least invasive or coercive means of achieving the objective.[89] This principle should also be observed in relation to the consequences of breaching the code.

1.146 Further, there is limited access to review. While judicial review is available for decisions relating to visa cancellation, as discussed at paragraph [1.127], merits review does not seem to be available. The committee has previously raised concerns about the lack of merits review in the context of this measure, particularly in relation to decisions to reduce social security payments as a result of breaching the code. The committee noted that the restricted work rights combined with minimal support available for bridging visa holders may result in their destitution, contrary to the rights to work and an adequate standard of living, and potentially the prohibition against inhuman and degrading treatment. The committee raised concerns that the minister's discretion to reduce social security payments as a result of breaching the code is likely to have a disproportionately severe impact on the person and their family. It

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

recommended that the proportionality of such measures would be assisted if the decision-maker was required to be satisfied that terminating or reducing income support of a visa holder will not result in their destitution, and that decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.[90]

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

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

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

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

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

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

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

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

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

Committee view

1.148 The committee notes that the measure would allow the minister to require a Subclass 070 visa holder to sign a code of behaviour and attach condition 8566 to that visa, which requires the visa holder to not breach the code. The consequences

90 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* (March 2014), pp. 90–91; *Seventh Report of the 44th Parliament* (June 2014), p. 95.

of breaching the code may be a reduction in social security income support or visa cancellation and detention in immigration detention.

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

1.150 The committee notes that while the measure is prescribed by law, it is unclear whether it meets the quality of law test because the expectations set out in the code are drafted in broad and imprecise terms and the consequences of breaching the code are not clear. While the general objectives of protecting public safety and strengthening community placement options may be capable of constituting a legitimate objective, the committee has questions as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law. The committee also notes that there are concerns that the measure may not be proportionate and therefore compatible with multiple rights.

1.151 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 [1.147].

Bills with no committee comment[1]

1.152 The committee has no comment in relation to the following bills which were introduced into the Parliament between 11 to 13 May 2021 and 24 May to 3 June 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]

- Farm Household Support Amendment (Debt Waiver) Bill 2021;
- Financial Regulator Assessment Authority Bill 2021;
- Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021;
- Fuel Security Bill 2021;
- Fuel Security (Consequential and Transitional Provisions) Bill 2021;
- Higher Education Support Amendment (Extending the Student Loan Fee Exemption) Bill 2021;
- Independent Office of Animal Welfare Bill 2021;
- Liability for Climate Change Damage (Make the Polluters Pay) Bill 2021;
- Medical and Midwife Indemnity Legislation Amendment Bill 2021;
- Migration Amendment (Tabling Notice of Certain Character Decisions) Bill 2021;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2021;
- Private Health Insurance Amendment (Income Thresholds) Bill 2021;
- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021 [No. 2];
- Social Services Legislation Amendment (Portability Extensions) Bill 2021;
- Tertiary Education Quality and Standards Agency (Charges) Bill 2021;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills with no committee comment, *Report 7 of 2021*; [2021] AUPJCHR 65.

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.

- Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Bill 2021;
- Treasury Laws Amendment (2021 Measures No. 3) Bill 2021;
- Treasury Laws Amendment (2021 Measures No. 4) Bill 2021; and
- Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021.

Chapter 2

Concluded matters

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

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

Bills

Family Law Amendment (Federal Family Violence Orders) Bill 2021[2]

Purpose	This bill seeks to establish new federal family violence orders which, if breached, can be criminally enforced
Portfolio	Attorney-General
Introduced	House of Representatives, 24 March 2021
Rights	Life; security of the person; equality and non-discrimination; rights of the child; freedom of movement; private life

2.3 The committee requested a response from the Attorney-General in relation to the bill in *Report 5 of 2021*.[3]

Federal family violence orders

2.4 This bill seeks to amend the *Family Law Act 1975* (Family Law Act) to introduce federal family violence orders in relation to a child or to a party to a marriage.[4] A listed

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Family Law Amendment (Federal Family Violence Orders) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 66.

3 Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (29 April 2021), pp. 2-12.

4 Schedule 1, item 1.

court[5] may make a federal family violence order on application by a party or of its own motion.[6] The order may provide for the personal protection of a child or a person related to a child, such as their parent or a person who has parental responsibility for the child, or a party to a marriage.[7] In order to make a federal family violence order, the court would need to be satisfied that:

- it is appropriate for the welfare of the child (in relation to a child) or appropriate in the circumstances (in relation to a party to a marriage);
- on the balance of probabilities, the protected person has been subjected or (in the case of a child) exposed to family violence or there are reasonable grounds to suspect that the protected person is likely to be subjected or (in the case of a child) exposed to family violence;[8] and
- there is no family violence order in force in relation to the parties.[9]

2.5 The court would also be required to take into account other matters in making an order, including as the primary consideration, the safety and welfare of the child or protected person, as well as any additional considerations the court considers relevant, such as the criminal history of the person against whom the order is directed.[10]

2.6 The court may make the order on the terms it considers appropriate for the welfare of the child or in the circumstances, including any of the terms set out in the bill and any term the court considers reasonably necessary to ensure the personal protection of the protected person. For example, the terms may prohibit the person against whom the order is directed from: subjecting the protected person to family

5 Schedule 1, item 2: A listed court includes the Family Court, Federal Circuit Court of Australia, Family Court of Western Australia and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

6 Schedule 1, item 13, proposed subsection 68AC(2); item 36, proposed subsection 113AC(2).

7 Schedule 1, item 13, proposed subsection 68AC(3); item 36, proposed subsection 113AC(3).

8 Section 4AB of the *Family Law Act 1975* defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. Examples of family violence include assault, sexual assault, stalking and unreasonably denying the family member financial autonomy. A child is exposed to family violence if they see or hear family violence or otherwise experience the effects of family violence.

9 Schedule 1, item 13, proposed subsection 68AC(6); item 36, proposed subsection 113AC(4). Subsections 68AC(7) and 113AC(5) provide that in satisfying itself that no family violence order is in force, the court must inspect any record, database or register that contains information about family violence orders; is maintained by a Commonwealth, state or territory department, agency or authority; and is or can reasonably be made available to the court.

10 Schedule 1, item 13, proposed subsection 68AC(9); item 36, proposed subsection 113AC(7).

violence; contacting the protected person; being within a specified distance of the protected person or within an area that the protected person is likely to be located.[11]

2.7 The bill would make it a criminal offence to breach a term of a federal family violence order, carrying a penalty of imprisonment for two years, 120 penalty units or both.[12] The default defences prescribed in the Criminal Code would be available in relation to this offence, except for the defence relating to self-induced intoxication.[13] The bill also provides that criminal responsibility would not be extended to a protected person in relation to conduct engaged in by that person that results in a breach of the order.[14]

Summary of initial assessment

Preliminary international human rights legal advice

Multiple rights

2.8 The statement of compatibility notes that the measure would enable federal and family law courts to provide additional protection for victims of family violence by enabling the courts to make an order for their personal protection.[15] It states that the measure would offer stronger protection for victims of family violence and in turn, would address the impacts of gender-based violence on women.[16] The second reading speech notes that the measure will particularly benefit victims who are already before a family law court, as the measure will reduce the need for vulnerable families to navigate multiple courts, thus saving time and money, and enabling victims and survivors to access protection when they require it most.[17] To the extent that the measure protects individuals from family violence, particularly women from gender-based violence, it would promote a number of rights, including the rights to life, security of the person, equality and non-discrimination (noting that women disproportionately experience family violence) and the rights of the child.

11 Schedule 1, item 13, proposed subsection 68AC(8); item 36, proposed subsection 113AC(6).

12 Schedule 1, item 13, proposed section 68AG; item 36, proposed section 113AG.

13 Schedule 1, item 13, proposed subsections 68AG(2)–(3); item 36, proposed subsections 113AG(2)–(3). See explanatory memorandum, p. 45.

14 Schedule 1, item 13, proposed subsection 68AG(4); item 36, proposed subsection 113AG(4). See explanatory memorandum, p. 45.

15 Statement of compatibility, p. 7.

16 Statement of compatibility, p. 7.

17 Second reading speech, pp. 4–5.

2.9 The right to life[18] imposes an obligation on the state to protect people from being killed by others or identified risks.[19] The United Nations (UN) Human Rights Committee has stated the duty to protect life requires States parties to 'enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in the deprivation of life'.[20] The duty to protect life also requires States parties to adopt special measures of protection towards vulnerable persons, including victims of domestic and gender-based violence and children.[21] The UN Committee on the Elimination of Discrimination against Women has noted that:

> Women's right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhuman or degrading treatment, and freedom of expression, movement, participation, assembly and association.[22]

2.10 The right to security of the person requires the State to take steps to protect people against interference with personal integrity by others.[23] This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

2.11 The UN Committee on the Elimination of Discrimination against Women has stated that 'gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all obligations under the Convention' on the Elimination of All Forms of Discrimination against Women.[24] Article 2 imposes an

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18 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

19 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

20 United Nations Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [20].

21 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [23].

22 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [15].

23 International Covenant on Civil and Political Rights, article 9(1).

24 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [21]. The Committee suggested at paragraph [2] that the 'prohibition of gender-based violence against women has evolved into a principle of customary international law'.

immediate obligation on States to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women', including gender-based violence against women.[25] Measures to tackle gender-based violence include 'having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice'.[26] The UN Committee on the Elimination of Discrimination against Women has recommended that States implement 'appropriate and accessible protective mechanisms to prevent further or potential violence', including the 'issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance'.[27]

2.12 Regarding the rights of the child, children have special rights under human rights law taking into account their particular vulnerabilities.[28] States have an obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation and abuse.[29]

2.13 In enabling the making of family violence orders, the measure promotes all of these human rights. However, in order to achieve its important objectives, it also necessarily engages and limits a number of other rights, insofar as the measure will have the effect of prohibiting and restricting certain behaviours, movements and communications of the person against whom the order is directed. The statement of compatibility does not relevantly recognise that any of these rights may be limited.

2.14 In particular, the measure would enable the court to include a broad range of terms in a federal family violence order, such as prohibiting a person from being within a specified distance of a specified place or area that the protected person is, or is likely to be, located, such as the protected person's place of residence, workplace, education or care facility, local shopping centre or gym.[30] A term may also require the person against whom the order is directed to leave a place or area if the protected person is at that same place or area, or the protected person requests that person to leave the

25 Convention on the Elimination of Discrimination against Women, article 2.

26 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [24].

27 Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017) [31].

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

29 Convention on the Rights of the Child, articles 19, 34, 35 and 36.

30 Explanatory memorandum, p. 28.

place or area.[31] Such terms would limit a person's right to freedom of movement and right to a private life. The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.[32] It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home life.[33]

2.15 In addition, the bill would confer a broad discretion on the court to include in the order any term that it considers reasonably necessary to ensure the personal protection of the protected person. As such, it is possible that the terms of an order may also engage and limit other rights.

2.16 The statement of compatibility does not acknowledge that the measure may limit these rights and as such there is no compatibility assessment as to whether any limitation is permissible. Most human rights, including the rights to freedom of movement and respect for private life, may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.17 In order to assess the proportionality of this measure, further information is required as to the existence of any safeguards and how such safeguards would likely operate in practice.

Committee's initial view

2.18 The committee considered that to the extent that the measure protects individuals from family violence, particularly women from gender-based violence, it would promote a number of rights, including the right to life, security of the person, right to equality and non-discrimination (noting that women disproportionately experience family violence) and the rights of the child.

2.19 However, the committee also noted that in order to achieve its important objectives, the measure also necessarily engages and limits a number of other rights insofar as it will have the effect of prohibiting and restricting certain behaviours, movements and communications of the person against whom the order is directed.

31 Schedule 1, item 13, proposed subsection 68AC(8); item 36, proposed subsection 113AC(6).

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

33 International Covenant on Civil and Political Rights, article 17; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4]. The UN Human Rights Committee further explains that this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.

2.20 The committee considered further information was required to assess the human rights implications of this measure, and sought the Attorney-General's advice as to the matters set out at paragraph [2.17].

2.21 The full initial analysis is set out in *Report 5 of 2021*.

Attorney-General's response[34]

2.22 The Attorney-General advised:

> **Noting that the statement of compatibility did not acknowledge that Federal Family Violence Orders (FFVOs) may limit the rights to freedom of movement and a private life, in order to assess the proportionality of the measure, the Committee requested further information regarding the existence of any safeguards and how such safeguards would likely operate in practice.**
>
> To the extent that terms included by the court in a FFVO have the potential to limit the rights to freedom of movement and respect for private life of the person against whom the FFVO is directed, a collection of safeguards contained within the bill ensures means that any such limitation is proportionate to achieving the objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. The Committee has noted this as a legitimate objective, with which the measure appears rationally connected.
>
> *Safeguards in relation to discretion and the making of orders*
>
> (1) Terms of the order
>
> The court may make the FFVO on the terms it considers appropriate for the welfare of the child (in relation to a child), or appropriate in the circumstances (in relation to parties to a marriage). The bill contains a list of example terms that the court can include, which, while not exhaustive, serve to provide the court with some guidance about terms that may be suitable.
>
> To the extent that the example terms may limit the person's freedom of movement and right to a private life, they are framed with reference to the protected person. For example, prohibiting the person against whom the order is directed from being within a specified distance of a specified place or area that the protected person is, or is likely to be, located. It is not intended that such a term would be used to prohibit the person from being within a particular municipal area, state or township.

34 The Attorney-General's response to the committee's inquiries was received on 12 May 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

The ability of the court to include any other non-listed term is subject to the requirement that the term must be considered by the court to be reasonably necessary to ensure the personal protection of the protected person. This ability has been deliberately included to ensure the court is not prevented from including a particular term that might best meet the specific safety needs of a particular protected person, in a particular case. It was not considered desirable to prevent the court from being able to flexibly tailor orders to the individual circumstances of a case, which would limit the effectiveness of the protections the measure seeks to afford, and risk limiting a number of rights that the measure seeks to promote, including the right to life, security of the person, and the rights of the child.

(2) Test for issuing a FFVO

The statutory test for the issue of a FFVO is proportionate to the criminal consequences of breaching such an order, with three separate matters as to which the court must be satisfied before it can make the order. The test for the issue of a FFVO will be considerably higher than the existing test for the issue of a family law personal protection injunction (PPI) under the *Family Law Act 1975* (Family Law Act), reflecting the more serious criminal consequences of a breach of the new orders.

For orders in relation to a child, the court must consider that the order is appropriate for the welfare of the child. This test ensures that, irrespective of whether the order is made for the protection of the child, or for the protection of a person close to the child, that the welfare of the child would be the fundamental purpose of the order. The court must also be satisfied on the balance of probabilities that either the protected person has been subjected to family violence or if the protected person is the child, subjected or exposed to family violence, or alternatively, that there are reasonable grounds to suspect that the protected person is likely to be subjected to family violence or, if the protected person is the child, is likely to be subjected or exposed to family violence.

For orders in relation to parties to a marriage, the court must be satisfied that the order is appropriate in the circumstances. Whether an order is appropriate is an objective consideration which would require the court to consider all the circumstances of the case. The court must also be satisfied on the balance of probabilities that either the protected person has been subjected to family violence, or alternatively, there are reasonable grounds to suspect the protected person is likely to be subjected to family violence.

The mere fact of previous violence will not of itself be sufficient to warrant the making of a FFVO.

A court would also be required to take into account as the primary consideration, the safety and welfare of the child, or of the protected person (as relevant). Other matters for the court to take into account include any criminal history, criminal charges and previous violent conduct of the person against whom the order is directed, if the court considers this

relevant. These factors may be relevant to determining whether and on what terms to issue a FFVO.

(3) Requirement to give reasons

As soon as practicable after making a FFVO, the listed court would be required to give reasons for the decision. Adequate reasons are required by the implied guarantee of procedural due process in the exercise of judicial power. The requirement to give reasons serves as a safeguard in promoting transparency and consistency in decision-making.

(4) Information included in a FFVO

A FFVO will be made in a standard form template and will contain important information for the person against whom the order is directed, including information about the criminal consequences of the order, and how the person can apply to have the order amended. The order will clearly identify the terms the person is subject to and contain examples of behaviour that may constitute family violence. This is to ensure that the person against whom the order is directed is informed and able to comply with the terms of the order.

(5) Power of a court to vary, revoke or suspend a FFVO

A listed court would be able to vary, revoke or suspend a FFVO, either by application or of its own motion, if the court considers that it is appropriate for the welfare of the child, or appropriate in the circumstances. The purpose for which the chosen course of action must be considered appropriate is to ensure the personal protection of the protected person from family violence. The court would also need to be satisfied that there is a change in circumstances since the order was made, or the court has before it material that was not before the court that made the order.

The requirement that there be a change in circumstances recognises the fact that the circumstances that gave rise to the making of an order may change during the life of the order. The change in circumstances may result in the order being too challenging to comply with or unduly restrictive. The court's ability to make changes to the order would address these concerns.

Separately to this bill, it should also be noted that the person against whom the FFVO is directed could ask the court to set aside the decision if it could be shown that the judge that issued the order erred.

Comparable existing measures

A broad discretion is currently available under the Family Law Act to decision-makers with respect to the issue of a PPI. The court can currently issue a PPI in relation to a child as it considers appropriate for the welfare of a child, or, in relation to a party to a marriage, as it considers proper with respect to the matter to which the proceedings relate. In practice, PPIs may include restrictions such as on a person's movements, and communication between the parties. While a PPI is a civilly-enforceable protection, the threshold test for the issue of a FFVO is higher to account for this.

The kinds of FFVO conditions listed in the bill are based on standard family violence order conditions in the States and Territories. In general, final State or Territory family violence orders may include such conditions as the court considers are necessary or desirable to achieve purposes associated with preventing family violence.

Concluding comments

International human rights legal advice

Multiple Rights

2.23 As was previously noted, the bill pursues a legitimate objective for the purposes of international human rights law (namely protecting victims of family violence and addressing gender-based violence) and the measure appears to be rationally connected to that objective.[35] The Attorney-General has provided advice regarding the proportionality of the measure. In particular, the Attorney-General identified five safeguards that will help ensure that any limitation is proportionate to achieving the objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. The first safeguard is the terms of the federal family violence order. The Attorney-General stated that the terms are intentionally non-exhaustive to enable the court to flexibly tailor orders to the individual circumstances of the case. Without this flexibility, the Attorney-General noted that the effectiveness of the measure may be limited. Regarding the potential breadth of the terms, such as a term directing a person not to be within a specified distance of a specified place or area where the protected person is located, the Attorney-General noted that the terms are not intended to be used to prohibit the person against whom the order is directed from being within a particular municipal area, state or township.

2.24 The second safeguard identified is the test for issuing a federal family violence order. The Attorney-General stated that the statutory test for issuing the order is higher than the existing test for a family law personal protection injunction, reflecting the more serious criminal consequences of breaching a federal family violence order. The Attorney-General noted that the mere fact of previous violence will not of itself be sufficient to warrant the making of a federal family violence order. The third safeguard is the requirement for the court to give reasons for its decision to issue a federal family violence order. The Attorney-General stated that this requirement serves as a safeguard in promoting transparency and consistency in decision-making. The fourth safeguard is the requirement for the order to contain certain information for the person against whom the order is directed, including the terms of the order, criminal consequences of breaching the order and how to apply to have the order

35 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), p.7.

amended. The Attorney-General stated that this ensures that the person against whom the order is made is directly informed and able to comply with the order.

2.25 The final safeguard identified is the power of the court to vary, revoke or suspend an order in certain circumstances. The Attorney-General noted that if there is a change in circumstances that results in the order becoming too challenging to comply with or unduly restrictive, the court may make changes to the order to address such concerns (if it considered that it was appropriate for the welfare of the child, or appropriate in the circumstances). The Attorney-General further noted that the person against whom the order is directed can ask the court to set aside the decision if it can be shown that the judge erred in making the order.

2.26 The preliminary analysis considered that the scope of the measure, the extent of interference with rights and the existence of safeguards were relevant matters in assessing the proportionality of this measure. As noted by the Attorney-General, the measure is intentionally broad in scope to provide the court with sufficient flexibility to treat different cases differently and tailor the order to the individual circumstances of the case. This would appear to assist with the proportionality of the measure. While the potential interference with rights may be significant, depending on the terms imposed, the safeguards identified by the Attorney-General appear to be adequate to ensure that any limitation on rights is proportionate to the objective being sought, namely, the protection of individuals from family and gender-based violence. This is particularly so noting Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women', including gender-based violence against women.[36]

2.27 In addition, a court's power to vary, revoke or suspend a federal family violence order, either on application by the person against whom the order is directed or of its own motion, as well as other general appeal avenues, provides a degree of oversight and access to review for the person whose rights may be limited. The requirement for the court to give reasons and provide information about the terms of the order, and the consequences of breaching the order, to the person against whom the order is directed may also ensure that the order and consequent interference with rights is appropriately justified and reasonably necessary in the circumstances of the case. Having regard to the cumulative effect of these safeguards and the flexibility of the measure, and the importance of providing protection against gender-based violence, any limitation on the rights of the person against whom the order is directed would likely be permissible as a matter of international human rights law.

36 Convention on the Elimination of Discrimination against Women, article 2.

Committee view

2.28 The committee thanks the Attorney-General for this response. The committee notes that the bill seeks to introduce federal family violence orders in relation to a child or a party to a marriage, which, if breached, can be criminally enforced. The court may make a federal family violence order on the terms it considers appropriate for the welfare of the child or in the circumstances, including any term the court considers reasonably necessary to ensure the personal protection of the protected person.

2.29 To the extent that the measure protects individuals from family violence, particularly women from gender-based violence, the committee considers that the measure would promote a number of rights, including the right to life, security of the person, right to equality and non-discrimination (noting that women disproportionately experience family violence) and the rights of the child. To this end, the committee considers that the measure would facilitate the realisation of Australia's international human rights obligations to protect life; eliminate discrimination against women, including gender-based violence against women; protect people against interference with personal integrity by others; and protect children from all forms of violence and abuse. In particular, the committee notes the UN Committee on the Elimination of Discrimination against Women's recommendation that States implement appropriate and accessible protective mechanisms to prevent further or potential violence, including protection orders against alleged perpetrators and adequate sanctions for non-compliance with such orders.

2.30 However, the committee also notes that in order to achieve its important objectives, the measure also necessarily engages and limits a number of other rights insofar as it will have the effect of prohibiting and restricting certain behaviours, movements and communications of the person against whom the order is directed. These rights can be subject to permissible limitations that are reasonable, necessary and proportionate.

2.31 The committee considers that the measure pursues the legitimate objective of better protecting victims of family violence and addressing the impacts of gender-based violence on women. Having regard to the various safeguards identified by the Attorney-General as well as the flexibility of the measure to treat different cases differently, the committee considers that any limitation on rights would likely be proportionate to the important objective being sought. The committee therefore considers that the measure would likely be a permissible limitation on the rights of the person against whom the order is directed.

Suggested action

2.32 The committee recommends the statement of compatibility with human rights be updated to reflect the information which has been provided by the Attorney-General.

2.33 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Relationship between federal family violence orders and state and territory family violence orders

2.34 The bill seeks to introduce provisions to deal with the concurrent operation of federal and state and territory laws, and the relationship between federal and state and territory family violence orders. The bill provides that the proposed provisions establishing federal family violence orders are not intended to exclude or limit the operation of state or territory laws which are capable of operating concurrently. However, a state or territory family violence order that is inconsistent with a federal family violence order would be invalid to the extent of that inconsistency.[37] With respect to a federal family violence order in relation to a child, the bill provides that where a state or territory court is exercising powers to suspend or revoke a federal family violence order, specified provisions of the Family Law Act do not apply, including any provision that would otherwise make the best interests of the child the paramount consideration.[38] With respect to a federal family violence order in relation to a party to a marriage, the bill would allow certain provisions to be specified in the regulations that would not apply to a state or territory court exercising its power to suspend or revoke a federal family violence order.[39]

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child

2.35 This aspect of the bill may engage and limit the rights of the child insofar as it would have the effect of not requiring the best interests of the child to be a paramount consideration in all actions concerning children. As a matter of international human

37 Schedule 1, item 24, proposed sections 68NA and 68ND; item 44, proposed sections 114AB and 114AE.

38 Schedule 1, item 24, proposed section 68NC.

39 Schedule 1, item 44, proposed section 114AE.

rights law, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[40] 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.[41] 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.[42]

2.36 The right of the child to have his or her best interests taken as a primary consideration in all actions concerning them may be limited by proposed section 68NC, which provides that where a state or territory court exercises its powers to suspend or revoke a federal family violence order, any provision that would otherwise make the best interests of the child the paramount consideration would not apply.[43] Noting the UN Committee on the Rights of the Child's advice that children's best interests must have 'high priority and not just [be] one of several considerations', proposed section 68NC may have the effect of downgrading the 'best interests of the child' from a paramount or primary consideration to a relevant consideration.[44] In addition, in circumstances where the terms of a state or territory family violence order are invalid to the extent of any inconsistency with a federal family violence order, it is unclear whether this could have the effect of weakening protection for victims of family violence, including children.

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

2.38 In order to assess the compatibility of this measure, further information is required as to:

(a) what is the objective being pursued by proposed section 68NC and how is the measure rationally connected to this objective;

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

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

42 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [37]; see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

43 Schedule 1, item 24, proposed section 68NC.

44 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [39].

(b) the likely circumstances in which the best interests of the child would not be considered as a paramount or primary consideration;

(c) what safeguards exist, if any, to ensure that any limitation on the rights of the child is proportionate; and

(d) whether it is possible that the provisions which provide that terms of a state or territory family violence order are invalid to the extent of any inconsistency with a federal family violence order could have the effect of weakening protection for victims of family violence, including children.

Committee's initial view

2.39 The committee noted that this measure may limit the right of the child to have his or her best interests taken as a primary consideration in all actions or decisions that concern them. The committee considered further information was required to assess the human rights implications of this measure, and sought the Attorney-General's advice as to the matters set out at paragraph [2.38].

2.40 The full initial analysis is set out in *Report 5 of 2021*.

Attorney-General's response

2.41 The Attorney-General advised:

(a) The Committee requested further information regarding the objective being pursued by proposed section 68NC and how the measure is rationally connected to this objective.

Proposed section 68NC would set out a number of requirements and provisions of the Family Law Act that would not apply to a State or Territory court exercising the power to revoke or suspend a FFVO in proceedings for a family violence order under new section 68NB, including any provision that would otherwise make the best interests of the child the paramount consideration. For section 68NB, the adequacy of the FFVO, and its appropriateness for the welfare of the child would be a relevant matter that the court would need to take into account, as well as the best interests of the child, which are captured in the purposes of Division 11 of Part VII.

State and Territory courts have historically been reluctant to exercise the family law jurisdiction available to them, which is often unfamiliar.

Proposed section 68NC is designed to simplify the process for a State or Territory court in exercising jurisdiction under section 68NB, and what the court has to consider. The intention is to encourage the exercise of this jurisdiction by a State or Territory court. Although new subsection 68NB(2) would provide State and Territory courts with the power to revoke or suspend a FFVO, it does not impose an obligation on these courts to do so when issuing a family violence order.

In respect of paragraph 68NC(b), if State and Territory courts were required to consider the best interests of the child as the paramount objective when revoking or suspending a FFVO, it is anticipated they would be less inclined

to exercise that family law jurisdiction due to the added complexity involved with this consideration.

The best interests of the child principles in existing section 60B relate to the rights of children to know and be cared for by their parents, spend time and communicate regularly with both parents and other significant adults and enjoy their culture; and the responsibilities of parents to jointly share duties concerning the care, welfare and development of their children and agree about the future parenting of their children. In determining what is in the child's best interests, the court must consider, as primary considerations, the benefit to the child of having a meaningful relationship with both of the child's parents, and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The court is required to give greater weight to the latter.

State and Territory family violence orders are often required in urgent circumstances to provide protection for victims quickly, and a State or Territory court looking to revoke or suspend the FFVO in that proceeding would not have before it the information that was before the listed court that made the FFVO.

Underuse of section 68NB may result in State and Territory family violence orders made that are inconsistent with FFVOs, and which would be invalid and unenforceable to the extent of direct inconsistency with the federal order. Section 68NB is critical to the resolution of inconsistent FFVOs and family violence orders, and in so doing, in protecting victims by safeguarding against the risks to safety that would arise in the case of such an inconsistency, including lack of clarity around the source and enforceability of their protections. Having inconsistent State and Territory family violence orders would also create enforcement challenges for police, and increase the risk of unlawful arrests.

(b) The Committee requested further information regarding the likely circumstances in which the best interests of the child would not be considered as a paramount or primary consideration.

While State and Territory courts are not legislatively required to make the best interests of the child a paramount consideration in the exercise of jurisdiction under section 68NB (as above, due to the complexity involved in that consideration which may impede the ability of the State or Territory court to rapidly and appropriately construct family violence orders, given the decisions are likely to be made in tandem) the best interests of the child principles will remain an important consideration. Along with consideration of the welfare of the child, the child's safety is a key focus.

Any decision on the part of a State or Territory court to revoke or suspend a FFVO under section 68NB would be ancillary to a decision to issue or vary a State or Territory family violence order. This would be the primary matter at hand. The purpose of the power to suspend and revoke FFVOs is to avoid inconsistency with State and Territory family violence orders. Accordingly, as long as the State or Territory court is satisfied that a family violence order

can be made or varied under State or Territory law in the particular case, the power to revoke or suspend the federal order would be enlivened.

The best interests of the child principles, which are captured in the purposes of Division 11 of Part VII, would be a relevant matter that the court would need to take into account in revoking or suspending a FFVO. So too would be the adequacy of the FFVO, and its appropriateness for the welfare of the child.

Ensuring there are clear and enforceable family violence protections, through the resolution of any inconsistencies between orders, supports the protection of children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence, is the primary consideration in a listed court's decision about making a FFVO in relation to a child. Whether an order is appropriate for this purpose is an objective consideration which would require the court to consider all the circumstances of the case. The court would also need to consider the matters set out in subsections 60CC(2) (applied in accordance with subsection 60CC(2A)) and (3) of the Act) which are about determining what is in the best interests of a child. These matters further demonstrate the centrality of the child to a FFVO made in relation to a child, regardless of whether the order is for the protection of the child or another person. The child's welfare is central to the order and its terms, ensuring that the FFVO is adequate to provide personal protection from family violence. The requirement 'for the welfare of the child' is also an element of existing section 68B, which provides for the grant of a PPI.

(c) The Committee requested further information regarding what safeguards exist, if any, to ensure that any limitation on the rights of the child is proportionate.

The court's consideration under section 68NB, taking into account the best interests of the child, the adequacy of the FFVO, and its appropriateness for the welfare of the child, ensures that the child is central to this decision.

Clear and enforceable family violence protections, whether under a FFVO in relation to a child and/or a State or Territory family violence order, are needed to protect the child from physical or psychological harm from being subjected to, or exposed to, family violence.

The bill contains safeguards against inconsistent federal and State and Territory orders arising, supporting the protection of the rights of the child in respect of whom the order is made. The bill would restrict a person from applying for a FFVO, and a listed court from making a FFVO, where there is a State or Territory family violence order in force between the same parties.

The bill would only allow a State or Territory court to revoke or suspend a FFVO when it is making or varying a family violence order. When revoking or suspending a FFVO, a State or Territory court must have regard to

whether the FFVO is adequate or is appropriate for the welfare of the child; and the purposes of Division 11 of Part VII. New paragraph 68N(2)(e) provides that one of the purposes of Division 11 is to achieve the objects and principles in current section 60B of the Family Law Act. The overarching objective in section 60B is to ensure that the best interests of the child are met.

It is intended that if the State or Territory court considers that the FFVO is adequate to provide personal protection of protected persons from family violence, and is appropriate for the welfare of the child in the current circumstances, the court would not revoke or suspend the order. If the court considers that the order is inadequate or is inappropriate for the welfare of the child, for example, because the terms of the order are insufficiently stringent, do not expressly prohibit particular violent conduct to which the protected person is vulnerable, or the order is due to expire imminently, it is intended that the court may revoke or suspend the order. It is intended that the court would consider the adequacy and appropriateness of the order in light of all the circumstances of the case.

(d) The Committee requested further information regarding whether it is possible that the provisions which provide that terms of a state or territory family violence order are invalid to the extent of any inconsistency with a federal family violence order could have the effect of weakening protection for victims of family violence, including children

New section 68ND would clarify that to the extent that a family violence order is not able to operate concurrently with a FFVO made under Division 9A of the Family Law Act because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the State order to the extent of that inconsistency. A FFVO would also invalidate conflicting Territory orders on a similar basis.

Section 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Where some of the terms of a family violence order are directly inconsistent with the terms of a FFVO order, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the federal family violence order, or vice versa. The conditions of the family violence order that are not inconsistent with the FFVO order would remain enforceable.

As mentioned above, the Bill includes significant safeguards against inconsistent orders arising, due to the risk that such inconsistencies present for persons requiring protection from family violence.

Provisions that serve to resolve inconsistent FFVOs and State or Territory family violence orders thereby support the protection of victims of family violence, including children, by reducing confusion for victims as to which order terms they are protected by and the enforceability of their protections, assisting police and reducing the risk of unlawful arrests.

Concluding comments

International human rights legal advice

Rights of the child

2.42 Regarding the objective being pursued by the measure, the Attorney-General advised that it is designed to simplify the process for state or territory courts in exercising jurisdiction under proposed section 68NB (the power to revoke or suspend a federal family violence order), and encourage the exercise of this jurisdiction. The Attorney-General stated that it is anticipated that if the court were required to consider the best interests of the child as the paramount consideration when revoking or suspending a federal family violence order, it would be less inclined to exercise this jurisdiction due to the added complexity involved with this consideration. The Attorney-General noted that this complexity may impede the ability of courts to construct family violence orders rapidly and appropriately. The Attorney-General further stated that underuse of proposed section 68NB may result in inconsistency between state and territory family violence orders and federal family violence orders, with the former invalid and unenforceable to the extent of direct inconsistency with the latter. The Attorney-General explained that resolving inconsistencies between orders and ensuring that orders are clear and enforceable supports the protection of children from physical or psychological harm arising from being subjected to, or exposed to, abuse, neglect or family violence.

2.43 To be capable of justifying a proposed limitation on human rights, the legitimate objective sought must be necessary to address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. In general, the objective of encouraging state and territory courts to exercise their jurisdiction to resolve inconsistent family violence orders, in order to ensure protection orders are clear and enforceable so as to protect children from harm, may constitute a legitimate objective for the purposes of international human rights law.

2.44 However, questions remain as to whether overriding the provisions which would otherwise make the best interests of the child the paramount consideration is necessary to address an issue of public or social concern that is pressing and substantial enough to warrant limiting the rights of the child. The stated objective appears to be premised on the assumption that courts would be reluctant to use section 68NB if they were required to make the best interests of the child the paramount consideration. This is because of the added complexity involved with this consideration. The Attorney-General also noted that a state or territory court would be seeking to make a family violence order in urgent circumstances and would not

have before it the information that was before the court that made the federal family violence order. Accordingly, proposed section 68NC simplifies the considerations the court must have regard to in exercising its jurisdiction. It is not clear, however, that a state or territory court would necessarily lack the legal and technical expertise to consider the best interests of the child, and thus be reluctant to exercise this jurisdiction. While considering the best interests of the child may be complex, it would seem that judges are suitably qualified and possess the necessary experience to perform this judicial exercise, noting that state and territory courts regularly deal with family and domestic violence matters. If a state or territory court lacked the information necessary to consider the best interests of the child, expert evidence may be provided to the court to assist it in exercising its jurisdiction. Indeed, article 3 of the Convention on the Rights of the Child explicitly requires courts of law to make the best interests of the child a primary consideration in all actions concerning children. 'Courts of law' in this context is not limited to family law courts but encompasses 'all judicial proceedings, in all instances…and all relevant procedures concerning children, without restriction'.[45]

2.45 However, while accepting that as a matter of international human rights law all courts shall take as a primary consideration the best interests of the child, it is also acknowledged that if this consideration were to delay proceedings such that it would weaken protections for victims of family violence, there may be a pressing social concern to facilitate the rapid and appropriate construction of family violence orders and the quick resolution of inconsistent orders to protect children from harm. The extent to which making the best interests of the child the paramount consideration will, or is likely to, delay proceedings and impede the making of appropriate family violence orders is unclear. Thus, without further information it remains unclear whether the measure is necessary and addresses a pressing and substantial issue of public or social concern.

2.46 Under international human rights law, any limitation on a right must also have a rational connection to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. The Attorney-General advised that proposed section 68NC was necessary to encourage the use of proposed section 68NB – the latter section being critical to the resolution of inconsistent federal and state or territory family violence orders. Resolving inconsistencies and ensuring that orders are enforceable in turn supports the protection of children from harm, violence and abuse. It is not immediately apparent, however, that downgrading the best interests of the child from a paramount to a relevant consideration would likely be effective to achieve the objective of encouraging courts to use proposed section 68NB. This is because, as noted above, it is not clear that courts, in exercising their power to suspend or revoke a federal family

45 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [27].

violence order, would necessarily find the task of making the best interests of the child the paramount consideration too complex, so as to impede their ability to rapidly and appropriately construct family violence orders. Indeed, there could be a risk that the measure may not be effective in achieving even the broader objective of protecting children from harm insofar as it would have the effect of making the best interests of the child one of several considerations rather than making it the highest priority.[46] For these reasons, questions remain as to whether the measure would be rationally connected to the stated objective.

2.47 Regarding proportionality, the Attorney-General stated that the bill contains safeguards against the making of inconsistent federal and state or territory orders, which supports the protection of the rights of the child in respect of whom the order is made. These safeguards include restricting a person from applying for, and a listed court from making, a federal family violence order if a state or territory family violence order is in force between the same parties. Additionally, in exercising its power under proposed section 68NB, the court must have regard to whether the federal family violence order is adequate or appropriate for the welfare of the child, and the purposes of Division 11, which include ensuring the best interests of the child are met. Thus, while state and territory courts are not legislatively required to make the best interests of the child the paramount consideration, the Attorney-General stated that this principle will 'remain an important consideration'. The Attorney-General further noted that the safety and welfare of the child is the 'primary consideration' in a listed court's decision about making a federal family violence order in relation to a child.

2.48 The requirement that the safety and welfare of the child be a 'primary consideration' and the best interests of the child an 'important consideration' may operate to protect the rights of the child generally, including the right of the child to be protected from all forms of violence and abuse.[47] However, this requirement may not serve as an effective safeguard to protect the right of the child to have his or her best interests taken as a primary consideration. The UN Committee on the Rights of

46 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [39]–[40]. The Committee stated that where there are potential conflicts between the best interests of the child and the rights of other persons, such as a parent, the decision-maker must carefully balance the interests of all parties and find a suitable compromise. If this is not possible, the Committee stated that: 'decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best'. The Committee continued: 'Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned'.

47 Convention on the Rights of the Child, article 19.

the Child has made clear that the phrase 'shall be a primary consideration' in article 3 'place[s] a strong legal obligation on States and mean[s] that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken'.[48] It has further stated that 'the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations'.[49] In light of this strong legal obligation, the safeguards outlined by the Attorney-General may not be sufficient for the purposes of ensuring that any limitation on this right is proportionate in all circumstances.

2.49 Furthermore, the preliminary analysis sought further information as to whether it is possible that proposed section 68ND (which provides that the terms of a state or territory family violence order is invalid to the extent of any inconsistency with a federal family violence order) could have the effect of weakening protection for victims of family violence, including children. The Attorney-General advised that the bill contains significant safeguards against inconsistent orders arising (as outlined in paragraph [2.47]) and includes provisions that serve to resolve any inconsistencies should they arise. These safeguards appear to be sufficient to mitigate the risk that proposed section 68ND would weaken protection for victims of family violence.

2.50 In conclusion, while the general objective of encouraging courts to use their powers to revoke or suspend federal family violence orders to resolve any inconsistencies may be a legitimate objective, questions remain as to whether this specific measure is necessary and addresses a pressing and substantial issue of public or social concern or is likely to be effective to achieve the stated objective. Noting the strong legal obligation on States to protect the best interests of the child, the safeguards identified by the Attorney-General may not be sufficient to ensure that any limitation on this right is proportionate. As such, there appears to be some risk that proposed paragraph 68NC(b) could impermissibly limit the right of the child to have his or her best interests taken as a primary consideration.

Committee view

2.51 The committee thanks the Attorney-General for this response. The committee notes that the bill seeks to introduce provisions that deal with the concurrent operation of federal and state and territory laws, and the relationship between federal and state and territory family violence orders. In particular, the bill provides that where a state or territory family violence order is inconsistent with a federal family violence order, it would be invalid to the extent of that inconsistency. The committee notes that the bill also provides that where a state or territory court

48 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [36].

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

is exercising powers to suspend or revoke a federal family violence order in relation to a child, any provision that would otherwise make the best interests of the child the paramount consideration would not apply.

2.52 The committee notes that this measure limits the right of the child to have his or her best interests taken as a primary consideration in all actions or decisions that concern them. This right may be subject to permissible limitations if it is shown to be reasonable, necessary and proportionate.

2.53 The committee notes the Attorney-General's advice that the measure seeks to encourage courts to exercise their power to revoke or suspend a federal family violence order so as to resolve inconsistencies between federal and state or territory family violence orders and in turn, protect children from harm. While the committee notes that this important objective could constitute a legitimate objective for the purposes of international human rights law, questions remain as to whether this specific measure is necessary and addresses a pressing or substantial concern. The committee notes that it is not clear whether the courts are reluctant to exercise their jurisdiction due to the complexity of considering the best interests of the child and the extent to which this reluctance could cause delay in proceedings and place victims of family violence at risk of harm. Without further information in relation to this, the committee is unable to conclude that the measure is rationally connected to the stated objective. As regards proportionality, while the committee notes that the best interests of the child would be an important consideration, this safeguard alone may be insufficient to protect the right of the child to have his or her best interests taken as a primary consideration.

Suggested action

2.54 The committee recommends the statement of compatibility with human rights be updated to reflect the information which has been provided by the Attorney-General.

2.55 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021[1]

Purpose	This bill seeks to amend the *Migration Act 1958* to: • modify the effect of section 197C to ensure it does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process unless: - the decision finding that the non-citizen engages protection obligations has been set aside; - the minister is satisfied that the non-citizen no longer engages protection obligations; or - the non-citizen requests voluntary removal; and • ensure that, in assessing a protection visa application, protection obligations are always assessed, including in circumstances where the applicant is ineligible for visa grant due to criminal conduct or risks to security
Portfolio	Immigration, Citizenship, Migrant Services and Multicultural Affairs
Introduced	House of Representatives, 25 March 2021 *Received Royal Assent on 25 May 2021*
Rights	Non-refoulement; liberty; prohibition against torture and ill-treatment; rights of the child

2.56 The committee requested a response from the minister in relation to the bill in *Report 5 of 2021*.[2]

Removal of unlawful non-citizens where protection obligations engaged

2.57 Section 198 of the *Migration Act 1958* (the Migration Act) sets out the circumstances in which mandatory removal of an 'unlawful non-citizen' is authorised.[3] An 'unlawful non-citizen' is a person who is a non-citizen in the migration zone and

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 7 of 2021*; [2021] AUPJCHR 67.

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), pp. 13–28.

3 *Migration Act 1958*, section 198.

does not hold a lawful visa.[4] Subsection 197C(1) provides that for the purposes of removal of an 'unlawful non-citizen' under section 198, 'it is irrelevant whether Australia has non-refoulement obligations in respect of that person'.[5] Non-refoulement obligations are international law obligations that require Australia not to return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm. Subsection 197C(2) specifies that an 'officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.[6]

2.58 This bill proposes to add subsection 197C(3), which would provide that 'despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if': that person's valid application for a protection visa has been finally determined; a protection finding has been made in relation to that person; that protection finding has not been quashed, set aside or found by the minister to be no longer applicable; and the person has not asked the minister to be removed from the country.[7] Proposed subsections 197C(4)–(7) would clarify the meaning of a protection finding for the purposes of proposed subsection 197C(3).[8] In addition, the bill proposes that a reference in 197C of the Migration Act to a protection finding within the meaning of proposed subsections 197C(5) or (6) would include a reference to a protection finding made before the Schedule commences.[9]

2.59 Proposed section 36A of this bill would also require the minister, in considering an application for a protection visa, to consider and make a record of whether they are satisfied that the applicant meets certain specified criteria for a protection visa under section 36 of the Migration Act.[10] The minister would be required to consider and make a record of their finding before deciding whether to grant or refuse to grant a visa or considering whether the person satisfies other criteria for the grant of a visa.[11] Read in conjunction with the proposed amendments to 197C, proposed section 36A would have the effect of ensuring that a protection finding is

4 *Migration Act 1958*, sections 13–14. Migration zone is defined in section 5.

5 *Migration Act 1958*, subsection 197(1).

6 *Migration Act 1958*, subsection 197(2).

7 Schedule 1, item 3, proposed subsection 197C(3).

8 Schedule 1, item 3, proposed subsections 197C(4)–(7).

9 Schedule 1, subitem 4(3).

10 Schedule 1, item 1, proposed subsection 36A(1).

11 Schedule 1, item 1, proposed subsection 36A(2).

made within the meaning of proposed subsections 197(4) or (5) before the minister considers whether the person meets other criteria for the grant of a protection visa.[12]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to non-refoulement; liberty; rights of the child; prohibition against torture and ill-treatment

Non-refoulement obligations

2.60 The bill engages, and may support Australia to uphold, its non-refoulement obligations insofar as it seeks to amend section 197C of the Migration Act to clarify that the removal power under section 198 does not require or authorise the removal of a person who is deemed an unlawful non-citizen and for whom a protection finding has been made through the protection visa process. Australia has non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[13] This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[14] Non-refoulement obligations are absolute and may not be subject to any limitations.[15]

Right to liberty and rights of the child

2.61 However, to the extent that the measure may also result in prolonged or indefinite immigration detention of persons who cannot be removed under section 198 because Australia's non-refoulement obligations are enlivened, the measure may also engage and limit the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[16] The notion of 'arbitrariness' includes elements of inappropriateness, injustice, lack of predictability and due process of law.[17] Accordingly, any detention must not only be lawful, but also

12 Explanatory memorandum, pp. 5–6.

13 Australia also has protection obligations under the Convention relating to the Status of Refugees 1951 (and the 1967 Protocol), however, this is not one of the seven listed treaties under the *Human Rights (Parliamentary Scrutiny) Act 2011*.

14 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018). See also UN Human Rights Committee, *General Comment No. 20: article 7 (prohibition against torture)* (1992) [9].

15 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018) [9].

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

17 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3].

reasonable, necessary and proportionate in all of the circumstances as well as subject to periodic judicial review.[18] In the context of mandatory immigration detention, detention may become arbitrary where individual circumstances are not taken into account; other, less intrusive measures could have achieved the same objective; a person may be subject to a significant length of detention; and a person is deprived of legal safeguards allowing them to challenge their indefinite detention.[19]

2.62 Furthermore, where the measure applies to children, it may also engage and limit the rights of the child.[20] Children have special rights under international human rights law taking into account their particular vulnerabilities.[21] In the context of immigration detention, the UN Human Rights Committee has stated that:

> children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[22]

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

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

(a) with respect to people to whom protection obligations are owed but who were ineligible for a grant of a visa on character or other grounds, in the last five years:

18 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/6 (2017) [38].

19 See UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]; *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.4]; *M.M.M et al v Australia*, UN Human Rights Committee Communication No. 2136/2012 (2013) [10.4].

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

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

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

(i) how many people were, or are currently, detained in immigration detention, and for how long were they, or have they been, detained; and

(ii) of this number, how many were:

- granted a visa by the minister in the exercise of the minister's personal discretionary powers under section 195A (discretion to grant a detainee a visa) or were released into community detention under section 197AB (residence determination); and
- returned to the country in relation to which there had been a protection finding because conditions in that country had improved such that protection obligations were no longer owing or sent to a safe third country;

(b) what effective safeguards exist to ensure that the limits on the right to liberty and the rights of the child are proportionate;

(c) what effective safeguards exist to ensure that persons affected by this measure in immigration detention will not be indefinitely detained and consequently at risk of being subjected to ill-treatment, and how the measure is compatible with the prohibition against torture or other cruel, inhuman or degrading treatment or punishment; and

(d) whether this measure will have any impact on persons involved in current litigation or who have been unlawfully detained based on the caselaw established by the Federal Court decision in *AJL20*.

Committee's initial view

2.65 The committee considered that the measure would support Australia's ability to uphold its non-refoulement obligations. However, the committee noted that the statement of compatibility states that these amendments are in response to two Federal Court cases that found that the current provisions oblige the minister to send an unlawful non-citizen back to a country despite any protection obligations owed, and if the minister will not do so as soon as reasonably practicable the person must be released from immigration detention. As such, to the extent that the measure may result in prolonged or indefinite detention of persons who are deemed to be unlawful non-citizens and cannot be removed because a protection finding has been made in relation to them, the measure also engages and limits the right to liberty and the rights of the child.

2.66 In addition, the committee noted that to the extent that the measure results in indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.

2.67 The committee considered further information was required to assess the human rights implications of this bill, and sought the minister's advice as to the matters set out at paragraph [2.64].

2.68 The full initial analysis is set out in *Report 5 of 2021*.

Minister's response[23]

2.69 The minister advised:

> **With respect to people to whom protection obligations are owed but who were ineligible for a grant of a visa on character or other grounds, in the last five years:**
>
> - **the number of people who were or are in detention, and the length of their detention; and**
> - **how many of this number have been either:**
>   - **granted a visa under section 195A of the Migration Act;**
>   - **placed in the community under a residence determination under section 197AB of the Migration Act; or**
>   - **returned to the country in relation to which there had been a protection finding because conditions in that country had improved such that protection obligations were no longer owing; or**
>   - **sent to a safe third country.**
>
> As at 31 March 2021, there were 1,482 people in an immigration detention facility, and 537 under a residence determination. This represents total numbers, rather than the cohort of persons who have been found to engage protection obligations. Further, it is important to note that there are over 390,000 people in the community on Bridging visas. This includes 31,557 people on Subclass (050 & 051) Bridging visa Es (including 8,894 on Departure Grounds). Many of these visas are granted by delegates and do not require my personal intervention.
>
> Statistics relating to the detention of the cohort who have been found to engage protection obligations but who were ineligible for a visa on character or other grounds are below:

23 The minister's response to the committee's inquiries was received on 25 May 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Length of time in detention^ of the 63 non-citizens* who were detained between 1/7/15 and 3/5/21		
Period Detained	**Total**	**% of Total**
7 days or less	0	0.0%
8 days – 31 days	<5	<5%
32 days – 91 days	<5	<5%
92 days – 182 days	<5	<5%
183 days – 365 days	0	0.0%
366 days – 547 days	<5	<5%
548 days – 730 days	<5	<5%
731 days – 1095 days	7	11.1%
1096 days – 1460 days	13	20.6%
1461 days – 1825 days	6	9.5%
Greater than 1825 days	28	44.4%
Total	**63**	**100.0%**
^Period detained is based on accumulative days in detention, including time in detention prior to 1 July 2015.		
**People who engage protection obligations but who were ineligible for a grant of a visa on character or other grounds.*		

Length of time in detention^ of the 29 non-citizens* who were detained in Immigration Detention Facilities		
Period Detained	**Total**	**% of Total**
7 days or less	0	0.0%
8 days – 31 days	0	0.0%
32 days – 91 days	0	0.0%
92 days – 182 days	0	0.0%
183 days – 365 days	0	0.0%
366 days – 547 days	0	0.0%
548 days – 730 days	0	0.0%
731 days – 1095 days	<5	6.9%

1096 days – 1460 days	6	20.7%
1461 days – 1825 days	5	17.2%
Greater than 1825 days	16	55.2%
Total	**29**	**100.0%**
^Period detained is based on accumulative days in detention, including time in detention prior to 1 July 2015.		
**People who engage protection obligations but who were ineligible for a grant of a visa on character or other grounds.*		

There are no children who have been found to engage protection obligations but who were ineligible for a grant of a visa on character or other grounds, in the last five years, who were, or are currently, detained in immigration detention facilities.

Historical statistics relating to section 195A for this cohort group are below.

Granted a visa under s 195A of the Act – persons in immigration detention who were found to engage protection obligations but were ineligible for grant of a visa on character or other grounds

Financial Year	Number of persons
2015-16	0
2016-17	<5
2017-18	<5
2018-19	<5
2019-20	<5
2020-21 (as at 30 April 2021)	<5

Information on the number of persons in detention (who have previously been found to engage protection obligations or who arrived in Australia as refugee) for whom the Minister has made a residence determination is not available in departmental systems in a reportable format.

In the last 5 years no person found to engage protection obligations has subsequently been returned to the country in relation to which they were found to engage protection obligations, or any third country.

Of the current cohort in immigration detention facilities who have not been granted a bridging visa or placed in community detention, the majority have convictions for crimes involving non-consensual sexual conduct and/or other violent crimes. A small number (less than 5) have been assessed as raising national security concerns.

Advice on safeguards to ensure that the limits on the right to liberty and the rights of the child are proportionate

I note the Committee's concerns about the Bill engaging the right to liberty and the rights of the child. The Committee notes that the Statement of Compatibility does not identify any safeguards beyond discretionary Ministerial intervention powers.

At the outset, it is relevant to reiterate that what the Bill does is protect non-citizens in respect of whom a protection finding has been made in the protection visa process, from the application of the removal provisions in section 198 of the Migration Act. The Bill makes no change to the existing provisions of the Act relating to the detention of unlawful non-citizens. Accordingly, the fact that the unlawful non-citizens who are covered by the Bill will, instead of being liable to removal irrespective of protection obligations, be subject to the existing provisions governing the detention of unlawful non-citizens while other options are explored, will be the result of those existing provisions.

That said, to address the Committee's concerns, I draw the Committee's attention to:

- The existing internal assurance processes and external oversight by scrutiny bodies;
- The Government's position around the detention of children; and
- Recent Bridging visa amendments.

Internal assurance processes and external scrutiny

The length and conditions of immigration detention are subject to regular internal and external review. The Department and the Australian Border Force use internal assurance and external oversight processes to help care for and protect people in immigration detention and maintain the health, safety and wellbeing of all detainees.

The Department has a framework of regular reviews in place, and escalation and referral points to ensure that people are detained in the most appropriate placement to manage their health, welfare and resolution of their immigration status. The Department also maintains that review mechanisms regularly consider the necessity of detention and where appropriate, identify less restrictive means of detention or the grant of a visa.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for an unlawful non-citizen while status resolution processes are being undertaken. Placement includes consideration of alternatives to an immigration detention centre, such as placement in the community on a bridging visa or under residence determination arrangements. The tool also assesses the types of support or conditions that may be appropriate. Theses supports and conditions are generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen *to* temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where only the Minister has the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Act for grant of a visa or under section 197AB of the Migration Act for placement in the community.

The Office of the Commonwealth Ombudsman (the Ombudsman) and the Australian Human Rights Commission have legislative oversight responsibilities. These bodies conduct oversight activities, publish reports and make recommendations in relation to immigration detention.

In addition to these activities, under the Migration Act, the Secretary of the Department of Home Affairs, the Ombudsman and the Minister have statutory obligations around the oversight of long-term immigration detainees. These provisions are intended to provide greater transparency in the management of long-term detainees through independent assessments by the Commonwealth Ombudsman.

The Secretary must provide reports to the Commonwealth Ombudsman on individuals who have completed a cumulative period of two years in immigration detention and then for every six months that they remain in detention. The Ombudsman must then provide an assessment of these individuals' detention to the Minister, which the Minister then tables in Parliament, including any recommendations from the Ombudsman. Once all domestic remedies are exhausted, individuals may also submit a complaint *to* relevant United Nation bodies such as the United Nations Committee against Torture or the UN Human Rights Committee.

Government position on the detention of children

The principle that a minor should only be placed in immigration detention as a measure of last resort is prescribed in Australian law, specifically section 4AA of the Migration Act. It remains the position that children are not held in immigration detention centres.

In the event that an unlawful non-citizen child is detained, they are accommodated in alternative places of detention, such as immigration residential housing precincts designed for families, or in the community under a residence determination.

Unaccompanied minors and family groups with minor children are routinely prioritised for consideration of a community placement. This means that vulnerable non-citizens may be able to reside in the community either under residence determination arrangements (community detention) or on a bridging visa while they resolve their immigration status.

The number of minors in held detention at any one time is generally less than five. On the whole, if a minor is detained, it is usually only briefly and as a result of immigration activities such as being turned around at an airport or in preparation for removal to their country of origin.

There are currently no minors in held immigration detention who have had a visa refused or cancelled on character or national security grounds but who have been found to engage protection obligations.

Recent Bridging visa amendments

As the Committee notes, the Statement of Compatibility with Human Rights acknowledges the Government's policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including placement in the community under residence determination arrangements or consideration of the grant of a visa, is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community.

To complement this Bill, the Government continues to explore ways to improve options for managing unlawful non-citizens in the community in a manner that would seek to protect the Australian community while addressing the risks associated with long-term detention.

- For example, on 16 April 2021, amendments were made *to* the *Migration Regulations 1994* to allow additional existing visa conditions to be imposed on certain Bridging visas granted under Ministerial Intervention powers. These amendments strengthen the community placement options available for detainees who may pose a risk to public safety. They are an additional safeguard designed to complement this Bill.

These amendments will enable the Minister to have further options available to assist in minimising the risk to public safety when considering whether to release the detainee from immigration detention.

Where a visa is not granted, people in immigration detention are accommodated in facilities most appropriate to their needs, circumstances and risk, with services developed to suit each individuals needs.

Advice on safeguards to ensure that people affected by the Bill in immigration detention will not be indefinitely detained and consequently at risk of being subjected to ill-treatments and how the measure is compatible with the prohibition against torture or other cruel, inhuman or degrading treatment or punishment

The amendments will provide a safeguard which ensures that an officer is not obliged to remove an unlawful non-citizen in breach of *non-refoulement* obligations. Such an unlawful non-citizen will be subject to the existing provisions of the Act relating to the detention of unlawful no-citizens while other options are explored.

Under the Migration Act, immigration detention is not limited by a set timeframe. It ends when the person is either granted a visa or is removed from Australia. The timeframe associated with either of these events is dependent upon a number of factors.

Removal in such cases may become possible if, for example, the circumstances in the person's home country improves such that they no longer engage *non-refoulement* obligations, or if a safe third country is willing to accept the person. An unlawful non-citizen may also request in writing to be removed from Australia at any time. The Bill will provide a clear legislative basis to allow adequate time to take active steps to consider alternative management options for people in detention who engage *non-refoulement* obligations.

As noted above, the Statement of Compatibility with Human Rights acknowledges the Government's policy that detention in an immigration detention centre continues to be an option of last resort for managing unlawful non-citizens who cannot be removed and present a risk to the community. Whether the person is placed in an immigration detention facility, or other arrangements are made, including community detention or consideration of the grant of a visa, is determined using a risk-based approach. Where appropriate, it is the Government's preference to manage individuals in the community.

- To reinforce this position, I wish to draw your attention to the widespread use of Bridging visas as an alternative to immigration detention. While I have provided statistics on the grant of visas under Ministerial Intervention powers this does not provide the full picture.
- While there are 1482 people in an immigration detention facility, and 537 under residence determination arrangements, it is important to note that there are over 390,000 people in the community on Bridging visas. This includes 31,557 people on Subclass (050&051) Bridging visa Es (including 8,894 on Departure Grounds). Many of these visas are granted by delegates and do not require my personal intervention.

- Without a Bridging visa, these people would be unlawful non-citizens and would need to be detained under the Migration Act.

As outlined further above, the viability of Bridging visas as an alternative to immigration detention has recently been improved through regulation amendments.

As also noted above, where a visa is not granted, people in immigration detention are accommodated in facilities most appropriate to their needs, circumstances and risk with services developed to suit each individual's needs.

Detainee welfare

I note the Committee's comment that the Statement of Compatibility did not address whether the measure is compatible with the prohibition against torture or ill-treatment.

The Government accepts that the prohibition on torture and ill-treatment includes protecting the physical and mental well-being of detained individuals. The Government takes the welfare of those in immigration detention very seriously. All people in detention are treated with respect dignity and fairness. I am committed to ensuring detainees in immigration detention are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person. The Government works closely with its service providers to ensure immigration detainees are provided with adequate accommodation, infrastructure, medical services, security services, catering services, programs, activities, support services and communication facilities.

Some detainees may be in more vulnerable circumstances than others. This includes people who have complex health needs including mental health or where they have a history of torture, trauma or people who have been subject to people trafficking or domestic or family violence. Any detainee who discloses a history of torture and/or trauma ls offered referral to specialist torture and trauma counselling.

The Detention Health Procedural Instruction on Mental Health outlines the services made available to persons in immigration detention, in order to manage a range of mental health issues that may present.

The Australian Government's contracted detention health services provider is responsible for mental health care and support services which are delivered by general practitioners mental health nurses, psychologists, counsellors and psychiatrists, including those specialising in torture and trauma counselling services (on a visiting basis, or through the use of tele-health facilities or external appointments).

Regular mental health assessments are performed and delivered in line with the relevant Australian standards.

Where the Department identifies that a detainee has significant vulnerabilities that indicate management within an immigration detention centre is no longer appropriate, they may be considered for alternative management options. These could include grant of a Bridging visa by a departmental delegate (if possible), or referral to a Minister for consideration under the Minister's personal intervention powers including those under section 197AB of the Migration Act to allow a detainee to reside in an Alternate Place of Detention.

Detainees are able to access legal representation in accordance with the Migration Act and the Government provide detainees with the means to contact family, friends and other support. The Government respects and caters for religious and cultural diversity.

Detainees who are unsatisfied with the conditions in immigration detention can raise concerns in person with Australian Border Force officers and service provider staff, or in writing or by telephone with the Department of Home Affairs or external scrutiny bodies.

In 2018 the Office of the Commonwealth Ombudsman was nominated as the National Preventive Mechanism Coordinator and the inspecting body for Commonwealth places of detention for the purpose of Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This function includes oversight of immigration detention facilities.

Advice on whether this measure will have any impact on persons involved in current litigation or who have been unlawfully detained based on the case law established by the Federal Court decision in AJL20 v Commonwealth of Australia [2020] FCA 1305.

After commencement, the new provisions in section 197C will apply to all unlawful non-citizens who are subject to removal but engage protection obligations that have been assessed and accepted during the Protection visa process. This means first and foremost that officers will no longer be authorised or required to remove a person in breach of *non-refoulement* obligations. If this Bill is not passed, there is a strong possibility that the Migration Act will require the removal of certain unlawful non-citizens in breach of *non-refoulement* obligations.

The new section 36A will apply to all new Protection visa applications. This means the Bill will provide a clear legislative basis to require the Minister or a delegate to consider and make a record of protection findings when assessing whether a non-citizen satisfies the protection visa criteria. This will ensure that unlawful non-citizens who are found to engage protection obligations are not removed in breach of *non-refoulement* obligations. While this is an important measure, it largely codifies existing processes outlined in Ministerial Direction 75 made under section 499 of the Migration Act.

Impact on AJL20 litigant

The Commonwealth has appealed the judgment in AJL20 in the High Court and judgment is reserved. If the Court accepts the Commonwealth's arguments, the Migration Act will have validly authorised AJL20's detention. ln that case, the Bill will not have any effect on unlawful detention claims based on AJL20.

If AJL20 is upheld, the Bill may prospectively validate a person's detention in analogous circumstances to AJL20. However, this will not have retrospective effect on any persons' unlawful detention claims.

It would not be appropriate to comment further on active litigation before the Courts.

Concluding comments

International human rights legal advice

Rights to non-refoulement; liberty; rights of the child

2.70 As was previously noted, the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and appears to be rationally connected to that objective insofar as it would ensure that persons to whom protection obligations are owed are not removed to the country in relation to which there has been a protection finding.[24] The preliminary analysis raised serious concerns as to whether the measure is proportionate and sought further information from the minister in this regard. Key considerations in assessing the proportionality of this measure include: whether it is accompanied by adequate safeguards and is the least rights restrictive alternative; whether it provides access to review and the possibility of oversight; and whether it constitutes a significant interference with rights.

2.71 In assessing whether the minister's discretionary powers would likely operate as an adequate safeguard, a relevant consideration is the extent to which these powers are exercised in practice. In relation to persons in immigration detention who engage protection obligations but are ineligible for a grant of a visa on character or other grounds, the minister advised that in the 2015-16 financial year, no persons were granted a discretionary visa under section 195A and less than five people were granted these visas in each financial year between 2016 and 2021. The minister did not specify the exact number of visas granted under section 195A between 2015 and 2021 and stated that the number of persons granted a residence determination under section 197AB is not available in a reportable format.

2.72 While exact figures are unavailable, it appears that the minister's discretionary powers to grant a visa under sections 195A or 197AB are exercised infrequently. The preliminary analysis noted that the minister's discretionary powers have the potential

24 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), pp. 20 and 26.

to operate as a safeguard by providing the minister with flexibility to treat individual cases differently. However, given that these discretionary powers appear to be exercised infrequently in practice, as well as the fact that they are non-reviewable and non-compellable, and do not attract the requirements of procedural fairness, they do not appear to be a sufficient safeguard for the purpose of a permissible limitation under international human rights law.

2.73 In addition, the minister advised that the recent amendments to the *Migration Regulations 1994*, which allow additional visa conditions to be imposed on visas granted by the minister under section 195A, would serve as a further safeguard to accompany this measure.[25] The minister stated that these additional conditions strengthen community placement options and improve management of unlawful non-citizens in the community. To the extent that these additional conditions would facilitate the granting of a visa under section 195A and result in the release of individuals from detention, they may promote the right to liberty.[26] However, these additional conditions may also limit a number of other rights. As outlined in the committee's preliminary analysis of these regulations (set out in Chapter 1 of this report), there are a number of concerns that the conditions may not: meet the quality of law test; address a pressing and substantial concern for the purposes of international human rights law; be sufficiently circumscribed; include sufficient safeguards; or include access to effective review.[27] In light of these concerns, it is unclear that the additional conditions would in fact operate as a safeguard against arbitrary detention in the context of this measure. Thus, notwithstanding the provision of these additional conditions and the stated preference to manage non-citizens in the community and use detention as a last resort, the infrequent use of the minister's discretionary powers in practice and the consequent protracted length of time non-citizens spend in immigration detention (with the majority of non-citizens currently in immigration detention having spent over five years in detention), indicates that the discretionary powers are not an accessible alternative to detention.[28] As observed by the UN High Commissioner for Refugees, alternatives to detention must

25 See Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444].

26 The amendments to the *Migration Regulations 1994* were considered by the committee in Chapter 1 of this report. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 7 of 2021* (23 June 2021) pp. 51-75.

27 Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [F2021L00444], *Report 7 of 2021* (23 June 2021) pp. 51-75.

28 The statement of compatibility notes that the minister's discretionary powers would enable the minister to take into account individual circumstances and implement the least restrictive option, thus helping to ensure that immigration detention is used as a last resort: pp. 13–14.

be accessible in practice (not merely available on paper) and should not be used as alternative forms of detention.[29]

2.74 Regarding the availability of review and the possibility of oversight, the minister advised that the length and conditions of immigration detention are subject to regular internal and external review and oversight processes. The minister stated that the department has a regular reviews framework in place, including a monthly review of each detainee's case by a Status Resolution Officer. The officer considers the vulnerabilities of each detainee and whether ongoing detention remains appropriate. The officers use the Community Protection Assessment Tool to assess the most appropriate placement for the detainee, including alternatives to detention such as a bridging visa or residence determination, and the types of support or conditions that may be appropriate for the detainee. The minister noted that these supports and conditions are generally reviewed every three to six months and/or where there is a significant change in an individual's circumstances. The minister advised that the officers use the Community Protection Assessment Tool to identify cases where only the minister has the power to grant the person a visa or to make a residence determination. These cases may be referred to the minister for consideration under sections 195A or 197AB for placement in the community. The minister stated that the monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each detainee.

2.75 In addition, the minister advised that the Office of the Commonwealth Ombudsman and the Australian Human Rights Commission have legislative oversight responsibilities, including overseeing activities, publishing reports and making recommendations in relation to immigration detention. The minister also noted that the Secretary of the Department of Home Affairs and the minister have statutory oversight obligations in relation to long-term immigration detainees. The secretary must provide reports to the Ombudsman on persons detained in immigration detention for a cumulative period of two years and then provide to the minister an assessment of these individuals every six months that they remain in detention. This assessment is tabled in Parliament. Finally, the minister stated that once all domestic remedies are exhausted, individuals may submit a complaint to the relevant UN bodies.

2.76 These internal review mechanisms and the availability of oversight by the Commonwealth Ombudsman and Australian Human Rights Commission could serve as a safeguard against arbitrary and unlawful detention. In particular, the monthly reviews by a Status Resolution Officer of the necessity and appropriateness of detention may help to ensure that detention is justified on an individual basis. The UN Human Rights Committee has made clear that periodic re-evaluation and judicial

29 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [37]–[38].

review of immigration detention must be available to scrutinise whether the continued detention is lawful and non-arbitrary.[30] This includes an individual assessment of the need to subject a person to continuous and protracted detention and the State party demonstrating that 'other, less intrusive, measures could not have achieved the same end'.[31] However, questions arise as to whether these internal review mechanisms and oversight frameworks would in fact be an effective safeguard in practice. This is because they may not necessarily result in the release of an individual from detention, as release is only possible where the minister exercises their discretionary powers to grant a visa under sections 195A or 197AB—which seems to occur infrequently, noting in particular that of those detained under these powers in the last five years, three-quarters were detained for over two years, and almost half were detained for over five years. As noted in the preliminary analysis, the minister is not under a duty to consider whether to exercise these discretionary powers; the threshold for exercising the discretionary powers is a broad public interest test (as opposed to being based on the needs and vulnerabilities of individual detainees); and the powers are non-reviewable and non-compellable.

2.77 Regarding the oversight functions of the minister and the Secretary of the Department of Home Affairs, there are concerns that these may not be adequate because they are not an independent oversight mechanism. The UN Human Rights Committee has emphasised the importance of access to independent procedural safeguards and regular review by an independent body. In relation to the right to take proceedings before a court to review the lawfulness and arbitrariness of detention, the Committee has stated that ordinarily the court should be within the judiciary and in exceptional circumstances, may be before a specialised tribunal or other body. This other body must still be established by law and 'must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature'.[32] As the minister and Secretary of the Department are not independent of the executive or legislature branches of government, their oversight functions would not appear to assist with the proportionality of this measure.

2.78 In addition, under international human rights law, detainees have the right to access judicial review to challenge the lawfulness of their detention.[33] To be effective, judicial review of detention should not be limited to compliance with law and must

30 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3].

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

32 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [45]. See also [14] and [21].

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

include the possibility of release.[34] It should also be 'open to the Court to review the justification of [an individual's] detention in substantive terms'.[35] As noted in the preliminary analysis, this bill seeks to remove the basis on which the applicant was released in *AJL20*[36] by clarifying that there is no requirement to remove an unlawful non-citizen from Australia to a country in respect of which there has been a protection finding in relation to that person.[37] Regarding the impact of this bill on the *AJL20* case, the minister advised that if the decision is upheld by the High Court, the bill may prospectively validate a person's detention in analogous circumstances to *AJL20* but it will not have retrospective effect on any persons' unlawful detention claims. If the Commonwealth is successful in its appeal of *AJL20*, the minister stated that the bill will not have any effect on unlawful detention claims based on this case. It appears, therefore, that the effect of this measure would be to make it more difficult to mount a successful legal challenge to detention for persons in similar circumstances to *AJL20* (namely, those who are owed protection obligations but are ineligible for a grant of a visa). As such, it seems unlikely that judicial review in these circumstances would include the possibility of release in appropriate cases and so does not appear to assist with the proportionality of this measure. Concerns therefore remain that, in the absence of merits review, judicial review in the context of this measure may not be effective for the purposes of international human rights law. The committee has previously concluded that judicial review without merits review is unlikely to be sufficient to fulfil the international standard required of effective review. This is because judicial review is only available on a number of restricted grounds and does not allow the court to take a full review of the facts (that is, the merits), as well as the

34 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.6]. See also *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6] and *A v Australia*, UN Human Rights Committee Communication No. 560/1993 (1997) [9.5].

35 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.6]. See also *MGC v Australia*, UN Human Rights Committee Communication No.1875/2009 (2015) [11.6].

36 *AJL20 v Commonwealth of Australia* [2020] FCA 1305. In this case, the court found the applicant's detention by the Commonwealth to be unlawful and ordered the applicant's release from detention. The detention was found to be unlawful because: 'the removal of the applicant from Australia has not been shown to have been undertaken or carried into effect as soon as reasonably practicable, that there was therefore a departure from the requisite removal purpose for the applicant's detention over the course of that period and that, as a consequence, the applicant's detention by the Commonwealth was unlawful throughout that period' (at [128] and [171]).

37 Statement of compatibility, pp. 11–12.

law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision.[38]

2.79 A further consideration in assessing proportionality is the extent of any interference with human rights. The length of detention is relevant in this regard.[39] The minister advised that between 1 July 2015 and 3 May 2021, of the 63 people in detention who engage protection obligations but are ineligible for a grant of a visa on character or other grounds, 54 people have been in detention for more than two years and of those people, 28 have been in detention for more than five years. Of the 29 non-citizens currently in detention, all persons have been detained for over two years and 16 people have been detained for more than five years. The minister advised that no children have been in the past five years, or currently are, in immigration detention as a result of being found to engage protection obligations but being ineligible for a grant of a visa.

2.80 These figures indicate that persons who are found to engage protection obligations but are ineligible for a visa on character or other grounds are frequently detained in immigration detention for significant periods of time. The minister stated that there is no legislative limit on the length of immigration detention and that detention will end when the person is either granted a visa or is removed from Australia. However, for persons to whom this measure applies, they are ineligible for the grant of a substantive visa and they cannot be removed from Australia because they are owed protection obligations. Therefore, without any legislative maximum period of detention and an absence of effective safeguards to protect against arbitrary detention, there is a real and significant risk that detention may become indefinite. The UN Human Rights Committee has made clear that '[t]he inability of a state to carry

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

39 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) [44]. The UN High Commissioner for Refugees has observed: 'The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law'.

out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[40]

2.81 The minister further noted that removal from Australia may become possible if the circumstances in the person's home country improve such that they are no longer owed protection obligations or where a person requests to be removed from Australia. This possibility of removal, however, does not mitigate the risk of protracted or indefinite detention, especially where the circumstances in the relevant country are unlikely to improve in the reasonably foreseeable future. As such, where the measure would result in the indefinite detention of certain persons, it does not appear to be proportionate to the aims of the measure.

Prohibition against torture and ill-treatment

2.82 Finally, the preliminary analysis noted that, to the extent that the measure results in prolonged or indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[41] This obligation is absolute and may never be limited. The length and conditions of detention are relevant in this regard.[42]

2.83 As noted above, the minister indicated that immigration detention is not limited by a set timeframe and will end when a person is granted a visa or is removed from Australia. The minister advised that where a person is not granted a visa, they are accommodated in immigration detention facilities most appropriate to their needs, circumstances and risk, with services developed to suit each individual's needs. For example, a detainee who discloses a history of torture and/or trauma is offered a referral to specialist torture and trauma counselling. The minister stated that detainees have access to health and other support services, including regular mental health assessments. The minister also noted that detainees have access to legal representation and are provided with the means to contact family, friends and other support. Finally, the minister stated that the Office of the Commonwealth

40 UN Human Rights Committee, *General Comment No. 35: Liberty and security of person* (2014) [18]. See, also*, C v Australia,* UN Human Rights Committee Communication No.900/1999 (2002) [8.2]; *Bakhtiyari et al. v. Australia,* UN Human Rights Committee Communication No.1069/2002 (2003) [9.3]; *D and E v. Australia,* UN Human Rights Committee Communication No. 1050/2002 (2006) [7.2]; *Shafiq v. Australia*, UN Human Rights Committee Communication No. 1324/2004 (2006) [7.3]; *Shams et al. v. Australia,* UN Human Rights Committee Communication No. 1255/2004 (2007) [7.2]; *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.3]; *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.4].

41 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5.

42 See *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]; *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

Ombudsman provides oversight of immigration detention facilities as part of its functions as the National Preventative Mechanism Coordinator and inspecting body for the purpose of Australia's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.84 The services outlined by the minister and the Commonwealth Ombudsman's oversight functions could help to ensure that detention conditions are humane. However, it is unclear whether these services are sufficient to ameliorate concerns about the implications of the measure for the prohibition against torture and ill-treatment. It is noted that the UN Human Rights Committee has previously characterised the conditions in Australia's detention facilities as 'difficult'. The UN Committee found that these difficult detention conditions in combination with the arbitrary character of detention, its protracted and/or indefinite duration and the absence of procedural safeguards to challenge detention, cumulatively inflicted serious psychological harm on detainees that amounted to cruel, inhuman or degrading treatment.[43] Noting the possibility of indefinite or protracted detention, the absence of effective review and other procedural safeguards as well as the uncertainty as to whether the services outlined by the minister are sufficient to ensure detention conditions are humane, there appears to remain a risk that the measure may have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.

Subsequent amendments to the bill

2.85 The minister advised that on 13 May 2021, the bill was passed by the Senate following amendments. The amendments included new 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.[44] If such a decision is made, the minister must notify the non-citizen of the decision and the reasons for the decision as well as their review rights in relation to the decision.[45] The minister advised that the effect of the amendments is to provide access to merits review for individuals who were previously determined to have engaged protection obligations but are subsequently found by the minister to no longer engage those obligations. New paragraph 197C(3)(c) permits the removal powers in section 198 to operate where a decision is made under section 197D.[46] The

43 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

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

45 *Migration Act 1958*, subsection 197D(4).

46 Revised statement of compatibility, p. 17.

minister noted, however, that a person cannot be removed under section 198 until the merits review process is finalised.

2.86 These amendments may have significant human rights implications insofar as they have 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. The revised explanatory memorandum notes that in practice, it would be rare that a person who has been found to engage protection obligations would no longer engage those obligations.[47] If this is the case, it is unclear why this amendment was necessary. It is difficult to assess the full human rights implications of these amendments, particularly in relation to Australia's *non-refoulement* obligations, as they were introduced after the committee undertook its preliminary analysis and the revised statement of compatibility does not provide a detailed compatibility analysis of this specific measure.[48]

Concluding remarks

2.87 In conclusion, the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and the measure appears to be rationally connected to that objective insofar as it would ensure that persons to whom protection obligations are owed are not removed to the country in relation to which there has been a protection finding. However, the minister's response has not alleviated the serious concerns raised in the preliminary analysis regarding the proportionality of this measure. While the minister's discretionary powers may provide some flexibility to treat individual cases differently, these powers appear to be infrequently exercised in practice and are non-reviewable and non-compellable. Thus, they are unlikely to be an effective safeguard in practice or offer an accessible alternative to detention. Given the effect of the measure is to make it more difficult to mount a successful legal challenge to detention for persons who are owed protection obligations but are ineligible for a grant of a visa, it seems that access to review in these circumstances would not be effective in practice, noting that review of detention must include the possibility of release. Finally, the statistics provided by the minister regarding the length of detention of persons who are found to engage protection obligations but are ineligible for a visa on character or other grounds, indicate that such persons are frequently detained in immigration detention for significant periods of time, with over three-quarters of such persons being detained for over two years, and almost half detained for over five years. Insofar as the measure

47 Revised explanatory memorandum, p. 11.

48 It is noted that the amendments to the bill were introduced and considered on 12 May 2021 and the bill passed both Houses of Parliament with amendments on 13 May 2021.

would effectively result in protracted or indefinite detention of these individuals, this represents a significant interference with their rights. For these reasons, there is a significant risk that the measure is incompatible with the right to liberty and the prohibition against torture or ill-treatment, and were children to be detained under these circumstances, with the rights of the child.

Committee view

2.88 The committee notes that this bill, which has now received royal assent, proposed to amend the Migration Act to clarify that the power to remove an unlawful non-citizen does not require or authorise an officer to remove a person where there has been a protection finding in relation to that person. The bill also proposed to introduce provisions which would have the effect of ensuring that protection obligations are always assessed, including before the minister considers whether the person meets other criteria for the grant of a protection visa.

2.89 The committee considers that the measure would support Australia's ability to uphold its protection obligations. However, to the extent that the measure may result in prolonged or indefinite detention of persons who are deemed to be unlawful non-citizens and cannot be removed because a protection finding has been made in relation to them, the measure also engages and limits the right to liberty and the rights of the child. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.90 In addition, the committee notes that to the extent that the measure results in indefinite detention, it may also have implications for Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment. This obligation is absolute and may never be limited.

2.91 The committee considers that the measure pursues the legitimate objective of supporting Australia to uphold its non-refoulement obligations and is rationally connected to that objective. However, the committee considers that the minister's response has not alleviated its serious concerns regarding the compatibility of this measure with the right to liberty, the rights of the child and the prohibition against torture or ill-treatment. The committee notes that for persons who are found to engage Australia's protection obligations but are ineligible for a visa on character or other grounds, the minister's advice indicates that such persons are frequently detained in immigration detention for significant periods of time, with over three-quarters of such persons being detained for over two years, and almost half detained for over five years. As such the committee does not consider the minister's discretionary powers to grant a visa to such persons has operated as an effective safeguard on the possibility of indefinite detention. Therefore, insofar as the measure may effectively result in the protracted or indefinite detention of these individuals, the committee considers there is a significant risk that it may be incompatible with the right to liberty and the prohibition against torture or

ill-treatment, and were children to be detained under these circumstances, with the rights of the child.

2.92 Noting that this bill passed both Houses of Parliament on 13 May 2021, the committee makes no further comment.

Legislative instruments

Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511][1]

Purpose	This legislative instrument determines the maximum number of visas that may be granted for certain classes of visas in the financial year from 1 July 2020 to 30 June 2021
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	This legislative instrument is exempt from disallowance (as it is made under Part 2 of the *Migration Act 1958*, which is prescribed in paragraph (a) of item 20 of the table in section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015)
Rights	Protection of the family; rights of the child

2.93 The committee requested a response from the minister in relation to this legislative instrument in *Report 6 of 2021*.[2]

Capping numbers of parent visas

2.94 This legislative instrument sets out the maximum number of visas that can be granted in the 2020–2021 financial year for contributory parent visas; parent visas; and other family visas. The cap set by the instrument is 4,500 for parent visas and 500 for other family visas. This is in comparison to the cap set for the previous financial year of 7,371 for parent visas and 562 for other family visas.[3]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021 [F2021L00511], *Report 7 of 2021*; [2021] AUPJCHR 68

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2021* (13 May 2021), pp. 8-10.

3 See Migration (LIN 19/131: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2019/2020 Financial Year) Instrument 2019 (F2019L01496).

Summary of initial assessment

Preliminary international human rights legal advice

Right to protection of the family and rights of the child

2.95 Capping the number of parent visas and other family visas, which it appears may limit the ability of certain family members (including parents of children aged under 18) to join others in Australia, engages and may limit the right to protection of the family and the rights of the child.[4] An important element of protection of the family[5] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. Additionally, Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[6]

2.96 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.97 As this legislative instrument is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.[7] As such, no assessment of the compatibility of this measure with the rights to protection of the family or the rights of the child has been provided. It is therefore not clear what is the legitimate objective of this measure, nor whether the measure is proportionate to that objective.

2.98 As such, further information is required to assess the compatibility of this measure with the right to protection of the family and the rights of the child, in particular:

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

4 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application no. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application no. 1638/03 (2008) [61]-[67].

5 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

6 Convention on the Rights of the Child, articles 3(1) and 10.

7 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

(c) why the cap on numbers in this financial year is lower than that in the previous financial year;

(d) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(e) whether there is any discretion to ensure family members are not involuntarily separated as a result of the cap on the number of parent and other family visas; and

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

Committee's initial view

2.99 The committee considered that capping the number of parent and other family visas engages and may limit the right to protection of the family and the rights of the child. The committee sought the minister's advice as to the matters set out at paragraph [2.98]. The full initial analysis is set out in *Report 6 of 2021*.

Minister's response[8]

2.100 The minister advised:

(a) whether setting a cap on the number of parent and other family visas seeks to achieve a legitimate objective for the purposes of international human rights law;

(b) whether the cap on the number of visas is a reasonable and proportionate measure to achieve the stated objective;

Australia's Family Migration Program facilitates the reunification of family members (including Parents and Other Family) with Australian citizens, permanent residents or eligible New Zealand citizens. The requirement not to arbitrarily or unlawfully interfere with the family unit under Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) does not amount to a right to enter Australia where there is no other right to do so. While there is no absolute right to family reunion at international law, Australia recognises that it is an important principle and it is facilitated where possible.

8 The minister's response to the committee's inquiries was received on 26 May 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

It has been the long-standing practice of successive governments to manage the orderly delivery of the Migration Program against planning levels. Each year, the Government sets Migration Program planning levels following consultations with state and territory governments, business and community groups and the wider public.

The Department of Home Affairs (the Department) manages the allocation of resources to deliver the Family Program, including Parent and Other Family visas, in line with the planning levels and priorities set by the Government.

Furthermore, section 85 of the *Migration Act 1958* (the Act) allows the Minister to determine the maximum number of visas which may be granted in each financial year in certain visa categories, including, Parent and Other Family visas. If a visa class has been 'capped' this means that if the number of visas granted within that financial year have reached the maximum number determined by the Minister, no more visas of that class may be granted in that financial year. Those visa applications will be 'queued' for further processing in the next financial year.

The 'cap and queue' power allows the annual Migration Program to be managed more efficiently by:

- limiting the number of visas that may be granted under a specific class, while queueing additional applications which satisfy the criteria for grant; and
- ensuring that applications which do not satisfy the criteria for a visa can be refused and do not remain in the queue for years before a decision is made on their application.

The number of Contributory Parent, Parent and Other Family visa application lodgements continue to exceed the visa places allocated each financial year by the Government. In order to facilitate the orderly and equitable processing of visa applications in these categories, Parent, Contributory Parent and Other Family visas are capped at their respective planning levels via a legislative instrument under annual Migration Program arrangements that have been in place for over ten years.

(c) why the cap on numbers in this financial year is lower than that in the previous financial year;

As noted above, each year the Parent, Contributory Parent and Other Family visas are capped at their respective planning levels, which are set by the Government following public consultations. Community views, economic and labour force forecasts, international research, net overseas migration and economic and fiscal modelling are all taken into account when planning the program.

In the 2020-21 Migration Program, in response to the impacts of the COVID-19 pandemic, including international travel restrictions, the Parent visa category was reduced to 4,500 and Other Family visa category to 500

places in favour of Partner visa places, which were increased to 72,300 places. An expanded Partner visa program is intended to support the reunification of Australians with their spouse or de *facto* partners during the COVID-19 pandemic and provide greater certainty for those who may have been waiting for extended periods for a visa outcome in Australia. The increase in Partner places is also expected to improve Partner visa processing times and reduce the number of applications on hand.

In line with the Migration Program planning levels set for 2020-21, the Migration *(Granting of contributory parent visas, parent visas and other family visas in the 2020-2021 financial year) Instrument (LIN 21/025) 2021* sets the cap for Contributory Parent visas at 3,600 and Parent visas at 900 (equal to the 4,500 places allocated for the Parent category). The cap for Other Family visas has also been set in line with the 2020-21 planning level of 500 places.

(d) whether any children under 18 years would be likely to be separated from their parents as a result of caps imposed on the numbers of parent visas granted;

(e) whether there is any discretion to ensure family members are not involuntarily separated as a result of the cap of the number of parent and other family visas;

While Australia recognises that family reunion is an important principle and will be facilitated where possible, as noted above, rights in relation to family reunion, including those under Articles 17 and 23 of the ICCPR, and Article 10 of the Convention on the Rights of the Child, are not absolute rights at international law and do not amount to a right to enter Australia where there is no other right to do so.

The capping of Parent and Other Family visas made under section 85 of the Act facilitates the orderly and equitable processing of all visa applications in these categories, including those involving children under 18 years of age.

In addition to Australia's permanent Family Migration Program, the Government also facilitates short-term family reunification through temporary visas, which allow for a temporary stay in Australia. Family visa applicants, including those awaiting an outcome of their permanent Parent visa, may be able to reunite with family members in Australia, subject to meeting the visa eligibility criteria. Visa options may include:

- Visitor visas which are available for the purposes of a short-term stay in Australia, including family visits. These include the Electronic Travel Authority (ETA) (subclass 601) and eVisitor visa (subclass 651), which are available to particular citizenships only for stays of up to three months at a time; and the Visitor visa (subclass 600), which is available to all citizenships for a stay of up to 12 months.
- The Visitor visa (subclass 600) which includes the Sponsored Family stream, which enables settled Australian citizens and permanent

residents, aged at least 18 years, to sponsor a relative for short-term stays in Australia. Visitor visa policy also allows for parents of Australian citizens or permanent residents to be granted Visitor visas (subclass 600) with visa validity periods greater than the standard 12 months.

- The Sponsored Parent (Temporary) Visa (subclass 870) (SPTV), which opened to visa applications on 1 July 2019, provides an alternative pathway for parents to reunite with their children in Australia, and has been capped at 15,000 places per program year. The SPTV allows parents of Australian sponsors (who are at least 18 years of age) to visit Australia for up to three or five years at one time, for a combined maximum stay of up to 10 years.

In recognition of the impact of COVID-19 travel restrictions on Parent visa applicants and their Australian citizen or permanent resident sponsors, and to facilitate family reunification, on 24 March 2021, the Government introduced a temporary concession that removed the requirement to be in or outside Australia at the time of visa grant for certain Parent visa applicants. This means that affected applicants would no longer be prevented from being granted a visa to stay in or enter Australia because they do not meet the criteria requiring them to be either in or outside Australian at the time of visa grant.

(f) whether the right to the protection of the family and the rights of the child were considered when these capped numbers were determined.

When developing policies and drafting legislation related to the Family Program, the Department carefully considers compliance with Australia's international human rights obligations.

Concluding comments

International human rights legal advice

Rights to protection of the family and rights of the child

2.101 The minister has advised that it is the government's view that the right to protection of the family and the rights of the child do not amount to a right to enter Australia where there is no other right to do so, but that the government recognises that family reunion is an important principle that is facilitated where possible. The minister has advised that the capping of the parent and other family visas would apply to all visa applications, including those involving children under 18 years of age. The minister has also advised that the cap on parent visas and other family visas is lower in 2020–2021 in favour of increasing the number of partner places during the COVID-19 pandemic. The minister has further advised that in addition to the permanent family migration program, there is the possibility of short-term reunification through temporary visas, such as visitor visas – subject to applicants and sponsors meeting the visa eligibility requirements. In response to whether the right to the protection of the family and the rights of the child were considered when capping

these numbers, the minister has advised that the department carefully considers compliance with Australia's international human rights obligations when developing policies and drafting legislation related to the family program.

2.102 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.[9] While the state has a right to control immigration, this right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[10] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[11] and is not necessarily displaced by geographical separation if there is a family bond to protect.[12] This clearly includes couples and the parent-child relationship, and may include parents and their adult children[13] and other family members,[14] depending on the level of dependency, shared life and emotional ties. As such, if parents are separated from their children (including children aged under 18 years and adult children), where it can be demonstrated that there is a family bond to protect, a failure to allow for family reunification limits the right to protection of the family. This is not an absolute right and may be limited, so long as the limitation can be demonstrated to pursue a legitimate objective, and the measure is rationally connected to (that is, effective to achieve) the objective and is a proportionate way in which to achieve the stated objective.

2.103 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and States should respect the primary responsibility of parents or guardians for promoting

9 International Covenant on Civil and Political Rights, article 23 and the International Covenant on Economic, Social and Cultural Rights, article 10.

10 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

11 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

12 *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

13 See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

14 See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

the development of children.[15] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner. As such, capping the number of parent visas for parents of children aged under 18, which may result in the separation, or continued separation, of children from their parent (such as where a child is in Australia with one parent but the other parent is in another country and is ineligible for any other type of visa) engages and limits the rights of the child. Similarly to the right to protection of the family, many of the rights of the child may be permissibly limited, if necessary, reasonable and proportionate to do so.

2.104 As the minister does not recognise that the cap on the number of parent or other relative visas may limit the right to protection of the family or the rights of the child, the minister has not advised what the legitimate objective of the measure is, and whether the cap is a reasonable and proportionate measure to achieve the stated objective. The minister has stated that the cap on visas allows the annual migration program to be managed more efficiently, and facilitates the orderly and equitable processing of visa applications. It also appears the lowering of the cap in this financial year has been to grant more partner visas. Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right. It is not clear that managing the migration program efficiently and facilitating the processing of visa applications would constitute a legitimate objective for the purposes of international human rights law. In addition, while increasing the number of partner visas available is likely to help promote the right to protection of the family for those partners affected, it is not clear that it is necessary to reduce the number of parent or other family visas in order to do so.

2.105 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective sought to be achieved. This includes considerations of whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, and whether it is accompanied by sufficient safeguards. The minister's response states that the minister determines the maximum number of visas which may be granted in relation to parent and other family visas, and when a visa class has been capped, no more visas of that class may be granted in that financial year. As such, it would appear that there is no capacity for flexibility to grant any further visas, regardless of the individual merits of a case. So, for example, if the cap has been reached, the parent of an Australian child aged under 18 years of age would not be eligible to be granted a parent visa, regardless of whether to do so would be in

15 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

the best interests of the child or promote the right to protection of the family. The only identified possible safeguard is if the parent were eligible for another type of visa, such as a temporary visa. However, if a person does not meet the eligibility requirements (which often include financial contributions by themselves or their sponsor) this cannot operate to safeguard these rights. In addition, it is noted that the minister's response states that many of these visa types would require sponsorship by a person aged over 18 years of age, so the child could not themselves sponsor their parent under these categories of visas. It is also noted that the Department of Home Affairs website states that new visa applications for contributory parent visas (which require a contributory payment of close to $50,000) [16] are likely to take over five years for final processing, and new parent and aged parent visa applications (which do not require the contributory payment) are likely to take approximately 30 years for final processing.[17] It therefore appears that the cap on the number of visas ensures there are significant delays in the processing of visa applications, making family reunification extremely difficult (particularly for those who cannot afford the contributory payment).

2.106 As such, in relation to those applicants who can demonstrate that there is a family bond with persons in Australia to protect, a failure to allow for their family reunification limits the right to protection of the family. In addition, where a child aged under 18 in Australia is separated from their parent or other close family member, this may also limit the best interests of the child. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, there is a significant risk of this measure being incompatible with the right to protection of the family and the rights of the child.

Committee view

2.107 The committee thanks the minister for this response. The committee notes this legislative instrument sets a cap on the number of parent visas and other family visas for the 2020–2021 financial year (which is lower than the cap set in the previous financial year). Once the cap is reached no further visas of this kind may be granted in that financial year.

16 Department of Home Affairs website, 'Contributory parent Visa' which states the cost is 'From AUD $47,755)' see: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-parent-143 (accessed 1 June 2021).

17 Department of Home Affairs website, 'Visa processing times, Parent visas – queue release dates and processing times', see: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates#:~:text=Applications%20for%20these%20visas%20are%20subject%20to%20capping%20and%20queueing.&text=New%20Parent%20and%20Aged%20Parent,30%20years%20for%20final%20processing (accessed 1 June 2021).

2.108 The committee notes that this measure may engage and limit the right to protection of the family. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may limit the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

2.109 The committee considers there will be many cases of family reunification where capping the number of parent or other family member visas will not limit the right to protection of the family or the rights of the child under international human rights law (as the family member in question is not part of the core family). However, the committee is concerned that no consideration can be given to these rights once a cap is set, as no further visas can be granted in that year. The committee considers that the cap on such visas is contributing to the significant delay in the processing of visa applications, and considers that a 30 year wait for a parent visa renders family reunification effectively impossible. As it is not clear that the measure seeks to achieve a legitimate objective for the purposes of international human rights law, and as there is no flexibility to consider the individual merits of an application once the cap is reached, the committee considers there is a significant risk of the measure being incompatible with the right to protection of the family and the rights of the child.

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

Social Security (Assurances of Support Amendment Determination 2021 [F2021L00198][1]

Purpose	This legislative instrument amends the *Social Security Act 1991* to: • make 31 March 2024 the new repeal date of the Social Security (Assurances of Support) Determination 2018 (the Determination); • clarify the values of securities for bodies under section 20 of the Determination, where the assurance period is for four years; and • replace references to newstart allowance with jobseeker payment
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 15 March 2021). Notice of motion to disallow must be given by 1 June 2021 in the House of Representatives and 4 August in the Senate[2]
Rights	Protection of the family and rights of the child

2.111 The committee requested a response from the minister in relation to this legislative instrument in *Report 5 of 2021*.[3]

Extending the assurances of support determination

2.112 This instrument extends by three years an existing determination which specifies requirements to be met for assurances of support. An assurance of support is an undertaking by a person (the assurer) that they will repay the Commonwealth the amount of any social security payments received during a certain period by a

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support Amendment Determination 2021 [F2021L00198], *Report 7 of 2021*; [2021] AUPJCHR 69.

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

3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2021* (29 April 2021), pp. 29-33.

migrant seeking to enter Australia.[4] This period could be up to ten years. This would appear to include any class of visa, including child and parent visas. The Social Security (Assurances of Support) Determination 2018, which this instrument extends, specifies the social security payments subject to these assurances of support;[5] the requirements that assurers must meet to give assurances of support; the period for which assurances of support remain valid; and the value of securities to be given. In particular, it specifies that the period the assurances of support remain valid ranges from 12 months to 10 years, with most valid for 4 years.[6] In addition, it specifies that the value of securities to be provided by an individual (i.e. payment of an upfront bond) for a parent visa is up to $10 000, and for all other types is up to $5 000.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to protection of the family and the child

2.113 A measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.[8] Insofar as the visa classes affected by the requirement for an assurance of support include child visas and adoption visas, the measure also engages the rights of children.

2.114 An important element of protection of the family[9] is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right. Additionally, Australia is

4 Section 1061ZZGA(a) of the *Social Security Act 1991*. Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, jobseeker allowance, mature age allowance, sickness allowance, special benefit and partner allowance.

5 Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, Austudy payment, jobseeker payment, mature age allowance, sickness allowance, special benefit and partner allowance. Social Security (Assurances of Support) Determination 2018, section 6.

6 For an assurance of support for aged parent visas, the period is 10 years; for an assurance of support for a Community Support Programme entrant, the period is 12 months; for an assurance of support for remaining relative, and orphan relative visas, the period is 2 years; and in any other case the period is 4 years. Social Security (Assurances of Support) Determination 2018, section 24.

7 Social Security (Assurances of Support) Determination 2018, section 19.

8 See, for example, *Sen v the Netherlands,* European Court of Human Rights Application no. 31465/96 (2001); *Tuquabo-Tekle And Others v The Netherlands,* European Court of Human Rights Application No. 60665/00 (2006) [41]; *Maslov v Austria,* European Court of Human Rights Application No. 1638/03 (2008) [61]-[67].

9 Protected by articles 17 and 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration, and to treat applications by minors for family reunification in a positive, humane and expeditious manner.[10]

2.115 These rights may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.116 The objectives of the measure, to 'protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia',[11] may be capable of constituting legitimate objectives under international human rights law and the measure appears to be rationally connected to those objectives.[12] However, questions remain over whether the measure is proportionate, particularly whether there is flexibility to treat different cases differently and safeguards to help protect the right to protection of the family and the rights of the child.

2.117 Further information is required to assess the compatibility of this measure with the right to protection of the family and the rights of the child, in particular:

(a) what visa categories are subject to the assurance of support scheme;

(b) what visa categories are subject to a mandatory assurance of support and what visa categories are subject to discretionary assurances of support (and how is this determined);

(c) what criteria does the Department of Home Affairs rely on to determine when it should use its discretionary powers to require an assurance of support (and where are these found);

(d) does the department consider the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond, and what safeguards exist to ensure dependent family members are not involuntarily separated if family members cannot afford to provide an assurance of support.

Committee's initial view

2.118 The committee noted that requiring the payment of an upfront bond may limit the ability of certain family members, including potentially children, to join others in Australia. This would appear to limit the right to protection of the family, and insofar

10 Article 3(1) and 10 of the Convention on the Rights of the Child.

11 Statement of compatibility, p. 6.

12 The committee has previously considered the assurance of support scheme, see Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018) pp. 41–46, *Report 7 of 2018* (14 August 2018) pp. 126–133, *Report 2 of 2019* (2 April 2019) pp. 83–89 and *Report 5 of 2019* (17 September 2019) pp. 76–83.

as the visa classes affected by the requirement for an assurance of support include child visas and adoption visas, also engages the rights of children.

2.119 The committee considered further information was required to assess the human rights implications of this legislative instrument, and as such sought the minister's advice as to the matters set out at paragraph [2.117].

2.120 The full initial analysis is set out in *Report 5 of 2021*.

Minister's response[13]

2.121 The minister advised:

> **a) What visa categories are subject to the Assurance of Support (AoS) scheme?**
>
> **b) What visa categories are subject to a mandatory AoS and what visa categories are subject to a discretionary AoS? How is this determined?**
>
> The Department of Home Affairs has policy responsibility for deciding which visa subclasses are subject to an AoS. This is based on the visa applicant's (assurees) likelihood of requiring income support.
>
> The following visa subclasses are subject to an AoS:
>
> Mandatory ten year AoS:
>
> - Subclass 143 (Contributory Parent (Migrant) (Class CA) visa)
> - Subclass 864 (Contributory Aged Parent (Residence) (Class DG) visa)
>
> Mandatory four year AoS:
>
> - Subclass 103 (Parent visa)
> - Subclass 114 (Aged Dependent Relative visa)
> - Subclass 804 (Aged Parent visa)
> - Subclass 838 (Aged Dependent Relative visa)
>
> Discretionary four year AoS:
>
> - Subclass 101 (Child visa)
> - Subclass 102 (Adoption visa)
> - Subclass 151 (Former Resident visa)
> - Subclass 802 (Child visa)
>
> Mandatory two year AoS:

13 The minister's response to the committee's inquiries was received on 12 May 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- Subclass 115 (Remaining Relative visa)
- Subclass 835 (Remaining Relative visa)

Discretionary two year AoS:

- Subclass 117 (Orphan Relative visa)
- Subclass 837 (Orphan Relative visa)

Discretionary one year AoS:

- Subclass 202 (Global Special Humanitarian visa)

c) What criteria does the Department of Home Affairs rely on to determine when it should use its discretionary powers to require an assurance of support?

Where are these found?

Where an applicant has applied for a visa that carries a discretionary AoS provision, Home Affairs will assess the applicant's financial, employment and family circumstances to determine whether they are likely to access Australia's social security system. A monetary bond is not required for a discretionary AoS.

d) Does the department consider the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond, and what safeguards exist to ensure dependent family members are not involuntarily separated if family members cannot afford to provide an assurance of support.

An AoS enables entry to Australia for migrants who may not otherwise be eligible to come, for example, in the family reunion categories, while protecting Australian Government social security outlays. It is also a commitment by an assurer to assume financial responsibility for supporting the visa applicant(s) during their Assurance of Support period.

Migrants entering Australia with an AoS do so on the condition a person (the assurer) provides an assurance to undertake financial responsibility for the migrant (the assuree) for the duration of the Assurance of Support period. An income test is used to assess the capacity of the assurer to support the potential migrant. The income test is incremented according to the number of assurers, the number of dependent children in the assurer's family and the number of adults to be supported under the AoS.

In the case of a mandatory AoS a bond is also required. The amount of the security is determined by the visa subclass and number of adult visa applicants. Currently for a two or four year AoS a security for the value of $5,000 for the primary visa applicant and $2,000 for any adult secondary visa applicant must be paid. In the case of contributory parent visas a security for the value of $10,000 for the primary visa applicant and $4,000 for any secondary visa applicant must be paid. The purpose of this bond is to assist the Australian Government to recover any debt incurred by the assurer under the terms of the AoS. Services Australia will recover the

amount of an AoS debt from this term deposit. When the term deposit does not fully cover the amount of the debt, the assurer must also repay the outstanding balance. The bond is deposited with the Commonwealth Bank of Australia and the balance is released to the assurer at the end of the AoS period.

If an individual cannot afford to provide an AoS, they have the option of entering into a joint AoS arrangement. In a joint AoS arrangement, up to three people sign the AoS and are held equally liable for any social security debts that arise as a result of the AoS.

Businesses and unincorporated bodies (such as community groups) are also able to provide an AoS, providing they meet income test requirements for individuals and other requirements such as proof of company registration in Australia.

Concluding comments

International human rights legal advice

Rights to protection of the family and the child

2.122 The minister has advised that mandatory assurances of support are required for parent visas, dependent relative visas and remaining relative visas. For all such visas an assurer in Australia must provide an upfront monetary bond of between $5,000 to $10,000 for the primary applicant and between $2,000 to $4,000 for any secondary applicant. The assurer must also assume financial responsibility for supporting that applicant for up to 10 years.

2.123 The minister has also advised that discretionary assurances of support may be required for child visas, adoption visas, former resident visas, orphan relative visas and Global Special Humanitarian visas. An upfront monetary bond is not required for these types of visas. However, if the Department of Home Affairs considers the applicant is likely to access Australia's social security system, an assurer will be required to assume financial responsibility for supporting that applicant for up to four years.

2.124 The Social Security (Assurances of Support) Determination 2018, which the instrument under consideration extends, provides that individuals will only be able to provide an assurance of support if they are an Australian resident, an adult, and meet the income test requirements.[14] The income test requirements differ depending on the number of people being given an assurance of support, and whether the assurer has children of their own. For example, a single person sponsoring their single parent, would need to demonstrate an annual minimum income of $32,281.60.[15] A partnered

14 Social Security (Assurances of Support) Determination 2018, sections 11 and 15.

15 Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $16,140.80 as at April 2021) multiplied by the total number of the assurer and the assure (two).

parent with three children in Australia wanting to sponsor their child would need to demonstrate a combined annual minimum income of $39,388.15 if required to provide an assurance of support.[16]

2.125 The right to protection of the family is found in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Those treaties state that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State' and that the 'widest possible protection and assistance should be accorded to the family'.[17] While the state has a right to control immigration, the right does require Australia to create the conditions conducive to family formation and stability, including the interest of family reunification.[18] The term 'family' is to be understood broadly as to include all those comprising a family as understood in the society concerned,[19] and is not necessarily displaced by geographical separation if there is a family bond to protect.[20] This clearly includes couples and the parent-child relationship, and may include parents and their adult children[21] and other family members,[22] depending on the level of dependency, shared life and emotional ties.

2.126 In addition, the Convention on the Rights of the Child requires that the best interests of the child must be a primary consideration, and children should not be separated against their will from their parents (except if in their best interests), and States should respect the primary responsibility of parents or guardians for promoting the development of children.[23] In particular, article 10 of the Convention on the Rights of the Child requires that applications by a child or his or her parents for the purpose

16 Social Security (Assurances of Support) Determination 2018, section 15, based on the applicable rate of jobseeker (being $16,140.80 as at April 2021) multiplied by two (if giving a joint assurance) plus the base FTB child rate and the applicable supplement amount multiplied by the total number of the assurer's children (three). See also Guide to Social Policy Law, Social Security Guide, version 1.282, 9.4.3.60.

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

18 See *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4]–[6.5].

19 See General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8 April 1988.

20 *Ngambi and Nebol v France,* United Nations Human Rights Committee, Communication No. 1179/2003 (2004) [6.4].

21 See *Warsame v Canada*, United Nations Human Rights Committee, Communication No. 1959/2010 (2011) [8.8].

22 See *Nystrom v Australia*, United Nations Human Rights Committee, Communication No. 1557/2007 (2011) [7.8], where the Committee referenced the applicant's family life with his mother, sister and nephews.

23 Convention on the Rights of the Child, articles 2, 3, 5, 8–10, 18 and 27.

of family reunification must be dealt with in a positive, humane and expeditious manner.

2.127 The minister's response did not address the question as to whether the department considers the right to the protection of the family and the rights of the child when determining whether to require payment of an upfront bond. In the case of mandatory assurances of support, it appears there is no flexibility, and all assurers for visas in this category will be required to meet the residency, age and income test requirements, and provide an upfront monetary bond, in order to be eligible to sponsor family members in such visa categories. As such, it would appear a child would not be eligible to sponsor their parent, for example, where they were living with their father in Australia but wanted to sponsor their mother to join, or stay with them (in circumstances where the parents were now separated) – as children cannot provide assurances of support. The only possible safeguard identified in the minister's response is that if an individual cannot afford to provide an assurance of support, they have the option of entering into a joint arrangement, whereby up to three people, if they meet the assurance requirements, will be held equally liable for any social security debts that arise. In addition, businesses and unincorporated bodies (such as community groups) may also be able to provide an assurance of support. However, if a family member cannot find others willing to provide such an assurance, there appears to be no flexibility for those in the visa categories subject to mandatory assurances of support to be able to be reunited with their family member.

2.128 In addition, in relation to discretionary assurances of support, the minister advised that when deciding whether to require an assurance the department will assess the applicant's financial, employment and family circumstances to determine whether they are likely to access Australia's social security system. The minister did not state that the department would consider the assurer's family ties to the applicant, or in the case of children within Australia's jurisdiction, the best interests of the child. It therefore does not appear that the rights of the child or the right to protection of the family is a factor that is considered when making this determination.

2.129 Where assurances are sought to be made for family members who do not have a shared life with the assurer (for example, parents and their adult children who may not have lived with, or relied on, one another for many years), a requirement for an assurance of support is unlikely to engage the right to protection of the family. However, the right is likely to be engaged and limited when family members can demonstrate a close family bond and shared life together but are unable to meet the assurance of support requirements. In these circumstances, the assurance of support could prevent family reunification. In addition, the rights of the child will be limited where children in Australia are unable to be reunited with their parent, or other close relative, if an assurance of support is required but cannot be met. In these circumstances, noting the lack of any flexibility in relation to those visa categories subject to mandatory assurances of support; that the family ties of members, or the rights of the child, do not appear to be considered when a decision is made to impose

a discretionary assurance of support; and the lack of any safeguards to protect the rights of those who cannot meet the age or income requirements or the payment of an upfront bond, there is a risk that extending this measure by a further three years may not be compatible with the right to protection of the family and the rights of the child.

Committee view

2.130 The committee thanks the minister for this response. The committee notes this legislative instrument extends by three years an existing determination that specifies matters relating to the assurance of support scheme. An assurance of support is an undertaking by a person (the assurer) that they will repay the Commonwealth the amount of any social security payments received during a certain period by a migrant seeking to enter Australia.

2.131 The committee notes that this measure may engage and limit the right to protection of the family. While States have a right to control their migration program, international human rights law requires Australia to create the conditions conducive to family formation and stability, and this includes the interest of family reunification. The committee also notes that the measure may engage the rights of the child, which requires that the best interests of the child must be a primary consideration, and applications by a child or his or her parents for the purpose of family reunification must be dealt with in a positive, humane and expeditious manner.

2.132 The committee notes that this measure requires all applications for parent visas (including parents of those under 18 years old) to have an Australian sponsor who is an adult, who meets set income requirements and can provide an upfront payment of a bond of up to $10,000. The committee also notes the measure enables the Department of Home Affairs to exercise its discretion to impose similar requirements (although without payment of the bond) for child visas (for example, where a parent in Australia is seeking to sponsor their child).

2.133 While the committee considers there will be many cases of family reunification where requiring an assurance of support does not limit the right to protection of the family or the rights of the child (as the family member in question is not part of the assurer's core family), the committee is concerned that no consideration is given to these rights when an assurance of support is imposed. As such, the committee considers there is a risk that requiring an assurance of support for certain family members may not be compatible with the right to protection of the family and the rights of the child.

Suggested action

2.134 The committee considers the proportionality of this measure may be assisted if:

(a) the Social Security (Assurances of Support) Determination 2018 is amended to provide that an assurance of support is not required where to do so would arbitrarily limit the right to protection of the family or the rights of the child;

(b) as a matter of policy, all assurances of support are made discretionary in order to assess the family circumstances of each application; and

(c) guidelines are developed to guide officials in assessing whether an assurance of support would be likely to limit the right to protection of the family or the rights of the child in each individual case.

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

Dr Anne Webster MP

Chair