Chapter 1

New and continuing matters

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

Bills

Migration Amendment (Aggregate Sentences) Bill 2023[1]

Purpose	This bill (now Act) amends the *Migration Act 1958* to clarify that provisions in the *Migration Act 1958* and the regulations apply to a single sentence imposed by a court in the same way, regardless of whether the sentence is in respect of a single offence or for two or more offences.
Portfolio	Home Affairs
Introduced	Senate, 7 February 2023. *Finally passed both Houses on 13 February 2023.*
Rights	Prohibition on the expulsion of aliens without due process; liberty; rights of the child; prohibition on torture and ill-treatment; freedom of movement; protection of the family; prohibition on non-refoulement; effective remedy

Consideration of aggregate sentences for the purposes of the Migration Act

1.2 This bill, now Act, amends the *Migration Act 1958* (Migration Act) to clarify that aggregate sentences (that is, where a court imposes a single sentence in respect of multiple offences) may be taken into account for all relevant purposes under the Migration Act and regulations. This includes for the purposes of assessing whether a person is of 'character concern' and whether to refuse or cancel a visa on character grounds. The amendments are stated to be in direct response to the Federal Court

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Aggregate Sentences) Bill 2023, *Report 2 of 2023*; [2023] AUPJCHR 17.

decision of *Pearson v Minister for Home Affairs* (*Pearson*),[2] which held that aggregate sentences are not subject to the minister's mandatory visa cancellation powers under subsection 501(3A) of the Migration Act. Subsection 501(3A) requires the minister to cancel a visa if they are satisfied that the person does not pass the character test because they have a substantial criminal record, namely, where a person has been sentenced to death, imprisonment for life or a term of imprisonment of 12 months or more.[3]

1.3 This bill reverses the effect of the *Pearson* decision by inserting new section 5AB, which provides that a single sentence imposed by a court in respect of two or more offences is to be applied in the same way as a sentence imposed by a court in respect of a single offence,[4] and retrospectively validates past decisions and actions (including mandatory visa cancellation decisions) that were rendered invalid on the basis of *Pearson*.[5] As a result of new section 5AB, for example, a person sentenced to a term of imprisonment of 12 months or more, irrespective of whether the sentence relates to one offence or multiple offences (that is, an aggregate sentence), would be considered to have a 'substantial criminal record'[6] for the purposes of triggering the minister's mandatory visa cancellation powers under subsection 501(3A). The minister may also take into account a person's aggregate sentence when exercising their discretionary powers to refuse or cancel a visa.[7]

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2 Explanatory Memorandum, p. 2. See *Pearson v Minister for Home Affairs* [2022] FCAFC 203. This case involved the mandatory cancellation of the applicant's visa under section 501(3A) of the Migration Act (which requires the minister to cancel a person's visa if they fail the character test because of a substantial criminal record). The applicant had been sentenced to an aggregate maximum term of imprisonment of 4 years and 3 months in respect of 10 offences under section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). At [47], the Court held that '[h]ad Parliament intended that an aggregate sentence of 12 months or more should be subject to mandatory cancellation of a person’s visa it would have been a straightforward matter to say so. That it did not do so is consistent with the apparent purpose of s 501(3A), namely that only the most serious offending subjects a person to mandatory cancellation of a visa. Self-evidently, an aggregate sentence may be arrived at after conviction of a series of lesser offences, none of which on their own could render a person liable to have his or her visa mandatorily cancelled'. At [48], the Court reasoned that the applicant had not been sentenced to *a* term of imprisonment of 12 months or more with respect to *an* offence, and consequently her visa was not amenable to mandatory cancellation.

3 *Migration Act 1958*, subsection 501(3A) and paragraphs 501(7)(a)–(c).

4 Item 5, new section 5AB.

5 Item 4. Item 5 deals with the effect of validation under item 4 on review and appeal rights.

6 Within the meaning given by paragraph 501(7)(c) of the *Migration Act 1958*, which applies in relation to a person sentenced to a term of imprisonment of 12 months or more. See Item 1.

7 Under subsections 501(1)–(3) of the *Migration Act 1958*, the minister may refuse to grant or cancel a visa on a number of grounds, including where a person does not pass the character test because they are 'not of good character' having regard to the person's 'past and present criminal conduct' (paragraph 501(6)(c)).

1.4 Additionally, the bill provides that new section 5AB applies retrospectively, meaning that it applies in relation to things that came into existence or were obtained before commencement of the bill, offences that occurred before commencement, and applications made before commencement.[8] For example, section 5AB applies, when making a visa cancellation decision, to any conduct of the non-citizen before commencement of the bill.[9]

International human rights legal advice

Prohibition on the expulsion of aliens without due process

1.5 Including aggregate sentences within the meaning of 'substantial criminal record' for the purposes of section 501 of the Migration Act[10] has the effect of expanding the circumstances to which the minister's mandatory visa cancellation powers must apply. Where a visa is cancelled on character grounds by the minister personally, including under subsection 501(3A) of the Migration Act, the rules of natural justice are stated not to apply.[11]

1.6 The cancellation of a visa for those in Australia would generally result in the expulsion of those persons from Australia as soon as reasonably practicable (noting that most individuals affected by this measure will be in Australia having served a term of imprisonment in Australia).[12] Therefore, by expanding the bases on which visas must be cancelled on character grounds, noting that the rules of natural justice do not apply to such decisions, this measure engages and may limit the prohibition on the expulsion of aliens without due process under article 13 of the International Covenant on Civil and Political Rights.[13] The statement of compatibility acknowledges

8 Item 3.

9 Explanatory memorandum, p. 8.

10 Noting that under subsection 501(3A) of the *Migration Act 1958*, the minister must cancel a person's visa if satisfied that they do not pass the character test because they have a substantial criminal record within the meaning of paragraph 501(7)(a)–(c).

11 *Migration Act 1958*, subsection 501(5), which provides the rules of natural justice do not apply to decisions made under subsections 501(3) and (3A).

12 *Migration Act 1958*, section 198.

13 While the measure would have implications for the minister's discretionary powers under section 501 of the *Migration Act 1958*, insofar as it clarifies that the minister may consider a person's aggregate sentence in exercising their discretion to refuse to grant or cancel a visa, this entry focuses on the impact of the measure on the minister's mandatory visa cancellation powers as the human rights implications in this context are more significant (noting also that the minister already has broad discretionary cancellation powers to cancel a visa on the basis of a person's past or present criminal conduct, regardless of any sentence, see *Migration Act 1958*, paragraph 501(6)(c)).

that as visa cancellation decisions can lead to the removal of a person from Australia, the cancellation process can amount to expulsion as contemplated in article 13.[14]

1.7 Article 13 provides that non-citizens lawfully in a territory may be expelled, but unless compelling reasons of national security otherwise require, they should be allowed to submit reasons against expulsion and to have their case reviewed by a competent authority, and be represented for the purpose of that review.[15] The United Nations (UN) Human Rights Committee has stated that article 13 requires that 'an alien…be given full facilities for pursuing [their] remedy against expulsion so that this right will in all circumstances of [their] case be an effective one'.[16] If the effect of this measure were to limit the procedural guarantees of article 13 such that the individual is unable to *effectively* submit reasons against their expulsion, article 13 may be engaged and limited. This right 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.[17]

1.8 The stated objective of the bill is to protect the safety of the Australian community and the integrity of the migration system.[18] The statement of compatibility states that the measure will protect the Australian community by

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14 Statement of compatibility, p. 18.

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

16 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The UN Committee has also stated that 'Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions'.

17 Note that the due process guarantees in article 13 may be departed from, but only when 'compelling reasons of national security' so require. Thus, if there are compelling reasons of national security not to allow an alien to submit reasons against their expulsion, the right will not be limited. Where there are no such grounds (as appears to be the case in relation to this measure), the right will be limited, and then it will be necessary to engage in an assessment of the limitation using the usual criteria (of necessity and proportionality). See International Covenant on Civil and Political Rights, article 13; UN Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant* (1986) [10]. The UN Human Rights Committee has applied a reasonably high threshold which States parties must meet before departing from their due process obligations. See e.g. *Mansour Leghaei and others v Australia,* United Nations Human Rights Committee Communication No. 1937/2010 (2015) [10.4] and dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia; *Mansour Ahani v Canada,* United Nations Human Rights Committee Communication No. 1051/2002 (2004) [10.8]; *Alzery v Sweden,* United Nations Human Rights Committee Communication No. 1416/2005 (2006).

18 Statement of compatibility, pp. 14, 16.

ensuring that persons who do not pass the character test because of a substantial criminal record, including having been sentenced to an aggregate term of imprisonment of 12 months or more, will be liable for continued immigration detention pending their removal from Australia.[19] The statement of compatibility acknowledges that in practice, this will result in persons who were released from detention as a result of the *Pearson* decision being re-detained in immigration detention, but states that is appropriate because these persons present a considerable risk to the community and need to be returned to immigration detention in order to progress their removal from Australia.[20] It notes that this approach aligns with community expectations that such persons should not be allowed to travel or remain in Australia.[21]

1.9 Protecting the safety of the Australian community and the integrity of the migration system may be capable of being legitimate objectives for the purposes of international human rights law. However, to be a legitimate objective, the objective must be one that is pressing and substantial, and not one that simply seeks an outcome that is desirable or convenient.

1.10 It is noted that the provisions of the Migration Act as it stood before these amendments were made already provided for a visa to be refused or cancelled on a broad range of character grounds, including when a person is sentenced to two or more terms of imprisonment, where the total of those terms is 12 months or more.[22] The Migration Act also includes a discretionary power for cancellation or refusal of a visa 'having regard to' the person's 'past and present criminal conduct' or 'past and present general conduct'.[23] The statement of compatibility states that were it not for this measure, there would be a 'perverse situation' whereby a person would automatically fail the character test for receiving a five year sentence for a single offence but another person would not automatically fail the character test if they received a five year aggregate sentence for multiple offences, regardless of the perceived seriousness of any single offence.[24] However, in the latter situation, under the law as it stood previously , the minister could still cancel that person's visa on the basis of not passing the character test using the grounds described above. It has therefore not been demonstrated that the laws as they stood were insufficient to achieve the stated objective.

19 Statement of compatibility, p. 14.

20 Statement of compatibility, p. 16.

21 Statement of compatibility, p. 15.

22 *Migration Act 1958*, paragraph 501(7)(d).

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

24 Statement of compatibility, p. 13.

1.11 Further, in relation to the need to accommodate the risk posed by an individual to the Australian community, it would appear that this is a risk more appropriately managed by the courts in the sentencing process.[25] It is not clear why a court's assessment of an appropriate sentence for an individual having committed one or multiple offences would not be sufficient to manage such risk, such that visa cancellation or refusal is also required. If the risk posed by Australian citizens who have been sentenced to an aggregate term of imprisonment can be adequately managed in the community, such that they do not require further detention and removal from Australia following the completion of their sentence, it is unclear why similar measures could not adequately mitigate the potential risk posed by non-citizens, noting that it has not been demonstrated that non-citizens pose a greater risk to the community than citizens.[26]

1.12 Additionally, in the context of automatic or mandatory visa cancellations, there is no individualised assessment of the risk posed by an individual to the community. Without taking into account the seriousness of the offences to which an aggregate sentence relates, as well as consideration of the particular circumstances and risk factors associated with an individual, such as participation in rehabilitation, community ties, employment and family support, it does not appear possible to conclusively state that all those 'non-citizens who have been released from immigration detention as a result of the *Pearson* decision present a considerable risk to the community'.[27] Further, even if there were evidence to establish that a particular non-citizen posed a 'considerable risk', as noted above, it is not clear why the pre-existing visa cancellation powers were not sufficient to manage any such risk.

1.13 As such, in circumstances where the minister may already cancel or refuse a person's visa where a person receives an aggregate sentence to address any

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

26 It is noted that this differential treatment of individuals based on citizenship status and nationality may also engage and limit the right to equality and non-discrimination. See *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56, particularly [54]–[68]. At [68], in assessing whether differential treatment of non-UK nationals and UK nationals in the context of national security measures was permissible, Lord Bingham concluded '[w]hat cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of' the right to equality and non-discrimination under article 14 of the European Convention on Human Rights and article 26 of the ICCPR and 'so inconsistent with the United Kingdom’s other obligations under international law within the meaning of article 15 of the European Convention'.

27 Statement of compatibility, p. 16.

perceived risks to community safety, and noting that questions remain as to whether non-citizens who have completed their sentence pose any additional risk (over and above that posed by citizens in the same circumstances), it has not been established that the measure is necessary, and addresses a pressing and substantial concern for the purposes of international human rights law. It is thus not clear that the measure pursues a legitimate objective, and is rationally connected to that objective, for the purposes of international human rights law.

1.14 Further, a key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review; whether any less rights restrictive alternatives could achieve the same stated objective; and the extent of any interference with human rights.

1.15 As to the existence of safeguards, the statement of compatibility states that the current review mechanisms available under the Migration Act are not restricted by this measure, including merits review for decisions made by a delegate, and judicial review of decisions made by the minister personally.[28] It states that the majority of *discretionary* decisions to cancel or refuse visas on character grounds are made under subsections 501(1) and (2) of the Migration Act, to which the rules of natural justice apply.[29] This means that in relation to these decisions, a person is allowed to comment and provide supporting documents as to why their visa should not be cancelled or refused. However, in relation to *mandatory* visa cancellation decisions under subsection 501(3A), as noted above, the rules of natural justice do not apply and merits review is not available.[30] In these cases, a person is not afforded an opportunity to provide reasons as to why their visa should not be cancelled – the consequence of which is removal from Australia. The statement of compatibility notes that in these situations, the non-citizen is able to seek revocation of the cancellation decision and the minister may exercise discretion to revoke the automatic visa cancellation under section 501CA if the person satisfies them that

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28 Statement of compatibility, p. 18.

29 Statement of compatibility, p. 19.

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

they pass the character test or there is another reason why the decision should be revoked.[31] However, as the effect of the measure is to ensure that a person who is sentenced to an aggregate term of imprisonment of 12 months or more does not pass the character test, such that their visa will be automatically cancelled, it is not clear on what basis a person could satisfy the minister that they do, in fact, pass the character test, except in the narrow circumstance where the minister made an error in relation to the person's conviction.

1.16 The committee has considered on a number of previous occasions that in the Australian domestic legal context the availability of merits review would likely be required to comply with Australia's obligations under international law, not simply judicial review.[32] While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review'.[33] This is because judicial review is only available on a number of restricted grounds and represents a limited form of review, in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision-maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision, to determine whether the decision is the correct or preferable decision.[34] Limiting the form of review in this way raises serious concerns as to whether judicial review alone in the Australian context would be sufficient to constitute 'effective review'.

31 Statement of compatibility, p. 19.

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

33 See, e.g. Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90; *Report 15 of 2021* (8 December 2021) pp. 17–34. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]–[8.9].

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

1.17 The statement of compatibility states that the bill preserves the availability of the review and revocation powers in relation to decisions by the minister that were invalidated by the *Pearson* decision.[35] However, noting the concerns outlined above, these review mechanisms do not appear to offer an effective form of review and, as such, offer minimal safeguard value.

1.18 As such, there appears to be a significant risk that a person may not have sufficient opportunity to present reasons against their expulsion in cases where the minister exercises their mandatory visa cancellation powers.[36] Noting the consequence of a visa cancellation decision is detention and subsequent removal from Australia, the resulting interference with a person's human rights is significant. This is especially the case in the context of this specific measure, noting that the result of this bill is the re-detention of persons previously released due to the *Pearson* decision. The greater the interference with rights, the less likely the measure is to be considered proportionate. Additionally, it is not clear that the measure pursues the least rights-restrictive option to achieve the stated objective. For example, the potential interference with rights would be lessened if the rules of natural justice applied to all visa cancellation decisions and, more broadly, if the visa cancellation powers under the Migration Act were only discretionary. For these reasons, the measure does not appear to be a proportionate limitation on the right of aliens not to be expelled without due process.

Right to liberty, rights of the child and prohibition on torture and ill-treatment

1.19 Under the Migration Act, the cancellation of a person's visa on character grounds results in that person being classified as an unlawful non-citizen and subject to mandatory immigration detention prior to removal from Australia.[37] By expanding the bases on which a visa can be cancelled, this measure engages and limits the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[38] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention, including immigration detention, must not only be lawful, but must also be reasonable, necessary, and proportionate in all 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.

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35 Item 5; statement of compatibility, p. 19.

36 Similar human rights concerns have been raised in relation to the minister's discretionary powers under section 501 to refuse or cancel a person's visa. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, [Report 15 of 2021](#) (8 December 2021) pp. 17–34.

37 *Migration Act 1958*, section 189.

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

1.20 The detention of a non-citizen on cancellation of their visa pending deportation will not necessarily constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. However, in the context of mandatory immigration detention, in which individual circumstances are not taken into account, and where there is no right to periodic judicial review of the detention, there may be circumstances where the detention could become arbitrary under international human rights law.[39] This is most likely to apply in cases where the person may be subject to indefinite or prolonged detention as the person cannot be returned to their home country because they may be subject to persecution there.[40] It may also apply where the person applies for review of a decision and the review process takes a prolonged period of time to finalise.

1.21 In addition, as the measure does not differentiate between adults and children, and the provisions of section 501 can operate to cancel or refuse a child's visa, which could also lead to their detention, it also engages and may limit the rights of the child.[41] Children have special rights under international human rights law taking into account their particular vulnerabilities.[42] 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.[43]

1.22 Further, 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

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

40 See an analysis of this in Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (16 June 2021), pp. 100–124. See also *Report 15 of 2021* (8 December 2021) pp. 17–34.

41 Including the requirement that the best interests of the child be a 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.

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

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

person to torture or to cruel, inhuman or degrading treatment or punishment.[44] This obligation is absolute and may never be limited.

1.23 The statement of compatibility acknowledges that the right to liberty and the rights of the child are engaged by the measure insofar as a person is liable to be detained where their visa is cancelled.[45] It also notes that persons who were released from immigration detention following the *Pearson* decision will be once again subject to immigration detention as a result of the measure retrospectively validating the original visa cancellation decisions (which were invalidated by *Pearson*).[46] It considers re-detention of such persons to be appropriate because they 'present a considerable risk to the community'.[47]

1.24 While the prohibition on torture and ill-treatment is absolute, there may be permissible limitations on the right to liberty and the rights of the child, provided the limitation supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.25 As set out above at paragraphs [1.8]–[1.13], it is not clear that the measure addresses an objective that is pressing and substantial enough to warrant limiting these rights.

1.26 In assessing proportionality, a relevant factor to consider is the flexibility of the measure, including whether decision-makers have the discretion to consider the individual circumstances of a case. The statement of compatibility states that in exercising their discretion to refuse or cancel a visa or to revoke a mandatory visa cancellation (under 501CA of the Migration Act), decision-makers are guided by comprehensive policy guidelines and ministerial directions, and take into account the individual's circumstances.[48] In the context of visas automatically cancelled pursuant to section 501(3A), as noted above in paragraph [1.15], the minister may revoke this mandatory visa cancellation decision if the person satisfies the minister that they pass the character test (which is unlikely unless there was an error in relation to the person's conviction) or where there is another reason why the original decision should be revoked. In assessing the latter, the decision-maker must take into account specified primary considerations as well as other considerations where relevant.[49]

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

45 Statement of compatibility, pp. 15–16.

46 Statement of compatibility, p. 16.

47 Statement of compatibility, p. 16.

48 Statement of compatibility, p. 16.

49 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), sections 6–9.

The relevant ministerial direction states that primary considerations (such as protection of the community from criminal conduct and the community expectation that non-citizens who disobey the law should not be allowed to remain in Australia) should generally be given greater weight than other considerations (such as Australia's non-refoulement obligations or impediments that may be faced by the person if removed from Australia).[50] Given that decision-makers are directed to give greater consideration to the protection, and perceived expectations, of the Australian community than to most individual circumstances, the relevant ministerial direction appears to be an inadequate safeguard against the risk of arbitrary detention.[51]

1.27 The statement of compatibility also notes that there is regular review of individuals held in immigration detention by detention review committees. However, the committee has previously considered that administrative and discretionary processes alone may not meet the requirement for periodic and substantive judicial review of detention so as to be compatible with the right to liberty, especially where there is no possibility of release.[52] Further, in *MGC v Australia,* the UN Human Rights Committee considered a case in which visa cancellation under section 501 of the Migration Act was found to be incompatible with the right to liberty. The UN Human Rights Committee noted that the detainee 'was deprived of the opportunity to challenge his indefinite detention in substantive terms [noting that] judicial review of the lawfulness of detention is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant'.[53] It stated that detaining persons while their claims were being resolved would be arbitrary 'in the absence of particular reasons specific to the individual, such as individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'.[54] As noted above at paragraphs [1.16]–[1.17], in the absence of merits

50 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), section 7.

51 Similar concerns were raised regarding the inadequacy of ministerial directions in the context of discretionary decisions to refuse or cancel a visa. See Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

52 Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 19; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202–205; *Report 15 of 2021* (8 December 2021) pp. 17–34.

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

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

review, judicial review in the context of this measure, which is unlikely to include the possibility of release from detention, is not effective for the purposes of international human rights law.

1.28 The statement of compatibility also refers to arrangements other than detention that can be made, such as granting a bridging visa with conditions or a community placement under a residence determination. It states that these alternative options enable the least rights restrictive option to be implemented.[55] However, it is noted that such arrangements are limited and remain at the discretion of the minister. For example, while section 195A of the Migration Act gives the minister the power to grant a visa to a person who is in detention, this is subject to the requirement that the minister must think it is 'in the public interest to do so', and the power is personal and non-compellable.[56] Similarly, section 197AB also gives the minister a personal and non-compellable power to make a 'residence determination' to the effect that a person in detention may instead reside at a specified place. However, the Migration Act and regulations continue to apply to such a person as if they were being kept in immigration detention.[57] It is also noted that these powers appear to be infrequently exercised in practice.[58] Further, while the statement of compatibility states that the amendments made to the Migration Regulations 1994 in 2021 enhance the options available to the minister in considering whether to grant a bridging visa,[59] this remains a personal and discretionary power with the conditions that may be imposed on the grant of such a visa, themselves raising human rights concerns.[60] Therefore, notwithstanding the administrative processes to review detention, the minister is not obliged to release a person even if a person's individual circumstances do not justify continued or protracted detention. As observed by the UN High Commissioner for Refugees, alternatives to detention must be accessible in

55 Statement of compatibility, pp. 16–17.

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

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

58 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021* (29 April 2021) pp. 13–28 and *Report 7 of 2021* (16 June 2021) pp. 100–124. At the time of this report, 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.

59 Statement of compatibility, p. 15.

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

practice (not merely available on paper) and should not be used as alternative forms of detention.[61]

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

1.30 In relation to the prohibition against torture and ill-treatment that may apply when a person is indefinitely detained, the statement of compatibility notes that there are processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary, including internal administrative review processes, oversight by the Commonwealth Ombudsman, and the minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[62] While these processes could help to ensure that detention conditions are humane, it is not clear they are sufficient to ameliorate concerns about the implications of the measure for the prohibition against torture and ill-treatment arising from protracted or indefinite detention, particularly as these processes are unlikely to result in the release of a person from immigration detention. It is noted that the UN Human Rights Committee has previously characterised the conditions in Australia's detention facilities as 'difficult'.[63] 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.[64] Noting the possibility of indefinite or protracted detention under the Migration Act (as there is no legislative maximum period of detention), the absence of effective review and other procedural safeguards, there is a risk that the measure, having regard to the legislative context in which it operates, may not be

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

62 Statement of compatibility, p. 16.

63 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8].

64 *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].

compatible with Australia's obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[65]

Rights to freedom of movement, protection of the family and rights of the child

1.31 For those for whom the consequence of a decision to cancel their visa is expulsion from Australia, the measure engages and may limit the right to freedom of movement. The right to freedom of movement includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[66] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they have resided for a substantial period of time and established their home.[67] As such, for those with very strong ties to Australia, the cancellation of their visa on character grounds, leading to their expulsion, and any subsequent refusal to grant them a visa to return to Australia would limit their right to return to their 'own country'. The statement of compatibility acknowledges this, stating that were a person's visa cancelled on the basis of an aggregate sentence, the measure may engage this right depending on the strength, nature and duration of their ties to Australia.[68]

1.32 The measure also engages and limits the right to protection of the family as a visa cancellation decision could operate to separate family members. The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another.[69] There is significant scope under international human rights law for states to enforce their immigration policies and to require the departure of unlawfully present persons. However, where a family has been in the country for a significant duration of time, additional factors justifying the separation of families, going beyond a simple enforcement of immigration law, must

65 In addition, if a person were to be detained for a significant period of time, questions arise as to whether the period of detention would be characterised as a criminal sanction under international human rights law. If it were to be considered a criminal sanction, the measure will engage the criminal process rights under 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. Given the retrospective application of the measure, it is also not clear whether there would be implications for the prohibition against retrospective application of criminal laws under article 15.

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

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

68 Statement of compatibility, p. 18.

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

be demonstrated in order to avoid a characterisation of arbitrariness or unreasonableness.[70]

1.33 Further, as the measure does not differentiate between adults and children, and the provisions of section 501 can operate to cancel a child's visa, were the measure to apply to a child, it would engage and limit the rights of the child. The obligation to consider the best interests of the child is engaged when determining whether to cancel a child's visa. It is also engaged when considering the cancellation of a parent's or close family member's visa, insofar as that cancellation of the family member's visa may not be in the best interests of their children. Further, under the Convention on the Rights of the Child, Australia has an obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions. The statement of compatibility acknowledges that the right to protection of the family and the rights of the child are engaged by the measure.[71]

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

1.35 As set out above at paragraphs [1.8]–[1.13], noting the existing powers under the Migration Act to cancel a visa on the basis of a person's criminal record, including where a person was sentenced to an aggregate term of imprisonment for multiple offences, it is not clear that the measure addresses an objective that is pressing and substantial enough to warrant limiting these rights.

1.36 The statement of compatibility states that the limitation on the above rights is proportionate because any decision to cancel a visa would occur after careful consideration of the person's individual circumstances, including their ties to Australia, any potential separation of family units, and the best interests of the child.[72] However, while such considerations are relevant in the context of *discretionary* decisions to cancel a visa (insofar as decision-makers are guided by ministerial directions and policy guidelines), in the case of *mandatory* visa cancellation decisions made under section 501(3A) (relating to persons serving a sentence of imprisonment), there can be no consideration of individual circumstances. If a person is sentenced to an aggregate term of imprisonment of 12 months or more, their visa is automatically cancelled without consideration of the seriousness of each offence to which the aggregate sentence relates or any other

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

71 Statement of compatibility, p. 20.

72 Statement of compatibility, pp. 18, 20.

personal circumstances that may be relevant, such as ties to Australia and possible separation of family members. Only where a person seeks revocation of a mandatory visa cancellation under section 501CA can the minister consider some individual circumstances.[73] In particular, decision-makers may consider the strength, nature, and duration of a person's ties to Australia, the possible impact of a visa cancellation decision on the person's family members as well as the 'best interests of minor children in Australia'. Following recent amendments to the relevant ministerial direction, these considerations are to be taken into account by decision-makers as 'primary considerations', which assists with proportionality. However, they are to be considered alongside other 'primary considerations', including protection of the Australian community and community expectations, and the decision-maker retains the discretion to attribute greater weight to these other primary considerations above a person's ties to Australia and the best interests of the child.[74] Placing the best interests of the child on the same or a lower level as other considerations risks being incompatible with Australia's obligations to consider the best interests of the child.[75] Further, the ministerial direction states that in some circumstances the nature of the non-citizen's conduct, or the harm caused were it to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not revoking the visa.[76] Against this background, the ministerial direction appears to be of limited safeguard value in the context of an automatic cancellation of a visa, particularly noting that ministerial directions may be amended or revoked by the executive. For the purposes of international human rights law, discretionary

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73 *Migration Act 1958*, section 501CA, which provides that the minister may revoke the original visa cancellation decision if the person makes representations in accordance with the invitation and the minister is satisfied that the person passes the character test (as defined by section 501) or there is another reason why the original decision should be revoked. For the consideration that applies, see Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023).

74 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), subsection 7(3).

75 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': *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013); see also *IAM v Denmark,* Committee on the Rights of the Child Communication No.3/2016 (8 March 2018) [11.8]. See also Parliamentary Joint Committee on Human Rights, *Report 7 of 2021* (12 June 2021) pp. 89-99; *Report 15 of 2021* (8 December 2021) pp. 17–34.

76 Minister for Immigration, Citizenship and Multicultural Affairs, 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA' (23 January 2023), subsection 5.2(6).

safeguards alone are unlikely to be sufficient because they are less stringent than the protection of statutory processes.

1.37 Further, the potential separation of family members, including parents from their children or vice versa, when those persons may have resided in Australia for a very long time, indicates that the impact of these measures may be significant. The greater the interference, the less likely the measure is to be considered proportionate. It seems unlikely that there would be circumstances where it would be proportionate to separate a child from their parents, for example, through cancelling a child's visa and deporting them.

1.38 Given there are no other safeguards identified in the statement of compatibility, and as noted above, access to review is unlikely to be effective in practice, it appears the measure would not be compatible with the rights to freedom of movement (were a person to have very strong ties to Australia) and protection of the family (were the measure to result in the separation of the family unit), and where applicable, the rights of the child.

Prohibition against non-refoulement and right to effective remedy

1.39 While a decision to which this measure relates, including a decision to cancel a protection visa on character grounds, would not, in itself, necessarily result in a person being sent to a country where they could be at risk of persecution or ill-treatment, the cancellation could be the first step in a process by which a person may be subject to removal to such a country (refoulement). In this way, if a visa cancellation decision related to a person to whom Australia owes protection obligations, the measure may engage the prohibition on non-refoulement and the right to an effective remedy. In particular, noting that the rules of natural justice are stated not to apply to mandatory visa cancellations, to the extent that this would limit a person's ability to effectively challenge a decision which may lead to their removal, possibly to a country where they would face persecution, torture or other serious forms of harm, there is a risk that it may not be consistent with Australia's non-refoulement obligations, which include the requirement for independent, effective and impartial review of non-refoulement decisions, and the right to an effective remedy.[77] Non-refoulement obligations are absolute and may not be subject to any limitations.

77 Obligations arise under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also United Nations Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018). The Parliamentary Joint Committee on Human Rights has previously concluded that powers to cancel or refuse a person's visa under the *Migration Act 1958*, in the context of the current legislative regime, were likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy. See, e.g. *Report 15 of 2021* (8 December 2021) pp. 17–34; *Report 11 of 2021* (16 September 2021) pp. 54–59; *Report 3 of 2021* (17 March 2021) pp. 37–62.

1.40 The statement of compatibility states that the measure does not affect Australia's commitment to complying with its non-refoulement obligations.[78] It explains that where a visa that is not a protection visa is cancelled, the person may apply for a protection visa under section 501E. It notes that a person would not be subject to involuntary removal from Australia to the country to which their protection claims relate unless and until their protection claims have been assessed.[79] However, while subsection 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the *Migration Act 1958*. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while still in the migration zone. This constitutes a very significant limitation on the effectiveness of section 501E as a safeguard to ensure Australia's compliance with its non-refoulement obligations. For example, circumstances may have changed in the country to which a person's protection claim relates since their last application, such that their claim for protection may be even stronger. However, if that person's visa was cancelled, they would be prevented from making a further application for a protection visa due to section 48A. In these circumstances, there may be risk that they could be removed to a country where they would face persecution, torture or other serious forms of harm.

1.41 The statement of compatibility further states that where the visa that is cancelled is a protection visa, the effect of subsection 197C(3) of the Migration Act is that a person will be protected from removal in breach of Australia's *non-refoulement* obligations.[80] Subsection 197C(3) of the Migration Act provides that where a protection finding has been made in the course of considering a protection visa application, such a person cannot be removed to the relevant country unless they request this or the minister makes a decision that a protection finding would no longer be made in the person's case, for example due to improving country conditions.[81] As was stated in the committee's report when subsection 197C(3) was introduced, this measure appears to support Australia's ability to adhere to its non-refoulement obligations, to the extent that it would provide a statutory protection to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, even where they are ineligible for the grant of a

78 Statement of compatibility, p. 18.

79 Statement of compatibility, p. 17.

80 Statement of compatibility, p. 17.

81 Statement of compatibility, pp. 17–18.

protection visa.[82] However, the committee also noted that the inclusion of the power in section 197D, which allows the minister to make a decision that an unlawful non-citizen to whom a protection finding is made is no longer a person in respect of whom any protection finding would be made,[83] may have significant human rights implications insofar as it has the effect of allowing the minister to overturn a protection finding, thereby exposing the person to the risk of being returned to the country in relation to which a protection finding was previously made. It is not clear on what basis the minister would make this decision, noting that section 197D provides limited guidance as to the circumstances in which the minister would be 'satisfied' that a person is no longer owed protection obligations.

1.42 Further, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[84] Such review mechanisms are important in guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[85] As outlined above at paragraphs [1.16]–[1.17], there is limited availability of merits review in respect of the relevant decisions and, while judicial review is available, it is unlikely to be effective in practice because it is only available on a number of restricted grounds and represents a limited form of review. As such, there is some risk that by expanding the bases on which a visa, including a protection visa, can be cancelled, this could expand the risk of Australia not meeting its non-refoulement obligations.

82 Parliamentary Joint Committee on Human Rights, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, *Report 5 of 2021* (29 April 2021) pp. 13–28 and *Report 7 of 2021* (16 June 2021) pp. 100–124. The committee noted that while subsection 197(3) would support Australia's ability to uphold its non-refoulement obligations, to the extent that it resulted 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, it also limits the rights to liberty and the rights of the child. See also Migration Amendment (Strengthening the Character Test) Bill 2021, *Report 15 of 2021* (8 December 2021) pp. 17–34.

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

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

85 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005(20 November 2006) [11.8]; *Singh v Canada*, UN Committee against Torture Communication No.319/2007 (2011) [8.8]–[8.9].

Conclusion

1.43 By clarifying that aggregate sentences may be taken into account for all relevant purposes of the Migration Act and regulations, the measure expands the bases on which a visa can be cancelled on character grounds. As the consequence of a visa cancellation decision is mandatory immigration detention and subsequent removal from Australia, the measure engages and limits multiple rights.

1.44 In general terms, protecting the safety of the Australian community and the integrity of the migration system are capable of being legitimate objectives for the purposes of international human rights law. However, in the context of this specific measure, noting that it has not been demonstrated that the visa cancellation powers as they stood before these amendments were insufficient to achieve the stated objective and that questions remain as to whether non-citizens who have completed their sentence pose any additional risk (over and above that posed by citizens in the same circumstances), it has not been established that the measure addresses a pressing and substantial need.

1.45 Regarding proportionality, noting the lack of avenues for effective review, the lack of adequate safeguards, the inability to consider the individual circumstances of a case in a meaningful way, and the significant interference with human rights, it does not appear that the measure would in all circumstances constitute a proportionate limitation on rights. For these reasons, there is a significant risk that the measure is incompatible with the prohibition on the expulsion of aliens without due process, and the rights to freedom of movement, protection of the family and liberty, and were children to be affected by the measure, with the rights of the child. There is also a risk that the measure may not be compatible with Australia's non-refoulement obligations (were it to apply to persons to whom protection obligations are owed) and the prohibition against torture and ill-treatment (were persons to be detained for an indefinite or prolonged period).

Committee view

1.46 The committee notes that the bill, now Act, clarifies that aggregate sentences may be taken into account for all relevant purposes of the Migration Act and regulations, including for the purposes of assessing whether a person is of 'character concern' and whether to refuse or cancel a visa on character grounds. Insofar as these amendments expand the bases on which a visa can be cancelled on character grounds, noting that the consequence of a visa cancellation decision is mandatory immigration detention and subsequent removal from Australia, the committee considers that the measure engages and limits multiple rights.

1.47 In particular, as the cancellation of a person's visa generally results in their expulsion from Australia (including potentially those with strong ties with Australia, including family ties), the committee considers the measure may limit the prohibition on expulsion of aliens without due process; the right to freedom of movement (which includes the right to return to one's 'own country'); the right to protection of

the family; and the rights of the child. As a visa cancellation decision would also subject a person to mandatory immigration detention prior to removal, this measure limits the right to liberty (and the rights of the child if a child's visa is cancelled). If a person is subjected to prolonged or indefinite detention, the measure may have implications for the prohibition against torture or ill-treatment. Finally, as protection visas could also be cancelled, the measure engages the obligation of non-refoulement (namely, the prohibition on sending a person to a country where they are at risk of persecution). Most of these rights can be permissibly limited if the measure limiting the rights is shown to be reasonable, necessary and proportionate.

1.48 The committee considers that the measure pursues an important objective, that is, protecting the safety of the Australian community and the integrity of the migration system. However, it notes that for an objective to be legitimate for the purposes of international human rights law, it must be necessary and address a pressing and substantial concern. In this regard, the committee notes that prior to these amendments, the Migration Act already enabled the cancellation of visas on the basis of a person's criminal record, which appeared capable of achieving the stated objective of protecting the Australian community and the integrity of the migration system, and as such, the committee considers this measure does not appear to addresses a pressing and substantial need, as required by international human rights law.

1.49 As regards proportionality, the committee notes that in the context of mandatory visa cancellation decisions, there appear to be a lack of adequate safeguards or avenues for effective review. The committee also notes that having regard to the consequences of a visa cancellation decision, that is detention and subsequent removal from Australia, the measure significantly interferes with a person's human rights. It is therefore not clear that the measure would in all circumstances constitute a proportionate limitation on rights.

1.50 The committee therefore considers, consistent with its previous findings in relation to substantially similar measures, there is a significant risk that the measure is incompatible with the prohibition on the expulsion of aliens without due process, the rights to freedom of movement, protection of the family and liberty, and were children to be affected by the measure, with the rights of the child. There is also a risk that the measure may not be compatible with Australia's non-refoulement obligations (were it to apply to persons to whom protection obligations are owed) and the prohibition against torture and ill-treatment (were persons to be detained for an indefinite or prolonged period of time).

1.51 Further, the committee notes that this bill passed both Houses of Parliament within three sitting days of introduction.[86] It notes that this short timeframe did not

86 The bill was first introduced in the Senate on 7 February 2023 and finally passed both Houses on 13 February 2023.

provide the committee with adequate time to scrutinise the legislation and seek further information in order to provide appropriate advice to the Parliament as to the human rights compatibility of the bill. This is of particular concern given the significant human rights implications of this bill. The committee draws this matter to the attention of the minister and the Parliament.

Legislative instruments

Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712][1]

Purpose	This legislative instrument amends the Australian Immunisation Rule 2015 to make it mandatory for all vaccination providers to report vaccinations of a person with Japanese encephalitis vaccines to the Australian Immunisation Register
Portfolio	Health and Aged Care
Authorising legislation	*Australian Immunisation Register Act 2015*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate[2]
Rights	Health; privacy

Expansion of requirement to report vaccine information

1.52 This legislative instrument makes amendments to require that all registered vaccination providers must report the administration of a relevant vaccine for the Japanese encephalitis virus (JEV) to the Australian Immunisation Register (AIR). Failure to comply with these reporting requirements is subject to a civil penalty of up to 30 penalty units for each failure to report.[3]

1.53 Vaccination providers must report: the person's Medicare number (if applicable), name, contact details, date of birth, and gender; the provider number, name and contact details of the person who administered the vaccines; and the brand name, dose number and batch number, and date of administration.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Immunisation Register Amendment (Japanese Encephalitis Virus) Rules 2022 [F2022L01712], *Report 2 of 2023*; [2021] AUPJCHR 18.

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 *Australian Immunisation Register Act 2015*, subsections 10A(5) and 10B(3).

4 Australian Immunisation Register Rule 2015, section 9.

International human rights legal advice

Rights to health and privacy

1.54 By adding a new vaccination that must be registered on the AIR, and thereby increasing the ability for the government to enhance the monitoring of vaccine-preventable diseases, and contributing to enriched monitoring and statistics on health related issues, this measure appears to promote the right to health. The right to health is the right to enjoy the highest attainable standard of physical and mental health.[5] It is a right to have access to adequate health care as well as to live in conditions which promote a healthy life (such as access to safe drinking water, housing, food, and a healthy environment).[6]

1.55 However, in requiring vaccination providers to provide personal information about individuals who receive JEV vaccinations, the measure also appears to limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[7] The right to privacy also includes the right to control the dissemination of information about one's private life.

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

1.57 In assessing whether the measure seeks to achieve a legitimate objective, the statement of compatibility states that mandatory reporting of the administration of relevant vaccines for the JEV in Australia will assist in the policy objective of protecting the health of individuals and the community more generally by enhanced monitoring of vaccine preventable disease and vaccine coverage.[8] This would appear to constitute a legitimate objective for the purposes of international human rights law and the measure appears rationally connected to (that is, effective to achieve) that objective.

1.58 When considering whether a limitation on a right is proportionate to achieve the stated objective, it is necessary to consider, among other things, whether there are sufficient safeguards in place to protect the right to privacy and whether there

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

6 UN Economic, Social and Cultural Rights Committee, *General Comment No. 14: the right to the Highest Attainable Standard of Health* (2000) [4]. See also, *General Comment No. 12: the right to food (article 11)* (1999); *General Comment No. 15: the right to water (articles 11 and 12)* (2002); and *General Comment No. 22: the right to sexual and reproductive health* (2016).

7 International Covenant on Civil and Political Rights, article 17. International human rights law also recognises the right of children to be free from arbitrary or unlawful interferences with their privacy. See, Convention on the Rights of the Child, article 16.

8 Statement of compatibility, p. 5.

are other less rights restrictive ways to achieve the stated objective. The statement of compatibility states that the information required to be provided is subject to the secrecy provisions in the *Australian Immunisation Register Act 2015* (AIR Act), which controls the use and disclosure of information stored on the AIR and who can use and disclose this information.[9] It also states that existing privacy provisions in the AIR Act regulate the uploading of personal information or of 'relevant identifying information' for the purposes of including such information in the AIR. Section 23 of the AIR Act provides that it is an offence for a person to record, disclose or use protected information (including personal information) obtained, or derived, under the Act, unless they are authorised to do so. A person is authorised to record, disclose or use protected information if they do so in order to include the information on the Register or to otherwise perform functions under the AIR Act, to disclose the information to a court or coroner, or where authorised to do so under another law.[10] These safeguards assist with the proportionality of the measure.

1.59 However, the AIR Act also includes a broad power for the minister (or their delegate) to authorise a person to use or disclose protected information for a specified purpose where satisfied 'it is in the public interest' to do so.[11] It is not clear why it is necessary for the AIR Act to include this broad discretionary power enabling the disclosure of the personal vaccination information of Australians to 'any person', for any specified purpose, so long as it is considered to be in the (undefined) 'public interest'.

1.60 As set out in earlier analyses of related legislation,[12] empowering the minister to disclose protected information to 'a person' rather than 'a specified class of person', appears to enable disclosure without specifying or limiting the recipients of the information. While a former minister has previously advised the committee that it was not his intention (at that time) to use this power to authorise the disclosure of information regarding vaccinations, as a matter of law the minister is empowered to, at any time, disclose personal information regarding a person's vaccination status to any person for any purpose, if the minister considers it to be in the public interest to do so. Expanding the type of vaccinations required to be reported to the AIR means that this power may now be exercised with respect to a larger volume of information.

1.61 It is difficult to assess the privacy implications of requiring vaccination providers to report information relating to National Immunisation Register

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9 Statement of compatibility, p. 5.

10 *Australian Immunisation Register Act 2015*, section 22.

11 *Australian Immunisation Register Act 2015*, subsection 22(3).

12 Parliamentary Joint Committee on Human Rights, *Thirty-Second Report of the 44th Parliament* (1 December 2015) p. 53; and *Report 4 of 2021* (31 May 2021), and *Report 10 of 2021* (25 August 2021) p. 31–35.

vaccinations to the AIR without knowing the extent to which such information may be disclosed or the purposes for which it may be used. However, noting the existing broad ministerial discretion to authorise the disclosure of this information to any person for any purpose if it is considered to be in the public interest to do so, there is a risk that expanding the range of personal information that may be so disclosed may impermissibly limit the right to privacy.

Committee view

1.62 The committee considers that enabling the government to enhance its monitoring of vaccination coverage of the Japanese encephalitis virus promotes the right to health. However, requiring vaccination providers to provide personal information about individuals who receive such vaccinations also limits the right to privacy.

1.63 The committee considers that monitoring information about vaccination coverage in order to identify health-related issues constitutes a legitimate objective for the purposes of international human rights law and the measure is rationally connected to that objective. In relation to proportionality, the committee notes that while the legislation provides safeguards regarding collection, use and disclosure of personal information, there is a risk that the existing broad ministerial discretion to disclose personal information to 'any person' and for any purpose if it is considered to be 'in the public interest' to do so, does not sufficiently safeguard the right to privacy.

1.64 In order to better respect the right to privacy, the committee has previously recommended,[13] that subsection 22(3) of the *Australian Immunisation Register Act 2015* be amended to provide that:

(a) the minister's power to disclose protected information is to 'a specified class of persons' rather than 'a person';

(b) specific, and limited, purposes for disclosure are set out in the legislation; and

(c) in authorising disclosure the minister must have regard to the extent to which the privacy of any person is likely to be affected by the disclosure.

1.65 The committee seeks the minister's response to this recommendation to amend the *Australian Immunisation Register Act 2015*.

13 Parliamentary Joint Committee on Human Rights, and *Report 4 of 2021* (31 May 2021), and *Report 10 of 2021* (25 August 2021) p. 31–35.

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009][1]

Purpose	This legislative instrument imposes entry requirements on passengers to provide proof of a negative test for Covid-19 taken within a 48-hour period prior to boarding a flight that has commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and ends in Australian territory.
Portfolio	Health and Aged Care
Authorising legislation	*Biosecurity Act 2015*
Disallowance	This legislative instrument is exempt from disallowance (see subsection 44(3) of the *Biosecurity Act 2015*)
Rights	Life; health; freedom of movement; privacy; equality and non-discrimination

Restriction of passengers entering Australia

1.66 This determination sets out entry requirements on passengers on flights that commenced from the People's Republic of China or the Special Administrative Region of Hong Kong or Macau and end in Australian territory. The requirements are to provide proof of a negative test for Covid-19 taken within 48 hours prior to the flight. This requirement does not apply to:

- children less than 12 years old;
- individuals with evidence from a medical practitioner that:
  - (a) they have a medical condition that prevents them from taking a Covid-19 test;
  - (b) it has been at least 7 days since the person has had Covid-19 and they have now recovered, are not considered to be infectious, and have not had a fever or respiratory symptoms in the last 72 hours; or
  - (c) they have a serious medical condition that requires emergency management or treatment in Australia within 48 hours, that is not reasonably available in China, Hong Kong or Macau;

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009], *Report 2 of 2023*; [2023] AUPJCHR 19.

- individuals accompanying and supporting a person who is on an emergency medical evacuation flight;
- individuals granted an exemption by an official in exceptional circumstances (being that the individual provided a compelling reason for not being tested), or flights being granted an exemption in exceptional circumstances;
- class of individuals for whom no test for Covid-19 is reasonably available.

1.67 If a person fails to comply with an entry requirement they may contravene a civil penalty provision of 30 penalty units ($8,250).[2]

Preliminary international human rights legal advice

Rights to life, health, freedom of movement, privacy and equality and non-discrimination

1.68 The explanatory statement does not explain why this determination has been made. However, the provision in the *Biosecurity Act 2015* that empowers the making of this determination states that the section applies for the purpose of preventing a listed human disease (in this case Covid-19) from entering, or establishing itself or spreading in, Australia.[3] As such, if the determination assists in preventing and managing the spread of Covid-19 it may promote and protect the rights to life and health for persons in Australia. The right to life requires the State to take positive measures to protect life.[4] The United Nations (UN) Human Rights Committee has stated that the duty to protect life implies that States parties should take appropriate measures to address the conditions in society that may give rise to direct threats to life, including life threatening diseases.[5]

1.69 The right to health is the right to enjoy the highest attainable standard of physical and mental health.[6] Article 12(2) of the International Covenant on Economic, Social and Cultural Rights requires that States parties shall take steps to prevent, treat and control epidemic diseases.[7] The UN Committee on Economic, Social and Cultural Rights has stated that the control of diseases refers to efforts to:

> make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the

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2 *Biosecurity Act 2015*, section 46.

3 *Biosecurity Act 2015*, section 44.

4 International Covenant on Civil and Political Rights, article 6.

5 See United Nations Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (2019), [26].

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

7 International Covenant on Economic, Social and Cultural Rights, article 12(2)(c).

> implementation or enhancement of immunization programmes and other strategies of infectious disease control.[8]

1.70 While the measure may promote the rights to life and health for persons in Australia, the effect of the measure may mean that persons who cannot produce a negative Covid-19 test may be temporarily banned from entering Australia, including Australian citizens and permanent residents. As such, this engages and may limit a number of other human rights, particularly the rights to freedom of movement and equality and non-discrimination. The right to freedom of movement includes the right to enter, remain in, or return to one's own country.[9] The UN Human Rights Committee has stated that the right of a person to enter his or her own country 'recognizes the special relationship of a person to that country'.[10] The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as long-standing residence and close personal and family ties.[11] The right to freedom of movement is not absolute: limitations can be placed on the right provided certain standards are met. However, the UN Human Rights Committee has stated in relation to the right to enter one's own country:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[12]

1.71 Further, requiring the production of a negative Covid-19 test also engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[13] It also includes the right to control the dissemination of information about one's private life. A private

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8 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (2000) [16].

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

10 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [19].

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

12 UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)* (1999) [21].

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

life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. 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 and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.

1.72 In addition, the measure also appears to engage the right to equality and non-discrimination.[14] This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.[15] The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[16] 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, such as race or nationality.[17] In this case it appears that requiring passengers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test is likely to disproportionately affect persons of Chinese descent. Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[18] Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective

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14 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

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

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

17 *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'.

18 *D.H. and Others v the Czech Republic,* European Court of Human Rights (Grand Chamber), Application no. 57325/00 (2007) [49]; *Hoogendijk v the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[19]

1.73 As this determination is exempt from disallowance by the Parliament, it is not required to be accompanied by a statement of compatibility with human rights.[20] As such, no assessment of the compatibility of this measure with the rights to freedom of movement or equality and non-discrimination has been provided. Further, the explanatory statement provides no explanation as to why this measure has been imposed.

1.74 The Department of Health website states that this measure is part of the government's response to the wave of Covid-19 infections in China and is being implemented to protect Australia from the risk of potential new variants.[21] If the objective of the measure is to protect Australia from the risk of new variants, this would appear to constitute a legitimate objective for the purposes of international human rights law. However, it is not clear that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test would be effective to achieve that objective. In particular, it is not clear that travellers from these countries have a greater likelihood of having new Covid-19 variants.[22]

1.75 It is also necessary to consider whether the measure is proportionate to the objective sought to be achieved. In this respect, it is necessary to consider whether the measure: is sufficiently circumscribed; whether the measure is accompanied by sufficient safeguards; whether there is sufficient flexibility to treat different cases differently; and whether any less rights restrictive alternatives could achieve the same stated objective.

1.76 There are a number of matters that assist with proportionality. In particular, this is not a complete ban on travel to Australia from these countries, rather if an individual has Covid-19 they would need to wait until they were no longer infectious. Further, the instrument sets out a number of exceptions from the requirement, including exceptions based on individual circumstances.

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

20 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

21 Department of Health and Aged Care, Travellers from China, Hong Kong and Macau (accessed 22 February 2023).

22 Noting, on the reported cases available, it appears that there are many other countries, Australia included, that have significantly more reported cases per 100,000 people. See data from John Hopkins University and Medicine, Coronavirus Resource Centre, Covid-19 Dashboard (accessed 22 February 2023).

1.77 However, it is noted that unlike previous measures to control the spread of Covid-19,[23] this instrument does not appear to be time-limited. It commenced on 5 January 2023, and it appears that it is not due to sunset until 1 April 2033 – 10 years after it was made. While it is possible for the minister to repeal the instrument, it is not clear why a shorter time period was not provided for in the instrument, with the minister being required to turn his mind to whether to remake the instrument based on the evidence available at the expiry of this period.

1.78 Noting the lack of any information in the explanatory statement as to why this instrument was made, and the lack of a statement of compatibility, further information is required to assess the compatibility of this measure with the rights to freedom of movement, privacy and equality and non-discrimination.

Committee view

1.79 The committee considers that measures designed to prevent the spread of Covid-19, are likely to promote and protect the rights to life and health, noting that the right to life requires that Australia takes positive measures to protect life, and the right to health requires Australia takes steps to prevent, treat and control epidemic diseases.

1.80 However, the committee notes that requiring only travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia limits the rights to freedom of movement, a private life and equality and non-discrimination. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

1.81 The committee notes that the explanatory statement accompanying this instrument provided no information as to why this measure was considered necessary. The committee also notes that there was no statement of compatibility provided with this instrument. The committee's role is to scrutinise all legislative instruments for compatibility with human rights.[24] There is no legislative requirement that these determinations, which are exempt from the disallowance process, be accompanied by a statement of compatibility.[25] However, the committee

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23 For example, the declaration of the human biosecurity emergency period can only last for three months, see *Biosecurity Act 2015*, section 475. Further, the ban on travel from passengers from India was time limited to 12 days, see Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 [F2021L00533].

24 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 7, provides that the function of the committee is to examine all legislative instruments that come before either House of the Parliament for compatibility with human rights.

25 The *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9, provides that only legislative instruments subject to disallowance under the *Legislation Act 2003* require a statement of compatibility.

has consistently said since the start of the legislative response to the Covid-19 pandemic,[26] that given the human rights implications of legislation regulating the movement of persons, it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility. The committee reiterates that the Department of Health and Aged Care should be providing statements for instruments made under the *Biosecurity Act 2015*, many of which can have a profound effect on human rights.

1.82 The committee considers further information is required to assess the compatibility of this measure with the rights to freedom of movement, privacy and equality and non-discrimination, and as such seeks the minister's advice in relation to:

(a) what is the objective behind requiring travellers from China, Macau and Hong Kong to show evidence of a negative Covid-19 test before entering Australia;

(b) how is requiring only travellers from China, Macau and Hong Kong to show such evidence rationally connected to – that is, effective to achieve – that objective;

(c) whether persons of Chinese descent will be disproportionately affected by this requirement, and if so, is this differential treatment based on reasonable and objective criteria;

(d) whether there is any less rights restrictive way to achieve the stated aims of preventing and controlling the entry, emergence, establishment or spread of Covid-19 into Australia; and

(e) why this instrument is not time-limited, but is due to sunset ten years from the date it was made.

26 The committee first stated this in Parliamentary Joint Committee on Human Rights, *Report 5 of 2020: Human rights scrutiny of COVID-19 legislation*, 29 April 2020. The committee also wrote to all ministers advising them of the importance of having a detailed statement of compatibility with human rights for all COVID-19 related legislation in April 2020 (see media statement of 15 April 2020, available on the committee's website).

Federal Court Legislation Amendment Rules 2022 [F2023L00033][1]

Purpose	This legislative instrument amends the Federal Court Rules 2011, Federal Court (Criminal Proceedings) Rules 2016, Federal Court (Bankruptcy) Rules 2016, and Federal Court (Corporations) Rules 2000 to provide updates to references to rules, regulations and the Federal Circuit and Family Court of Australia. It clarifies the transfer of proceedings to and from the Federal Circuit and Family Court of Australia (Division 2).
Portfolio	Attorney-General
Authorising legislation	*Federal Court of Australia Act 1976*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 6 February 2023). Notice of motion to disallow must be given by 23 March 2023 in the House and by 29 March 2023 in the Senate[2]
Right	Freedom of expression

Access to court documents

1.83 These rules provide that a person who is not a party to a Federal Court proceeding cannot inspect certain court documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).[3]

1.84 This applies to documents such as originating applications; pleadings; statements of agreed facts; judgments or orders of court; notices of appeal; and reasons for judgment.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court Legislation Amendment Rules 2022 [F2023L00033], *Report 2 of 2023*; [2023] AUPJCHR 20.

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 Schedule 1, item 4.

4 See Federal Court Rules 2011, subrule 2.32(2).

Preliminary international human rights legal advice

Right to freedom of expression

1.85 Restricting access to court documents, which journalists may use to help them accurately report on cases before the Federal Court, engages and limits the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[5] The United Nations (UN) Human Rights Committee has noted the important status of this right under international human rights law.[6]

1.86 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[7] A free, uncensored and unhindered press is essential to ensure freedom of opinion and expression, and the enjoyment of other civil and political rights.[8]

1.87 The right to freedom of expression also includes 'a right of access to information held by public bodies'[9] and according to the UN Human Rights Committee:

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[10]

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

6 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3]. The UN Human Rights Committee stated that: 'Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.

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

8 UN Human Rights Committee*, General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [13].

9 UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [18].

10 UN Human Rights Committee, *General Comment 34, Article 19: Freedom of opinions and expression* (12 September 2011) [19].

1.88 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others,[11] national security,[12] public order, or public health or morals.[13] Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.[14]

1.89 In determining whether limitations on the right to freedom of expression are proportionate, the UN Human Rights Committee has noted that restrictions on freedom of expression must not be overly broad.[15]

1.90 The statement of compatibility accompanying the instrument does not identify that this right is engaged, and the explanatory statement provides no information as to why this amendment was considered necessary. As such, it is not possible to assess whether the measure seeks to achieve a legitimate objective, and if there are any safeguards in place that would assist with the proportionality of the measure.

Committee view

1.91 The committee notes that restricting access to certain court documents prior to a hearing, including access by journalists, engages and limits the right to freedom of expression. The committee considers further information is required to assess the compatibility of this measure with this right, and as such seeks the Chief Justice's advice in relation to:

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11 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

12 Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

13 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

14 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

15 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34].

(a) what is the objective behind preventing people who are not parties to a proceeding from inspecting certain documents in the proceeding until after the first directions hearing or the hearing;

(b) is restricting such access likely to be effective to achieve that objective; and

(c) is this a proportionate way to achieve that objective. In particular, are there any safeguards in place or any less rights restrictive ways to achieve the objective (for example, allowing non-parties to apply for access; allowing decisions to be made on a case-by-case basis).