



Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 6 of 2024

24 July 2024

© Commonwealth of Australia 2024

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823

Email: human.rights@aph.gov.au

Website: http://www.aph.gov.au/joint_humanrights/

This report can be cited as: Parliamentary Joint Committee on Human Rights, *Report 6 of 2024*; [2024] AUPJCHR 39

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Mr Josh Burns MP, Chair	Macnamara, Victoria, ALP
Mr Henry Pike MP, Deputy Chair	Bowman, Queensland, LNP
Senator Lisa Darmanin	Victoria, ALP
Senator Matt O'Sullivan	Western Australia, LP
Ms Alicia Payne MP	Canberra, Australian Capital Territory, ALP
Mr Graham Perrett MP	Moreton, Queensland, ALP
Senator Gerard Rennick	Queensland, LNP
Senator David Shoebridge	New South Wales, AG
Senator Jana Stewart	Victoria, ALP
Senator Lidia Thorpe	Victoria, IND
Ms Kylea Tink MP	North Sydney, New South Wales, IND

Secretariat

Charlotte Fletcher, Committee Secretary
Rebecca Preston, Principal Research Officer
Rashmi Chary, Legislative Research Officer

Committee legal adviser

Associate Professor Jacqueline Mowbray

Contents

Membership of the committee.....	iii
Committee information.....	vi
Report snapshot.....	1
Chapter 1 : New and ongoing matters	10
Bill	10
Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024	10
Legislative instrument	16
Telecommunications (Interception and Access) (Criminal Law-Enforcement Agency—ACT Integrity Commission) Declaration 2024.....	16
Chapter 2 : Concluded matters	25
Legislative instrument	25
Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024	25

Committee information

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

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.¹ The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.²

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

¹ International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

² See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).

Report snapshot¹

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

Bills

Chapter 1: New and continuing matters

Bills introduced 24 June to 4 July 2024	22
Bills substantively commented on in report ²	1
Private members or senators' bills that may engage and limit human rights	2

Chapter 2: Concluded

Bills committee has concluded its examination of following receipt of ministerial response	0
--	---

Commission of Inquiry into Antisemitism at Australian Universities Bill 2024 (No. 2)

The committee notes that this non-government bill is intended to prevent antisemitism from occurring at Australian universities, which may promote a number of human rights. The committee also notes that the bill appears to engage and may limit human rights to the extent that the bill applies the powers in the *Royal Commissions Act 1902*. The committee has previously recommended that a foundational assessment of the human rights compatibility of the *Royal Commissions Act 1902* be conducted. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

Communications Legislation Amendment (Regional Broadcasting Continuity) Bill 2024

No comment

¹ This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 6 of 2024*; [2024] AUPJCHR 40.

² The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

COVID-19 Response Commission of Inquiry Bill 2024

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024

No comment

Customs Licensing Charges Amendment Bill 2024

No comment

Digital ID Repeal Bill 2024

No comment

Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamation) Bill 2024

No comment

Future Made in Australia (Omnibus Amendments No. 1) Bill 2024

No comment

Future Made in Australia Bill 2024

No comment

Governor-General Amendment (Salary) Bill 2024

No comment

Interactive Gambling Amendment (Ban on Gambling Advertisements) Bill 2024

No comment

Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024

No comment

National Housing and Homelessness Plan Bill 2024

No comment

National Housing and Homelessness Plan Bill 2024 (No. 2)

No comment

Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024

No comment

Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024

No comment

Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024

No comment

Telecommunications Amendment (SMS Sender ID Register) Bill 2024

No comment

Treasury Laws Amendment (Build to Rent) Bill 2024

No comment

Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) Bill 2024

No comment

Truth and Justice Commission Bill 2024

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024

Advice to Parliament

Contempt offences

Rights to freedom of assembly and freedom of expression

The bill would provide that a person commits an offence if they engage in certain conduct with respect to the Veterans' Review Board (the Board), including if they insult another person in the exercise of that person's functions under the *Military Rehabilitation and Compensation Act 2004*; interrupt the proceedings of the Board; create, or take part in creating or continuing, a disturbance in or near a place where the Board is sitting; and engage in conduct that would constitute contempt of a court. These offences would be punishable

by six months imprisonment. Prohibiting a person from engaging in this type of conduct engages and may limit the rights to freedom of assembly and freedom of expression. These rights protect the right of people to peacefully assemble to collectively express their views, including by way of public protest, even where such expression may be regarded as deeply offensive or insulting (subject to specific limitations placed on these rights under international human rights law).

The committee considers that while the objective of promoting the effective operation of the Board is important, it is not clear that this objective is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. The committee considers there to be a risk that the offences are framed so broadly that they may criminalise legitimate conduct that would otherwise be protected under international human rights law, and notes that there appears to be a less rights restrictive way to achieve the stated objective. The committee therefore considers that the measure risks disproportionately limiting the rights to freedom of expression and assembly. The committee has recommended amendments to the bill to assist with the proportionality of the measure.

Legislative instruments

Chapter 1: New and continuing matters

Legislative instruments registered on the Federal Register of Legislation between 21 May to 20 June 2024 ³	143
Legislative instruments substantively commented on in report ⁴	1

Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response	1
--	---

Australian Passports Amendment (2024 Measures No. 1) Determination 2024

This instrument amends the Australian Passports Determination 2015 to specify to whom, and the purposes for which, the minister may disclose certain kinds of information. In particular, the minister may disclose specified kinds of information relating to a person's Australian travel document, including a person's biometric and biographical information, to any person receiving the information on behalf of a requesting party for the purposes of participating in the Document Verification Service (DVS) or the Face Verification Service (FVS) to share or match information relating to the identity of a person. These verification services are 1:1 matching services that verify the identity of a person by comparing either biographical information (such as a name or date of birth) or face-matching service information (such as a facial image) contained in a specimen document against information contained in a government identification document (such as a passport).

In [Reports 11](#) and [12 of 2023](#), the committee commented on the *Identity Verification Services Bill 2023* and the *Identity Verification Services (Consequential Amendments) Bill 2023* (now Acts), which established a federal legislative framework to support the operation of these identity verification services. The committee considered that while these bills pursued legitimate objectives, the identity verification facilities and services may not represent a proportionate limit on the right to privacy.

³ The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, use the advanced search function on the [Federal Register of Legislation](#), and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above.

⁴ Unless otherwise indicated, the committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

While there are important safeguards accompanying the services, they rely on safeguards contained in other legislation, including state and territory legislation. The committee noted that without a comprehensive review of the broader legislative framework governing the identity verification facilities and services, it was not possible to conclude whether the safeguards contained in this other legislation were sufficient to protect the right to privacy for the purposes of international human rights law. The committee also considered that if an impermissible limit on the right to privacy did occur, it was not clear that an individual would have access to an effective remedy with respect to any such violation, as access to a remedy depends on the individual being notified of the breach. With respect to the right to equality and non-discrimination, the committee noted that it was not clear whether there were sufficient safeguards to mitigate the risk of data verification errors that may disproportionately impact certain groups (on the basis of racial identity) and lead to discriminatory decisions. The committee recommended that a comprehensive government review of all legislation governing the identity verification facilities and services would assist with proportionality.

Insofar as this instrument provides a legal basis for the minister to disclose personal information, including biometric information, for the purposes of participating in the DVS and FVS, these same human rights concerns apply. The committee therefore draws to the attention of the Parliament and the Attorney-General its previous comments in [Reports 11](#) and [12 of 2023](#) and reiterates its previous recommendation that a comprehensive governmental review of all legislation governing the identity verification facilities and services would assist with proportionality.

Identity Verification Services Rules 2024

This instrument prescribes various matters for the purposes of the *Identity Verification Services Act 2023* (IVS Act), which, along with the *Identity Verification Services (Consequential Amendments) Act 2023*, established a federal legislative framework to support the operation of identity verification services. The IVS Act requires that all entities accessing identity verification services must be a party to a participation agreement, which in themselves contain several safeguards with respect to the right to privacy. Under section 9 of the IVS Act, parties to a participation agreement must be subject to privacy legislation or agree to comply with the Australian Privacy Principles (APPs), or otherwise be a government authority prescribed by the rules. This instrument prescribes the Australian Security Intelligence Organisation and Australian Secret Intelligence Service for the purposes of this section, the effect being that these intelligence agencies can be a party to a participation agreement and therefore access identity verification services despite not being subject to privacy legislation or agreeing to comply with the APPs.

The committee considered the Identity Verification Services Bill 2023 and the Identity Verification Services (Consequential Amendments) Bill 2023 (now Acts) in [Reports 11](#) and [12 of 2023](#). With respect to the limitation on the right to privacy, the committee noted that participation agreements were a key safeguard, particularly the requirement that parties must be subject to and comply with privacy legislation. By not subjecting intelligence agencies to this requirement, this instrument weakens the overall value of this safeguard. The committee previously concluded that there was a risk that the identity verification facilities and services impermissibly limited the right to privacy and that it was unclear whether there would be an effective remedy with respect to any such violation, as access to a remedy depends on the individual being notified of the breach. The committee notes that additional privacy safeguards were legislated for in the Senate. The committee retains its broader human rights concerns with respect to the identity verification facilities and services and draws these concerns to the attention of the Parliament and the Attorney-General in the context of this instrument.

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024

*Advice to Parliament***Code of behaviour***Multiple rights*

This legislative instrument specifies an enforceable code of behaviour which applies to some applicants for the Subclass 050 (Bridging (General)) Visa (BVE), for the purposes of Public Interest Criterion 4022. This applies to unauthorised maritime arrivals to Australia. Requiring certain BVE holders to sign an enforceable code of behaviour, and subsequently enforcing the code (which may result in visa cancellation and subsequent immigration detention or reduction in social security benefits) engages and may limit numerous rights.

The committee notes that this measure replaces the previous such legislative instrument (made in 2013), and will operate for 12 months pending further consultation and review. The committee notes the minister's advice that the code is intended to draw a visa holder's attention to the types of behaviours which could cause them to fail the existing character cancellation framework in the Migration Act 1958. However, the committee notes the minister's advice that the code has not been used to cancel a person's visa since it was introduced in 2010, and that any such enforcement action would be taken under other existing enforcement measures in the migration legislative framework in practice. The committee also notes the minister's advice that, while no person has had financial payments reduced because of their visa being cancelled pursuant to this measure, they are unable to advise whether a person's financial payment may have been otherwise reduced for a breach of the code. The committee considers that, as it is not clear when a person may be regarded as breaching the code, how a reduction in financial assistance would be calculated and whether an affected person would still be able to meet their basic needs, there is a risk that such enforcement activity would constitute an impermissible limit on the rights to social security or an adequate standard of living.

In addition, the committee considers that it is not clear that the code satisfies the quality of law test (as many of the terms used are vague and it is unclear when a person may engage in conduct which would breach the code). The committee considers that, as no information has been provided to demonstrate that these BVE holders present a particular risk to community safety, it is not clear that the measure is directed towards a legitimate objective (being one which is pressing and substantial enough to warrant limiting rights). The committee considers that it is unclear why the code of behaviour is required to be enforceable if it has not been enforced in practice, and noting that it replicates other enforcement powers which are already available. The committee considers that this raises questions as to whether the code has been shown to be rationally connected (that is, capable of

achieving) the stated objective, or constitutes the least rights restrictive means by which to achieve its stated objective.

Consequently, the committee considers that there is a significant risk that the imposition of the code of behaviour, and corresponding enforcement action, may constitute an impermissible limit on multiple human rights. Further, the committee considers that there is a significant risk that the measure, which applies primarily to nationals of Sri Lanka and Iran in practice, constitutes an impermissible limit on the right to equality and non-discrimination. The committee has recommended that: in the event the minister enforces the code that they consider the committee's concerns, and human rights implications of the instrument; and the current review of the code give close consideration of its comments, and draws these concerns to the attention of the minister and the Parliament.

Online Safety (Basic Online Safety Expectations) Amendment Determination 2024

The *Online Safety Act 2021* empowers the minister to determine the basic online safety expectations for service providers (including social media services, designated internet services and relevant electronic services). The Online Safety (Basic Online Safety Expectations) Determination 2022 set out basic online safety expectations for these services. This legislative instrument amends that determination, imposing additional online safety expectations, and amending existing expectations, including the expectation that a service provider 'will take reasonable steps to ensure that technological or other measures are in effect to prevent access by children to class 2 material provided on the service' including by implementing age assurance mechanisms. While these expectations do not impose a legally enforceable duty on service providers, they may be required to report on their compliance.

The committee commented on the Online Safety (Basic Online Safety Expectations) Determination 2022 in [Report 2 of 2022](#). In particular, it considered that, while restricting children's access to material on the internet that may be harmful to them is likely to promote the rights of the child, implementing access control measures, which include a requirement to verify the age of the person accessing content on the internet is also likely to limit a number of rights, particularly the rights to privacy and freedom of expression. It considered that it was not clear that the Online Safety legislative framework (including the determination) constituted a proportionate limit on these human rights. The committee reiterates those comments in relation to this legislative instrument, and draws its concerns to the attention of the minister and the Parliament.

Telecommunications (Interception and Access) (Criminal Law-Enforcement Agency—ACT Integrity Commission) Declaration 2024

Advice to Parliament

Access to stored communications and telecommunications data by ACT Integrity Commission staff

Right to privacy

This instrument declares the ACT Integrity Commission (the Commission) to be a 'criminal law-enforcement agency' and each staff member of the Commission to be 'officers' for the purposes of the *Telecommunications (Interception and Access) Act 1979* (TIA Act). The effect of this declaration is that officers of the Commission can access (via a warrant) stored communications in respect of a person

(that is, the contents of communication sent via telecommunications systems, such as messages and emails) as well as telecommunications data (that is, information about a communication, such as the phone number and length of call). By authorising the Commission to access this data, the declaration engages and limits the right to privacy.

While accessing communications data to identify and investigate alleged corrupt conduct would likely constitute a legitimate objective, the committee considers that it has not been clearly established that there is a pressing and substantial concern that warrants the Commission having direct access to telecommunications data (rather than partnering with the police, who already have the power to access this information). The committee notes that the measure is broadly framed and not limited only to those officers that require access to the data, and that the safeguards accompanying the measure do not appear to be sufficient to ensure that any limitation on privacy is proportionate. The committee therefore considers that there is a significant risk that this declaration does not constitute a permissible limitation on the right to privacy, and recommends amending the declaration to specify only those staff members who require access to telecommunications data to be officers for the purposes of the TIA Act. The committee recommends that the statement of compatibility be updated having regard to its analysis and otherwise draws these concerns to the attention of the Attorney-General and the Parliament.

Chapter 1

New and ongoing matters

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

Bill

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024⁷

Purpose	This bill seeks to simplify and harmonise the legislative framework governing veterans' entitlements, rehabilitation and compensation arrangements by providing for all claims for compensation and rehabilitation received from 1 July 2026 to be determined under the <i>Military Rehabilitation and Compensation Act 2004</i> and by closing new claims for compensation under the <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1998</i> and <i>Veterans' Entitlements Act 1986</i>
Portfolio	Veterans' Affairs
Introduced	House of Representatives, 3 July 2024
Rights	Freedom of assembly; freedom of expression

Contempt offences

1.2 The bill would provide that a person commits an offence if they engage in certain conduct with respect to the Veterans' Review Board (the Board), including if they:

- insult another person in, or in relation to, the exercise of the other person's powers or functions under Part 4 of the *Military Rehabilitation and*

⁷ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024, *Report 6 of 2024*; [2024] AUPJCHR 41.

Compensation Act 2004,⁸ which relates to review of original determinations by the Board;⁹

- interrupt the proceedings of the Board;
- create, or take part in creating or continuing, a disturbance in or near a place where the Board is sitting; and
- engage in conduct that, if the Board were a court of record, would constitute a contempt of that court.¹⁰

1.3 The offences would be punishable by imprisonment for six months. By way of background, the Board is a specialist tribunal that reviews original determinations of the Military Rehabilitation and Compensation Commission or the Chief of the Defence Force, namely decisions relating to veterans' entitlements and compensation.

International human rights legal advice

Rights to freedom of assembly and expression

1.4 Prohibiting a person from engaging in insulting conduct, interrupting the proceedings of the Board or creating, or taking part in creating or continuing, a disturbance in or near a place where the Board is sitting, engages and may limit the right to freedom of assembly and the right to freedom of expression. The right to freedom of assembly provides that all people have the right to peaceful assembly.¹¹ It protects the right of individuals and groups to meet, gather and engage in peaceful protest and other forms of collective activity in public. The right to peaceful assembly is strongly linked to the right to freedom of expression, as it is a means for people to collectively express their views. The right to freedom of expression 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.¹² The right extends to the communication of information or ideas through any medium, including oral communication and public protest. The right embraces expression that may be regarded as deeply offensive and insulting, subject to the limitations placed on this right in the International Covenant on Civil and Political

⁸ Schedule 3, Part 1, item 10 would repeal and substitute Part 4 of the *Military Rehabilitation and Compensation Act 2004* to extend the Board's jurisdiction to include certain decisions under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1998* and *Veterans' Entitlements Act 1986*.

⁹ Schedule 3, Part 1, item 10, section 352A would provide that a claimant may make an application to the Board for review of an original determination. Section 345 of the *Military Rehabilitation and Compensation Act 2004* defines 'original determination' as a determination of the Commission under the Act or a determination of the Chief of the Defence Force under the Act that relates to rehabilitation for a person.

¹⁰ Schedule 3, Part 1, item 10, section 353L.

¹¹ International Covenant on Civil and Political Rights, article 21.

¹² International Covenant on Civil and Political Rights, article 19(2).

Rights.¹³ The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.¹⁴ These rights may be subject to permissible limitations that are necessary to pursue certain legitimate objectives, namely to protect the rights or reputations of others, national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law and be rationally connected and proportionate to the legitimate objective.

1.5 The statement of compatibility does not acknowledge that these human rights are engaged and so provides no assessment as to the compatibility of the measure with these rights. The explanatory memorandum states that the contempt offences are based on section 170 of the *Veterans' Entitlements Act 1986*. It states that the policy intent of these provisions is to promote the effective operation of the Board.¹⁵ While promoting the effective operation of the Board is capable of constituting a legitimate objective in general, it must also be demonstrated that this objective is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. In this regard, it is not clear that insulting a person or creating a disturbance near a place where the Board is sitting would necessarily prevent the Board from exercising their powers or undertaking their functions such that the Board was unable to effectively operate. Noting the important status of the right to freedom of expression under international human rights law and its protection of insulting expression,¹⁶ it is not clear that insulting a person or creating a disturbance near a place where the Board is sitting would necessarily prevent the Board from exercising their powers or undertaking their functions such that there would be a pressing and substantial need to deter these activities.

1.6 In assessing proportionality, a relevant consideration is the breadth of the measure. The proposed offences capture a broad scope of conduct, including conduct that is insulting or that creates a disturbance near a place where the Board is sitting. Neither of the terms 'insult' or 'disturbance' are defined in the bill, nor is their meaning

¹³ UN Human Rights Committee, General Comment No. 34, *Article 19: Freedoms of opinion and expression* (2011) [11] and [38]. This is subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights. Article 19(3) states that the right to freedom of expression carries with it special duties and responsibilities, and may be subject to restrictions but only such that are provided by law and are necessary for respecting the rights or reputations of others, or to protect national security, public order, public health or morals. Article 20 provides any propaganda for war, and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.

¹⁴ UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27* (2011) [37].

¹⁵ Explanatory memorandum, p. 65.

¹⁶ UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression* (2011) [2]–[3].

addressed in the explanatory materials. By framing the offences so broadly, there appears to be a risk that the provisions may criminalise legitimate criticism of, or objection to, the Board and its proceedings, and legitimate protests in or near buildings within which a proceeding was being held, including protests that do not prevent the Board from carrying out its functions, and may be unrelated to the operation of the Board. It is also not clear why it is necessary to make it an offence to insult a person, interrupt a proceeding or create a disturbance in or near the Board in light of the specific contempt offence in the bill, which makes it an offence to engage in conduct that would constitute a contempt of a court of record.¹⁷ A contempt of court includes conduct that interferes with or undermines the authority, performance or dignity of the courts, including abusing and swearing at a magistrate, refusing to leave the court when directed and disobeying court orders.¹⁸ As such, there appears to be overlap between the specific contempt offence and the other proposed offences of insulting a person, interrupting Board proceedings and creating a disturbance. It is therefore not clear why the specific contempt offence alone is not sufficient to address conduct that may disrupt or interfere with the effective operation of the Board. As drafted, the proposed offences do not appear to be sufficiently circumscribed, and do not appear to be the least rights restrictive way to achieve the stated objective. As such, these provisions risk disproportionately limiting the rights to freedom of expression and assembly.

Committee view

1.7 The committee notes that proposed section 353L of the bill would make it an offence, punishable by six months imprisonment, to insult a person in relation to the exercise of that person's powers or functions under *the Military Rehabilitation and Compensation Act 2004*; interrupt proceedings of the Veterans' Review Board (the Board); create a disturbance in or near a place where the Board is sitting; or engage in conduct that would constitute a contempt of court. The committee considers that this engages and limits the rights to freedom of assembly and expression.

1.8 The committee notes that the statement of compatibility does not acknowledge that this measure limits these rights and so provides no assessment as to whether the limitations are permissible. The committee notes that the purpose of the measure is to promote the effective operation of the Board. While the committee considers this to be an important objective, particularly in light of the important role the Board plays in reviewing decisions about veterans' entitlements and compensation, it is not clear that this objective is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting rights. The committee considers there to be a risk that the offences are framed so broadly that they may criminalise legitimate conduct that would otherwise be

¹⁷ Schedule 3, Part 1, item 10, subsection 353L(5).

¹⁸ Judicial Commission of New South Wales, *Local Court Bench Book* (November 2019) [48-020].

protected under international human rights law, such as peaceful protest (including protests not related to the Board) and legitimate criticism of the Board. The committee further considers that the measure is not drafted in the least rights restrictive way to achieve the stated objective, noting that there appears to be overlap between each offence. The committee therefore considers that the measure risks disproportionately limiting the rights to freedom of expression and assembly.

1.9 The committee notes that it has previously reached similar conclusions with respect to contempt offences in other legislation.¹⁹ Most recently, in considering contempt offences in the National Anti-Corruption Commission Bill 2022 (now Act), the committee recommended amending the relevant provision to remove the paragraphs that made it a contempt to use insulting language or create a disturbance near a Commission hearing (given that it was also a contempt to disrupt a hearing or obstruct or hinder a Commission staff member in performing their functions).²⁰ The Government subsequently advised the committee that it would amend the relevant provision to remove the paragraph that made it a contempt to create a disturbance near a hearing.²¹ The committee considers that a similar approach can be adopted with respect to this bill without frustrating its legislative purposes.

Suggested action

1.10 The committee considers the proportionality of this measure may be assisted were the bill amended to:

- (a) remove proposed subsections 353L(1) to (4) (which would remove all offences except the contempt of Board offence in subsection 353L(5), which captures much of the conduct targeted in the other offences) or,

¹⁹ The committee has historically raised repeated concerns regarding the compatibility of similar contempt provisions relating to Royal Commissions (and other bodies invested with the powers of Royal Commissions) and has recommended their amendment. See, for example, Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], [Thirty-Eighth Report of the 44th Parliament](#) (3 May 2016) pp. 21-26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, [Report 6 of 2017](#) (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, [Report 4 of 2017](#) (9 May 2017) pp. 42-45; Commission of Inquiry (Coal Seam Gas) Bill 2017, [Report 11 of 2017](#) (17 October 2017) pp. 51-52; Murray-Darling Basin Commission of Inquiry Bill 2019, [Report 2 of 2019](#) (12 February 2019) pp. 131-135; National Integrity Commission Bill 2018, National Integrity Commission Bill 2018 (No. 2) and National Integrity (Parliamentary Standards) Bill 2018, [Report 2 of 2019](#) (12 February 2019), pp. 136-145; National Integrity Commission Bill 2018 (No. 2) and National Integrity Commission Bill 2019, [Report 6 of 2019](#) (5 December 2019), pp. 99-116.

²⁰ Parliamentary Joint Committee on Human Rights, [Report 5 of 2022](#) (20 October 2022) pp. 17-20.

²¹ Parliamentary Joint Committee on Human Rights, [Report 6 of 2022](#) (24 November 2022) p. 79. The relevant paragraph omitted was section 82(e) of the *National Anti-Corruption Commission Act 2022*.

at a minimum, remove proposed subsections 353L(3) and (4) (which make it an offence to create, or take part in creating or continuing, a disturbance in or near a place where the Board is sitting); and

- (b) provide that the conduct that each offence seeks to criminalise must reach such a level that the Board is effectively unable to operate.

1.11 The committee recommends that the statement of compatibility be updated to provide an assessment of the compatibility of the measure with the rights to freedom of assembly and freedom of expression.

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

Legislative instrument

Telecommunications (Interception and Access) (Criminal Law-Enforcement Agency—ACT Integrity Commission) Declaration 2024²²

FRL No.	F2024L00646
Purpose	This declaration declares the ACT Integrity Commission to be a criminal law-enforcement agency and its staff members to be officers under subsection 110A(3) of the <i>Telecommunications (Interception and Access) Act 1979</i> to enable it to access stored communications and telecommunications data
Portfolio	Attorney-General's Department
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Disallowance	15 sitting days after tabling (tabled in the House of Representatives on 24 June 2024). Notice of motion to disallow must be given by 22 August 2024 in the House ²³
Right	Privacy

Access to stored communications and telecommunications data by ACT Integrity Commission staff

1.13 This instrument declares the ACT Integrity Commission (the Commission) to be a 'criminal law-enforcement agency' and each staff member of the Commission to be 'officers' for the purposes of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).²⁴ The declaration is subject to the condition that officers of the Commission may not exercise powers under the TIA Act with respect to any preliminary inquiries conducted by the Commission.²⁵

1.14 Declaring the Commission to be a 'criminal law-enforcement agency' means that an officer of the Commission can apply for a stored communications warrant in

²² This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Telecommunications (Interception and Access) (Criminal Law-Enforcement Agency—ACT Integrity Commission) Declaration 2024, Report 6 of 2024*; [2024] AUPJCHR 42.

²³ In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

²⁴ Section 3.

²⁵ Section 4. Under section 86 of the *Integrity Commission Act 2018* (ACT), the Commission may carry out a preliminary inquiry to decide whether to dismiss, refer or investigate a corruption report.

order to access stored communications in respect of a person.²⁶ Stored communication refers to the contents of communications sent via telecommunications systems, such as messages and emails, that are stored by the telecommunications provider or carrier and cannot be accessed by a person who is not a party to the communication without the assistance of the provider.²⁷ Additionally, the TIA Act provides that authorised officers of an enforcement agency can access and disclose telecommunications data for the purposes of enforcing the criminal law or a law imposing a pecuniary penalty, or for the protection of public revenue.²⁸ An enforcement agency includes a criminal law-enforcement agency, meaning that officers of the Commission would also be able to access telecommunications data.²⁹ Telecommunications data is information about a communication – such as the phone number and length of call or email address from which a message was sent and the time it was sent – but does not include the content of the communication.³⁰ The effect of this declaration is therefore to authorise officers of the Commission to access stored communications, via a warrant, and telecommunications data.

International human rights legal advice

Right to privacy

1.15 Insofar as the effect of this declaration is to enable officers of the Commission to access stored communications and telecommunications data, the right to privacy is engaged and limited. This is acknowledged in the statement of compatibility.³¹ 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.³² It also includes the right to control the dissemination of information about one's private life. The type of information protected includes substantive information contained in communications as well as metadata.³³ Stored communications and telecommunications data reveals highly personal information

²⁶ *Telecommunications (Interception and Access) Act 1979*, sections 110 and 110A.

²⁷ *Telecommunications (Interception and Access) Act 1979*, section 5 defines 'stored communication' as communication that is not passing over a telecommunications system; and is held on equipment that is operated by, and is in the possession of a carrier; and cannot be accessed on that equipment by a person who is not a party to the communication without the assistance of an employee of the carrier. See also explanatory statement, [4].

²⁸ *Telecommunications (Interception and Access) Act 1979*, Part 4.1, Division 4.

²⁹ *Telecommunications (Interception and Access) Act 1979*, paragraph 176A(1)(a).

³⁰ *Telecommunications (Interception and Access) Act 1979*, section 172. See also explanatory statement, [6].

³¹ Statement of compatibility, p. 7.

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

³³ UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [6].

about an individual, including the content of messages, who a person is in contact with, how often and where. The Commission will also be able to access information not only in relation to the person to whom the warrant applies, but also anyone in contact with them. The United Nations (UN) High Commissioner for Human Rights has stated that the generation and collection of data relating to a person's identity, family or life as well as the examination or use of that information, interferes with the right to privacy, as the individual loses some control over information that could put his or her privacy at risk.³⁴ 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.

1.16 The Parliamentary Joint Committee on Human Rights has previously commented on similar declarations that declared the NSW Department of Communities and Justice to be an enforcement agency, and each staff member of Corrective Services NSW to be an officer for the purposes of the TIA Act.³⁵ The committee concluded that these declarations were not compatible with the right to privacy as the necessity of the power had not been established, noting that all other corrective services agencies access telecommunications data via the police, and the power was insufficiently defined, noting that as a matter of law thousands of employees could access the data. The committee recommended that at a minimum the declaration be amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the TIA Act.³⁶ As this declaration enables the Commission to not only access telecommunications data but also stored communications, these same human rights concerns apply and are set out below.

Legitimate objective

1.17 The statement of compatibility notes that the Commission is responsible for investigating alleged and actual serious and systemic corrupt conduct within the ACT public sector and providing support for the prosecution of these crimes by territory and Commonwealth prosecution authorities.³⁷ It states that in furthering the Commission's ability to combat corruption, the declaration addresses the objectives of national security and public order.³⁸

1.18 In general terms, national security and public order have been recognised as being capable of constituting legitimate objectives for the purposes of international

³⁴ UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [13].

³⁵ See Parliamentary Joint Committee on Human Rights, [Report 5 of 2024](#) (26 June 2024) p. 8; [Report 8 of 2023](#) (20 August 2023) pp. 181–189; and [Report 6 of 2023](#) (14 June 2023) pp. 39–44.

³⁶ Parliamentary Joint Committee on Human Rights, [Report 8 of 2023](#) (20 August 2023) p. 189.

³⁷ Statement of compatibility, p. 7.

³⁸ Statement of compatibility, p. 8.

human rights law. However, it is not clear that investigating alleged corrupt conduct within the ACT public sector would be such a serious criminal offence as to amount to a genuine threat to national security. The former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression raised concerns with respect to the use of ‘[v]ague and unspecified notions of “national security”’ as a ‘justification for the interception of and access to communications in many countries’.³⁹ The UN High Commissioner for Human Rights has also cautioned that ‘[v]ague and overbroad justifications, such as unspecific references to “national security” do not qualify as adequately clear laws’.⁴⁰

1.19 In this regard, the explanatory materials cite national security as a justification for the Commission accessing communications data, but do not articulate the specific national security threat which the measure seeks to address or identify how corrupt conduct by territory public servants poses a genuine risk to national security (or public order). It is therefore not clear that the stated objectives of national security and public order would be legitimate in the context of this specific measure. However, accessing communications in order to identify and investigate alleged corrupt conduct would itself appear capable of constituting a legitimate objective for the purposes of international human rights law.⁴¹

1.20 It must also be demonstrated that there is a pressing and substantial concern which gives rise to the need for the specific measures. The statement of compatibility states that telecommunications data is vital in establishing the ownership or location of mobile phones used to commit offences, and stored communications may disclose criminal or corrupt conduct. It states that accessing this information would assist the Commission to better identify, investigate and prevent serious and systemic corrupt conduct within the ACT public sector and would ensure any criminal offences are appropriately detected and prosecuted. More specifically, the explanatory statement states that accessing this information would increase the Commission’s capacity to

³⁹ UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40* (2013) [58]. They described national security as an amorphous concept, which is broadly defined, and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists (at [60]). They cautioned that inadequate national legal frameworks with respect to accessing and using communications data on the ground of national security ‘create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression’ (at [3]).

⁴⁰ UN High Commissioner for Human Rights, *The Right to privacy in the digital age, A/HRC/39/29* (2018) [35].

⁴¹ Some human rights contained in the International Covenant on Civil and Political Rights may be restricted only in particular circumstances, including where it is necessary for national security or public order (for example, the right to freedom of movement). That restricted limitation does not apply to the right to privacy under article 17 of the ICCPR. See, ICCPR, articles 12-14; 19; and 21-22.

gather and analyse relevant information and pursue search and surveillance device warrants.⁴² However, the statement of compatibility does not fully address why it is insufficient for the Commission to rely on the police to access this information for the purpose of investigating and prosecuting alleged offences. This appears to be particularly pertinent given the seemingly small number of investigations undertaken by the Commission into alleged criminal conduct.⁴³

1.21 Consequently, it has not been clearly established that there is a pressing and substantial concern that warrants the Commission having direct access to telecommunications data (rather than partnering with the police).

Proportionality

1.22 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The UN Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted.⁴⁴

1.23 The declaration declares each staff member of the Commission to be an officer for the purposes of the TIA Act, meaning all staff may access stored communications and telecommunications data obtained. While the Commission appears to have a relatively small number of staff,⁴⁵ it is unclear why all staff members require access to communications data rather than it being restricted to only those staff members who require access to the data to perform their functions. The explanatory statement states that the Commission has a purpose-built electronic data storage system for protected and sensitive information that is accessible only by authorised staff, and states that there is a clear hierarchy of approval before consent is given to make an authorisation under the TIA Act. It also states that there are clearly defined processes to record authorisations requests, outcomes and use of information obtained, as well as training on data retention laws, including authorised officer considerations.⁴⁶ If

⁴² Explanatory statement, [15].

⁴³ Of the thirteen investigations undertaken by the Commission in 2022-23, only two investigations related to criminal conduct, the rest relating to abuse of office, misuse of official information and mismanagement of a conflict of interest. See ACT Integrity Commission, *2022-23 Annual Report* (September 2023) p. 38. Between 1 July 2023 and 31 December 2023, of all allegations received by the Commission, based on an initial assessment of the type of corrupt conduct being alleged, 9 percent (or 7 allegations) related to criminal conduct (including fraud). See ACT Integrity Commission, *ACT Integrity Commission Statistics 1 July 2023 to 31 December 2023* (2024).

⁴⁴ UN Human Rights Committee, *General comment No.16: Article 17 (Right to Privacy)* (1988) [8]; *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

⁴⁵ 24 full time equivalent staff as at 31 December 2023. ACT Integrity Commission, *ACT Integrity Commission Statistics 1 July 2023 to 31 December 2023* (2024).

⁴⁶ Explanatory statement, [21].

these policies and practices were, in practice, to restrict access to communications data to a limited number of staff within the Commission that have a specific need for the data, it may assist with proportionality. However, as a matter of law, all staff members could be authorised to access the data. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law. This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

1.24 In addition to the Commission's internal policies and practices outlined above, the explanatory materials identify the following safeguards that may assist with proportionality:

- the requirement to comply with the *Information Privacy Act 2014* (ACT), which includes a binding scheme that provides for the protection of personal information, and the Territory Privacy Principles, which are comparable to the Australian Privacy Principles;⁴⁷
- oversight by the Commonwealth Attorney-General and the Office of the Commonwealth Ombudsman;⁴⁸ and
- the condition that the Commission and its staff may not access stored communications and telecommunications data for the purposes of preliminary inquiries.⁴⁹

1.25 In relation to stored communications, requiring a warrant to access stored communications would assist with ensuring that the potential interference with privacy is targeted and only as extensive as is strictly necessary. A stored communications warrant may be issued where the issuing authority is satisfied of certain matters, including that there are reasonable grounds for suspecting that a particular carrier holds the relevant stored communications; the information that would be obtained by accessing the stored communications would likely assist with an investigation of a serious contravention of the Act; and, having regard to specified matters, including the potential interference with a person's privacy and the extent to which alternative methods of investigating the contravention have been used, the issuing authority should issue the warrant.⁵⁰ An issuing authority is defined as a judge, magistrate or a person who is an Administrative Appeals Tribunal (AAT) member and

⁴⁷ Explanatory statement, [18] and [19]; statement of compatibility, p. 8.

⁴⁸ Explanatory statement, [22]; statement of compatibility, p. 8.

⁴⁹ The statement of compatibility noted that the ACT Government wanted to restrict the use of coercive and covert powers during preliminary inquiries due to the impact of those powers on human rights and thus potential engagement with the *Human Rights Act 2004* (ACT). Statement of compatibility, p. 8.

⁵⁰ *Telecommunications (Interception and Access) Act 1979*, section 116.

is a legal practitioner who has been enrolled for at least five years.⁵¹ A stored communications warrant remains in force until it is first executed or until the end of the period of five days after the day on which it was issued, whichever occurs sooner.⁵² Requiring consideration of certain matters when issuing the warrant, particularly the potential interference with an individual's privacy as well as the extent to which alternative investigation methods have been used, and limiting the time in which the warrant is in force, would assist with proportionality.

1.26 However, the overall safeguard value of a stored communications warrant is somewhat weakened by the fact that warrants may be issued by AAT members. While not an absolute requirement, judicial authorisation of surveillance activities is considered 'best practice' in international human rights law jurisprudence.⁵³ Indeed, the European Court of Human Rights has held that 'judicial control [offers] the best guarantees of independence, impartiality and a proper procedure'⁵⁴ and that 'control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny'.⁵⁵ The UN Human Rights Committee has also recommended that States parties provide for 'judicial involvement in the authorization or monitoring of surveillance measures' and consider

⁵¹ *Telecommunications (Interception and Access) Act 1979*, section 6DB.

⁵² *Telecommunications (Interception and Access) Act 1979*, section 119.

⁵³ See *Case of Big Brother Watch and Others v The United Kingdom*, European Court of Human Rights, Application nos. 58170/13, 62322/14 and 24960/15 (2019) [320]. See also *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application no. 47143/06 (2015) [233]; *Klass and Others v Germany*, European Court of Human Rights, Application no. 5029/71 (1978) [55]; *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [77].

⁵⁴ *Roman Zakharov v Russia*, European Court of Human Rights, Grand Chamber, Application no. 47143/06 (2015) [233]. See also *Klass and Others v Germany*, European Court of Human Rights, Application no. 5029/71 (1978) [55]: 'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.

⁵⁵ *Szabó and Vissy v Hungary*, European Court of Human Rights, Application no. 37138/14 (2016) [77].

establishing 'strong and independent oversight mandates with a view to preventing abuses'.⁵⁶

1.27 The Parliamentary Joint Committee on Human Rights has previously raised concerns that AAT members do not have all the necessary attributes of a permanent independent judicial authority, such as security of tenure, sufficient independence from the executive, and a high level of legal expertise (noting that the TIA Act only requires AAT members to have five years' experience as a legal practitioner).⁵⁷ The AAT will be replaced by a new Administrative Review Tribunal (ART), which is intended to be more independent and will require members to be appointed through a merit-based process.⁵⁸ However, many of the concerns associated with the AAT would still apply to the new ART (in particular, no security of tenure for members, with each term of appointment being five years).⁵⁹

1.28 Noting that it has not been clearly established that there is a pressing and substantial concern that warrants the Commission having direct access to telecommunications data (rather than partnering with the police) and that the declaration is broadly framed and not limited only to those officers that require access

⁵⁶ UN Committee on Human Rights, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 (2014) [22]. See also UN Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16. Similarly, the UN High Commissioner for Human Rights has stated that surveillance measures (including communications data requests) should be authorized, reviewed and supervised by independent bodies at all stages, including when they are first ordered, while they are being carried out and after they have been terminated. See, UN High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (2018) [39].

⁵⁷ See Parliamentary Joint Committee on Human Rights, *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020*, [Report 3 of 2021](#) (17 March 2021) pp. 63–112, citing UN Special Rapporteur on the right to privacy, *Draft Legal Instrument on Government-led Surveillance and Privacy*, Version 0.6 (2018), p. 16: the UN Special Rapporteur on the right to privacy stated that where domestic law provides for the use of surveillance systems, the law shall 'provide that the individual concerned is likely to have committed a serious crime or is likely to be about to commit a serious crime and in all such cases such domestic law shall establish that an independent authority, having all the attributes of permanent independent judicial standing, and operating from outside the law enforcement agency or security or intelligence agency concerned, shall have the competence to authorise targeted surveillance using specified means for a period of time limited to what may be appropriate to the case'.

⁵⁸ The Parliamentary Joint Committee on Human Rights commented on the human rights compatibility of terminating certain AAT members in the process of abolishing the AAT and establishing the Administrative Review Tribunal. See *Administrative Review Tribunal Bill 2023 and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023*, [Report 1 of 2024](#) (7 February 2024) pp. 15–42.

⁵⁹ *Administrative Appeals Tribunal Act 1975*, section 8; *Administrative Review Tribunal Act 2024*, subsection 208(5).

to the data, there is a significant risk that this declaration does not constitute a permissible limitation on the right to privacy.

Committee view

1.29 The committee notes that by declaring the ACT Integrity Commission (the Commission) to be a criminal law-enforcement agency, and its staff to be officers for the purposes of the *Telecommunications (Interception and Access) Act 1979*, the Commission is authorised to access stored communications (via a warrant) and telecommunications data – which includes both the content of messages and emails as well as information about the communication. By authorising the Commission to access this data, the declaration engages and limits the right to privacy.

1.30 The committee considers that accessing communications data to identify and investigate alleged corrupt conduct would likely constitute a legitimate objective. However, the committee considers that it has not been clearly established that there is a pressing and substantial concern that warrants the Commission having direct access to telecommunications data (rather than partnering with the police, who already have the power to access this information). The committee also notes that the declaration is broadly framed and authority to access data is not limited only to those officers that require access to the data. The committee further notes that while requiring a warrant to access stored communications would assist with proportionality insofar as it ensures any interference with privacy is more targeted, the safeguard value of the warrant is weakened by the fact that stored communications warrants may be issued by tribunal members, which departs from best practice under international human rights law. As such, while the measure is accompanied by some safeguards, these do not appear to be sufficient to ensure that any limitation on privacy is proportionate. The committee therefore considers that there is a significant risk that this declaration does not constitute a permissible limitation on the right to privacy.

Suggested action

1.31 The committee considers that the proportionality of this measure may be assisted were the instrument amended to specify only those staff members who require access to telecommunications data to be officers for the purposes of the *Telecommunications (Interception and Access) Act 1979*.

1.32 The committee recommends that the statement of compatibility be updated having regard to the analysis above.

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

Chapter 2

Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

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

Legislative instrument

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024²

FRL No.	F2024L00381
Purpose	This legislative instrument specifies, for the Subclass 050 (Bridging (General)) visa, a code of behaviour for the purposes of Public Interest Criterion 4022
Portfolio	Home Affairs
Authorising legislation	<i>Migration Regulations 1994</i>
Disallowance	Exempt from disallowance
Rights	Adequate standard of living; criminal process rights; equality and non-discrimination; freedom of assembly; freedom of association; freedom of expression; liberty; privacy; protection of the family; social security

2.3 The committee requested a response from the minister in relation to the instrument in [Report 4 of 2024](#).³

Code of behaviour

2.4 This legislative instrument specifies a code of behaviour which applies to some applicants for the Subclass 050 (Bridging (General)) visa (BVE), for the purposes of Public Interest Criterion (PIC) 4022.

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

² This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024, *Report 6 of 2024*; [2024] AUPJCHR 43.

³ Parliamentary Joint Committee on Human Rights, [Report 4 of 2024](#) (15 May 2024), pp. 55–65.

2.5 The BVE is a temporary bridging visa that permits an unlawful non-citizen to stay in Australia until their immigration matter is finalised or arrangements have been made for their departure from Australia. Only certain applicants for a BVE are required to satisfy PIC 4022, namely, people aged at least 18 years old at the time of application, and who hold or have previously held a Bridging E (Class WE) visa granted by the minister under section 195A of the *Migration Act 1958* (the Migration Act).⁴ It appears this would apply to persons previously held in immigration detention where the minister has decided to grant the detainee a visa.⁵ To satisfy PIC 4022, either the applicant must sign a code of behaviour, or the minister does not require them to sign the code of behaviour.⁶

2.6 The code of behaviour states that it ‘contains a list of expectations about how [the applicant] will behave at all times while in Australia’. It cautions that if the individual is found to have breached the code:

[Y]ou could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you may be taken into immigration detention and may be transferred to a regional processing country.

2.7 The code states that while the individual is living in the Australian community they must:

- not disobey any Australian laws including Australian road laws; and cooperate with all lawful instructions given by police and other government officials;
- not make sexual contact with another person without that person’s consent, regardless of their age or make sexual contact with someone under the age of consent;
- ‘not take part in, or get involved in’ any kind of criminal behaviour in Australia, including violence against any person; deliberately damage property; give false identity documents or lie to a government official;
- not ‘harass, intimidate or bully any other person’ or group of people or engage in any ‘anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community’;
- not refuse to comply with any health undertaking given to the Department of Home Affairs or direction issued by a Medical Officer of the

⁴ See, Migration Regulations 1998, clause 050.225 of Schedule 2. Section 195A of the *Migration Act 1958* provides the minister with a personal and non-compellable power to grant a visa of any class to a person in immigration detention, if the minister thinks it is in the public interest to do so.

⁵ See *Migration Act 1958*, section 195A.

⁶ Migration Regulations 1998, Schedule 4, PIC 4022.

Commonwealth to undertake treatment for a health condition for public health purposes; and

- co-operate with all reasonable requests from the Department of Home Affairs or its agents regarding the resolution of their status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

2.8 This legislative instrument is made pursuant to clause 4.1 of Schedule 4 to the Migration Regulations 1994 (the Migration Regulations). It repeals and replaces the previous code,⁷ which was made in 2013 and was due to sunset. This legislative instrument will self-repeal on 31 March 2025.

Summary of initial assessment

Preliminary international human rights legal advice

Rights engaged by imposing the code of behaviour

Multiple rights

2.9 Requiring certain BVE holders to sign an enforceable code of behaviour engages and may limit numerous human rights, including the right to equality and non-discrimination (as the measure would apply only to non-citizens, and may disproportionately apply to non-citizens of certain nationalities in practice); freedom of expression, association and assembly (if it prevented visa-holders from engaging in lawful acts of public protest); and privacy (as it may require a person to disclose personal information and would regulate aspects of their personal life).

2.10 The right to equality and non-discrimination 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.⁸ 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).⁹ 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

⁷ Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 ([F2013L02105](#)).

⁸ 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.

⁹ UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

particular protected attribute.¹⁰ The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.¹¹ This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations. This right supports many other rights, such as freedom of expression, religion, assembly and political rights. 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.¹² The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.¹³ 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.¹⁴ It also includes the right to control the dissemination of information about one's private life.

Rights engaged by consequences for breaching the code

Rights to liberty, social security, adequate standard of living and protection of the family; and criminal process rights

2.11 Enforcement of the code may engage and limit the right to liberty (if it resulted in a person being returned to immigration detention or sent to a regional processing centre); and the rights to social security and an adequate standard of living (if non-compliance resulted in a reduction in social security payments). If visa cancellation resulted in a person being taken away from their family it may also engage and limit the right to protection of the family, which requires the state not to arbitrarily or unlawfully interfere in family life and to adopt measures to protect the family.¹⁵

¹⁰ *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'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition, Oxford University Press, Oxford, 2013, [23.39].

¹¹ International Covenant on Civil and Political Rights, article 22.

¹² International Covenant on Civil and Political Rights, article 19.

¹³ International Covenant on Civil and Political Rights, article 21, UN Human Rights Committee, *General Comment No. 25: Article 25 (Participation in public affairs and the right to vote)* (1996) [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

¹⁴ International Covenant on Civil and Political Rights, article 17.

¹⁵ International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10.

Further, if the penalty for non-compliance was regarded as being 'criminal' under international human rights law, it would also engage criminal process rights.

2.12 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.¹⁶ The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must be lawful, reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

2.13 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.¹⁷ The right to an adequate standard of living requires that the States party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.¹⁸

2.14 If visa cancellation led to immigration detention for a protracted period,¹⁹ the consequences of breaching this visa condition may be considered so severe as to constitute a 'criminal' penalty for the purposes of international human rights law. If so, this would mean that the relevant provisions, which empower the minister to

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

¹⁷ International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

¹⁸ International Covenant on Economic, Social and Cultural Rights, article 11. See also, UN Human Rights Committee, *General Comment No. 3: Article 2 (Implementation at a national level)*. The Committee explains that 'implementation [of the ICCPR] does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction'.

¹⁹ It is unclear if all persons whose visas are cancelled for breach of these conditions could be detained for long periods in light of the High Court decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 that held it was unconstitutional to detain people in immigration detention where there is no real prospect of the removal of the person from Australia becoming practicable in the reasonably foreseeable future.

cancel a visa and re-detain a person who has not complied with a visa condition,²⁰ must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,²¹ and the right to be presumed innocent until proven guilty according to law.²²

2.15 Most of the above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

Committee's initial view

2.16 The committee noted that requiring certain Subclass 050 (Bridging (General)) visa holders to sign an enforceable code of behaviour engages and limits numerous rights and that the enforcement of the code (resulting in visa cancellation and potential immigration detention) may result in the limitation of further human rights.

2.17 The committee noted that this measure repeals and replaces the previous legislative instrument, which was made in 2013. The committee noted that this measure will operate for 12 months pending further consultation and review, and that this is the first opportunity the committee has had to examine the compatibility of this measure since it was last made in 2013. The committee noted that it raised numerous human rights concerns in 2013 and concluded it had not been established that the measure was compatible with multiple human rights.

2.18 The committee therefore sought the advice of the Minister for Immigration, Citizenship and Multicultural Affairs.

2.19 The full initial analysis is set out in [Report 4 of 2024](#).

Minister's response²³

2.20 The minister advised:

a) how many people are currently subject to the requirement to satisfy Public Interest Criterion 4022 (the code of behaviour)

²⁰ *Migration Act 1958*, subsections 116(1)(b) and 133C(3). Note that section 118 provides that the powers to cancel a visa under sections 116 (general power to cancel) and 133C (Minister's personal powers to cancel visas on section 116 grounds) are not limited, or otherwise affected, by each other.

²¹ International Covenant on Civil and Political Rights, article 14(7).

²² International Covenant on Civil and Political Rights, article 14(2).

²³ The minister's response to the committee's inquiries was received on 9 July 2024 (it was originally due on 30 May, and an extension of time was granted to 7 June 2024). This is an extract of the response. The response is available in full on the committee's [website](#).

The table below contains data on BVEs with condition 8566 imposed that were in effect as at 31 May 2024, broken down by the citizenship country for visa holders.

Citizenship Country	Total
Sri Lanka	2,150
Iran	1,758
Pakistan	624
Afghanistan	433
Iraq	370
Bangladesh	358
Vietnam	191
Lebanon	131
Myanmar	122
Somalia	49
Other citizenships	838
Total	7,024

b) whether the measure has a disproportionate impact on people of certain national backgrounds in practice

The Code of Behaviour was originally established in late 2013 to manage those unauthorised maritime arrivals (UMAs) who were granted a BVE under the Ministerial Intervention powers in section 195A of Act, who would otherwise have been subject to immigration detention as unlawful non-citizens.

Therefore, the grant of a BVE with the application of the Code of Behaviour reflected the UMA cohort. Statistics and data on the UMA cohort are available at www.homeaffairs.gov.au and statistics and data on the Number of Temporary visa holders in Australia including bridging visas and other temporary visas, is available at www.data.gov.au.

c) whether and how the legislative instrument satisfies the ‘quality of law’ test, in particular, what is meant by not ‘take part in, or get involved in’ any kind of criminal behaviour (does it only apply where the person has been convicted of a crime, or does it apply where they are suspected of involvement, and if so, whose suspicion); not ‘harass, intimidate or bully any other person’ (who determines if the visa holder has bullied someone); or not engage in any ‘anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community’ (according to what standard)

The Code of Behaviour complements other cancellation powers and visa conditions under the Act and the Regulations. It provides a framework for messaging the expectations of the Australian community as to which behaviours are acceptable and unacceptable. This is intended to place visa holders on notice, and gives the Government the ability to respond to unacceptable behaviour, prior to the escalation of behaviours which could result in criminal matters and subsequent visa cancellation.

These other powers to cancel a visa include section 501 to refuse or cancel the visa of a person who is not of good character, such as where they do not pass the character test because there is a risk that the person would engage in criminal conduct in Australia; harass, molest, intimidate or stalk another person in Australia; vilify a segment of the Australian community; incite discord in the Australian community or in a segment of that community; or represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way (section 501(6)(d) of the Act).

In addition, under section 116(1)(g) of the Act, regulations 2.43(1)(p) and (q) of the Regulations provide grounds to cancel visas where individuals are:

- convicted of, or charged with, an offence in Australia or another country; or
- the subject of an Interpol notice relating to criminal conduct or public safety threats; or
- under investigation by an agency responsible for the regulation of law enforcement or security.

Visa conditions dealing with similar subject matter as the Code of Behaviour, and which may be imposed on a wider range of visas, include condition 8303 (the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community) and 8564 (the holder must not engage in criminal conduct).

Where a BVE holder's behaviour both breaches the Code and enlivens other visa cancellation powers, the general practice has been to consider the person's case under the other relevant powers.

d) whether the measure is directed towards a legitimate objective (and in particular, whether there exists a pressing and substantial issue of public or social concern that warrants the code of behaviour in relation to certain BVE-holders)

This measure can be reasonably categorised as being rationally connected and proportionate to achieving the legitimate objective of ensuring the ongoing safety of the Australian community.

The Australian Government takes very seriously its role in protecting the Australian community – including citizens, permanent residents and non-citizen non-residents – from all persons who engage in criminal conduct or other behaviours of concern. Being in Australia is a privilege conferred on noncitizens in the expectation that they have been and will continue to be both law-abiding and respectful of Australia’s important institutions (including our law enforcement framework) and they will not cause or threaten harm to individuals or the Australian community.

The Code of Behaviour does not contain all of a non-citizen’s rights, duties or obligations under Australian law. Instead, it expressly draws a non-citizen’s attention to the type of behaviours that, if engaged in, could cause them to fail the character test set out in section 501 of the Act or enliven other relevant character related visa cancellation powers. These include failing to comply with lawful instructions; threatening the health of the Australian community; engaging in anti-social or disruptive behaviours; making sexual contact without the other person’s consent; any sexual contact with a minor; or being involved in criminal activity of any kind in Australia including committing acts of domestic or family violence.

These behaviours are significant matters of public policy from the perspective of ensuring ongoing community safety. They are also matters of ongoing social concern – particularly compliance with Australian laws and not threatening or causing harm to other members of the Australian community. It is appropriate that non-citizens have their attention expressly directed to these matters so that there can be no claim that they were unaware of the Australian Government’s expectations regarding their conduct while in Australia.

Non-citizens who may be required to sign the Code of Behaviour include those granted a:

- BVE (subclass 050) through Ministerial Intervention under section 195A of the Act; or
- subsequent BVE where the previous BVE was granted through Ministerial Intervention.

While only a small number of non-citizens may be required to sign the Code of Behaviour, it is appropriate to retain the mechanism that allows the imposition of a level of accountability on those persons granted a visa under the Minister’s personal powers and who would otherwise have been subject to immigration detention as unlawful non-citizens.

e) the necessity of each item included on the code of behaviour (including whether there is evidence demonstrating an increased risk of certain behaviours by persons who would be subject to it)

The list of expectations included in the Code of Behaviour relates largely to existing duties and obligations that all visa holders have under the framework of Australian law. The Code draws the attention of non-citizens

specifically to those offences and types of behaviours that have a high likelihood of leading to a visa refusal or cancellation decision. This helps to protect the rights and interests of individuals and promote the ongoing safety of the Australian community.

In this way, the Code of Behaviour helps to ensure that the ways a non-citizen may be held responsible and accountable for any actions they take that are contrary to the expectations of the Australian community regarding their behaviour are transparent and understandable.

f) whether, and in accordance with what criteria, the requirement to sign a code of behaviour has been demonstrated to be effective to achieve its objective since it was introduced in 2013

The Department of Home Affairs is intending to further evaluate the Code from a policy and operational perspective and will make recommendations to Government on the Code at that evaluation's conclusion ahead of the next sunset on this Instrument.

Where a BVE holder's behaviour both breaches the Code *and* enlivens other visa cancellation powers, the general practice has been to consider the person's case under the other relevant powers.

The Code itself was not relied on to cancel any subclass 050 BVEs between 1 July 2010 and 30 April 2024, noting that the Code was introduced to provide a messaging tool about the importance of adherence to Australian laws, and is supplemented by the Character Framework within the *Migration Act 1958* which provides the power to cancel a visa in relation to a person's conduct in a range of circumstances.

In this context, the BVE of persons who have signed the Code are considered for visa cancellation under the Character Framework where, for example, they have been convicted of an offence or enlivened one of the other cancellation powers under the Character Framework.

g) how many times a breach of PIC 4022 has resulted in a reduction in social welfare payment (since 2013), what reduction was applied, whether affected persons were able to still meet their basic needs, and what guidelines regulated the exercise of this discretion

The income support envisaged when the Code was established was provided by certain schemes managed by the Department, which have since been combined as the Status Resolution Support Service Program (SRSS). The Committee's question regarding "a reduction in social welfare payment" has been taken as a reference to the withdrawal of SRSS from a person as a result of their visa being cancelled due to breach of condition 8566. As no visas have been cancelled on this ground, no individuals have had SRSS withdrawn because of a visa cancellation.

The Department of Home Affairs does not have the capacity to report on any breaches of condition 8566 that may have occurred that did not lead to visa cancellation. It is therefore not possible to report any reductions in SRSS

payments that may have occurred as a response to a person breaching the Code as an alternative to visa cancellation action.

h) how many times a breach of PIC 4022 has resulted in cancellation of a person's visa (since 2013)

In the period 1 January 2013 to 30 April 2024, there were no visa cancellations recorded against section 116(1)(b) – that the visa holder has not complied with condition 8566 imposed on their visa.

As noted above, where a BVE holder's behaviour both breaches the Code and enlivens other visa cancellation powers, the general practice has been to consider the person's case under the other relevant powers.

The Code itself was not relied on to cancel any subclass 050 BVEs between 1 July 2010 and 30 April 2024, noting that the Code was introduced to provide a messaging tool about the importance of adherence to Australian laws, and is supplemented by the Character Framework within the Migration Act 1958 which provides the power to cancel a visa in relation to a person's conduct in a range of circumstances.

In this context, the BVE of persons who have signed the Code are considered for visa cancellation under the Character Framework where, for example, they have been convicted of an offence or enlivened one of the other cancellation powers under the Character Framework.

i) the circumstances in which breach of PIC 4022 which results in cancellation of a person's visa may result in them being detained in immigration detention (and for how long) or removed to a regional processing centre

If a person signs a Code of Behaviour, visa condition 8566 will be imposed on their BVE. Any breach of condition 8566, because the person has breached the Code, could result in the discretionary cancellation of the person's visa under section 116 of the Act.

In considering whether or not to cancel a person's visa under section 116 of the Act, decision-makers are guided by policy to consider a range of matters including but not limited to:

- the purpose of the visa holder's stay
- extent of compliance with visa conditions now and in the past
- degree of hardship to the visa holder and any family members
- the circumstances in which the ground for cancellation arose
- the visa holder's past and present behaviour towards the Department
- whether there are mandatory legal consequences of the cancellation such as immigration detention, visa application bars and/or the person would become liable for removal

- relevant international obligations including consideration of the best interests of the child and *non-refoulement* obligations.

The cancellation of a visa as a result of a breach of condition 8566 would render the person an unlawful non-citizen under the Act. An unlawful non-citizen must be detained until removed from Australia, or until there is no real prospect that it will be practicable to remove them to another country in the reasonably foreseeable future, or they are granted a visa.

The length of time a non-citizen may remain in immigration detention will depend on a range of factors unique to the circumstances of their individual case. In general, however, these may include but are not limited to whether the non-citizen is:

- making arrangements to leave Australia;
- seeking merits or judicial review of either a visa cancellation decision or the non-revocation of a visa cancellation decision;
- awaiting the outcome of any subsequent visa application(s);
- on a removal pathway but not cooperating with lawful removal efforts; **or**
- whether there are other diplomatic or logistical barriers to removal (for example: a lack of an involuntary removal agreement between Australia and the non-citizen's country of origin; issues with definitively establishing the person's identity; where a non-citizen has acute health issues or other circumstances that render them highly vulnerable and may impede removal etc).

Under the Regulations, a person who has previously held a BVE that was cancelled for failure to comply with the Code of Behaviour is prevented from applying for a further BVE. It remains open to the Minister to personally grant the person a visa under section 195A of the Act if the person is in immigration detention.

Whether the person, as an immigration detainee, would be subject to the power in section 198AD of the Act to be taken to a regional processing country would depend on whether they are an unauthorised maritime arrival, the date of their arrival in Australia, whether they have previously been taken to a regional processing country, whether their protection claims have been assessed in Australia and/or whether they have been exempted from transfer under section 198AE of the Act. In practice there is no record of any Bridging visa holder having had their visa cancelled in relation to a breach of the Code of Behaviour being removed to a regional processing country.

j) whether there is a less rights restrictive way of achieving the objective

To a large extent, the Code of Behaviour replicates the requirements that apply to all visa holders in Australia and overlaps with other visa conditions (such as condition 8564, which prohibits the visa holder from engaging in

criminal conduct). Breaches of Australian law and engaging in behaviour similar to the behaviours listed in the Code may already lead to visa cancellation on character grounds or for failure to comply with visa conditions (see, for example, sections 116(1)(b), 116(1)(g) and 501 of the Act).

The Government highlights that a key benefit of the Code of Behaviour is that it explicitly draws the visa holder's attention to the behaviour expected of them while they are in Australia and not the holder of a substantive visa. As such, it is an important tool for highlighting the expectations of both the Government and the Australian community in general for non-citizens who are granted the privilege of lawful status in Australia in circumstances where they arrived in Australia without a valid visa or whose substantive visa has ceased or been cancelled, and do not hold a substantive visa to remain in Australia. In particular, it draws the visa holder's attention explicitly to behaviours and activities that are of high public policy concern – such as preventing domestic and family violence; deterring criminal activity; and protecting the health of the Australian community.

In this way, the Code of Behaviour contributes to the safety of the Australian community and the integrity of the migration system by ensuring that non-citizens who may not be familiar with all of their duties and obligations under Australian law are explicitly informed of key behavioural expectations. A decision to cancel a visa under section 116(1)(b) of the Act for breach of the visa condition relating to the Code would be a discretionary decision and is subject to the procedural fairness requirements in Subdivision E of Division 3 of Part 2 of the Act.

k) what independent oversight would apply to the exercise of this power, and what review rights an affected person would have

The Regulations allow for Bridging visa holders who are granted a visa by the Minister under section 195A of the Act or granted a subsequent Bridging visa following Ministerial Intervention to be required to sign the Code of Behaviour.

A non-citizen is able to seek review of a decision to refuse to grant a subsequent Bridging visa or to cancel a Bridging visa (including on the basis of breaching the visa condition to comply with the Code of Behaviour if they have signed it). The independent Administrative Appeals Tribunal is responsible for undertaking merits review of visa decisions made by a delegate of the Minister, including a decision to cancel a BVE held by a person who would otherwise be in immigration detention, on the basis of a breach of a visa condition (subsection 338(4) of the Act). Merits review is not available of decisions made personally by the Minister. Non-citizens have the right to seek judicial review of a visa refusal or cancellation decision if they believe that decision was not lawfully made, whether made by the Minister or their delegate.

Concluding comments

International human rights legal advice

2.21 As to the application of the code in practice, the minister advised that, at 31 May 2024, 7,024 BVE holders were subject to the requirement to satisfy PIC 4022 (the code of behaviour). The minister stated that the grant of a BVE with the application of the code reflected the cohort of persons who arrived in Australia by boat, without a valid visa ('unauthorised maritime arrivals'). The most recent departmental statistics indicate that, at March 2024, there were 9,892 unauthorised maritime arrivals with a BVE in Australia.²⁴ This data suggests that approximately 71 per cent of unauthorised maritime arrivals in Australia who are on a BVE are currently subject to the code of behaviour requirement.

2.22 The minister further stated that 3,908 (55 per cent) of those persons currently subject to the code are nationals of Sri Lanka and Iran. As such, in addition to only applying to non-citizens, the requirement to satisfy the code of behaviour criterion appears to have a disproportionate impact on people of certain national backgrounds in practice, and so limits the right to equality and non-discrimination. Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.²⁵ This analysis is set out below.

2.23 As to the enforcement of the code in practice, the minister advised that the code has not been relied on to cancel any subclass 050 BVEs between 1 July 2010 and 30 April 2024. The minister stated that as no visas have been cancelled for breach of the code, no individuals have had Status Resolution Support Service (SSRS) financial support withdrawn because of a visa cancellation, but that the department cannot report any reductions in SRSS payments that may have occurred as a response to a person breaching the code as an alternative to visa cancellation action.

Quality of law test

2.24 Further information was sought in relation to the code to establish whether it is formulated with sufficient precision. The minister stated that the code provides a 'framework for messaging the expectations of the Australian community as to which behaviours are acceptable and unacceptable', and is intended to place visa holders on notice, and give the Government the ability to respond to 'unacceptable behaviour',

²⁴ Department of Home Affairs, [Unauthorised Maritime Arrivals on Bridging E visa March 2024](#) (released 30 May 2024). While there are immigration statistics relating to bridging visas available on www.data.gov.au, the relevant [dataset](#) states that information about Bridging Visa E (subclass 050 and 051 has been removed from the report.

²⁵ 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].

prior to the escalation of behaviours which could result in criminal matters and subsequent visa cancellation. The minister stated that a person's visa may be cancelled, or their application refused, under section 501 of the Migration Act, where they do not pass the character test, including because there is a risk that the person would engage in criminal conduct in Australia, or represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way. The minister also stated that a visa may be cancelled where a person has been convicted, or charged with, an offence.²⁶

2.25 While it is clear that a person may be regarded as having breached the code of behaviour where they have not been convicted of or charged with a crime, it is unclear precisely *what* threshold or standard would be applied to assess a breach of each provision in the code, and what standard of proof would be applied. In particular, it remains unclear what is meant by not 'take part in, or get involved in' any kind of criminal behaviour; not 'harass, intimidate or bully any other person'; or not engage in any 'anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community'. The use of these broad and ambiguous terms raises concerns that the conditions are not sufficiently precise to enable visa holders to understand what is expected of them and in what circumstances a breach may occur. In order to satisfy the requirements of legal certainty and foreseeability, the measure must enable visa holders 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.²⁷ An understanding of the circumstances in which the minister may elect to exercise their discretion to cancel a visa is also relevant in this regard. Noting the minister's advice that the code has never been relied on to cancel any subclass 050 BVE since 2010, this is unclear, and it appears unlikely that clarity has arisen out of practice.

2.26 Noting the breadth of the minister's discretion and the vague and open-ended nature of the expectations set out in the code of behaviour, there appears to be a risk that the code of behaviour may not satisfy the quality of law test.

Legitimate objective and rational connection

2.27 The minister stated that the measure 'can be reasonably categorised as being rationally connected' to achieving the legitimate objective of ensuring the ongoing safety of the Australian community. The minister stated that the code expressly draws a non-citizen's attention to the type of behaviours that, if engaged in, could cause them to fail the character test set out in section 501, or enliven other relevant

²⁶ Migration Act, subsection 116(1)(g) and Migration Regulations, subsection 2.43(1)(p).

²⁷ *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64].

character related visa cancellation powers. They stated that these behaviours are ‘significant matters of public policy from the perspective of ensuring ongoing community safety’ and are matters of ongoing social concern. As to the necessity of each item included in the code of behaviour, the minister stated that the list of expectations ‘relates largely to existing duties and obligations that all visa holders have under the framework of Australian law’, and stated that inclusion in the code ‘helps to ensure that the ways a non-citizen may be held responsible and accountable for any actions they take that are contrary to the expectations of the Australian community regarding their behaviour are transparent and understandable’. The minister also stated that the code was introduced to provide ‘a messaging tool’ about the importance of adherence to Australian laws and is supplemented by the character cancellation framework.

2.28 In general terms, ensuring community safety may be capable of constituting a legitimate objective under international human rights law. However, a legitimate objective must address an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights, and it is unclear whether such a pressing and substantial concern exists requiring the rights-limiting measures in the code. The minister did not advise whether non-citizens on a BVE have been shown to be more likely to engage in concerning behaviours and so present some specific or heightened risk to community safety beyond the overall risk of criminal or anti-social activity that exists in the community generally. Further, and as noted above, the minister stated that the code itself has not been relied on to cancel any subclass 050 BVEs between 1 July 2010 and 30 April 2024. As such, it is not possible to assess the effectiveness of the code in regulating a non-citizen’s behaviour and so promoting community safety. Finally, the minister stated that the department intends to evaluate the code ‘from a policy and operational perspective’ before it self-repeals on 31 March 2025. However, they did not explain why that evaluation is taking place, what specific matters are being considered, and why it was necessary for the code to be re-made in the intervening period.

2.29 Consequently, it is not clear that the code is directed towards a legitimate objective which constitutes an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights, or rationally connected to (that is, capable of achieving) such an objective.

Proportionality

2.30 As to the application of the requirement to sign the code in practice, the minister’s advice suggested that approximately 71 per cent of unauthorised maritime arrivals in Australia who are on a BVE are currently subject to the code of behaviour requirement. It may assist the proportionality of the measure that not all BVE holders are subject to the code of behaviour, rather only certain applicants for a BVE are required to satisfy PIC 4022. However, it is unclear whether this percentage reflects the exercise of a discretion by the minister to not require a person to sign the code, or

that the remaining BVE holders are not required to satisfy the requirement. This raises questions as to whether the measure is sufficiently circumscribed.

2.31 Further information was also sought as to how the code has been enforced in practice. As set out above, the minister advised that the code itself has not been relied on to cancel a person's visa. The minister also stated that there is no record of any bridging visa holder having had their visa cancelled 'in relation to a breach of the code' being removed to a regional processing country. As to whether a person has had their income support reduced (the terminology used in the code) because of a breach, the minister stated:

The income support envisaged when the Code was established was provided by certain schemes managed by the Department, which have since been combined as the Status Resolution Support Service Program (SRSS). The Committee's question regarding "a reduction in social welfare payment" has been taken as a reference to the withdrawal of SRSS from a person as a result of their visa being cancelled due to breach of condition 8566. As no visas have been cancelled on this ground, no individuals have had SRSS withdrawn because of a visa cancellation.

2.32 The minister further stated that the department 'does not have the capacity to report on any breaches of condition 8566 that may have occurred that did not lead to visa cancellation', meaning that it cannot report any reductions in SRSS payments that may have occurred as a response to a person breaching the code as an alternative to visa cancellation action. It is not clear why the department cannot report on any reductions in SRSS payments (noting that the SRSS appears to be a service delivered by the department). There appears to be a risk that persons subject to the code may have had SSRS financial assistance reduced. As it is not clear how such a reduction would be calculated and whether an affected person would still be able to meet their basic needs, it cannot be concluded that such enforcement activity would constitute a proportionate limit on the rights to social security or an adequate standard of living.

2.33 As to whether there is a less rights restrictive way of achieving the stated objective, the minister stated that while the code substantially replicates the requirements that apply to all visa holders in Australia and overlaps with other visa conditions, it 'explicitly draws the visa holder's attention to the behaviour expected of them while they are in Australia and not the holder of a substantive visa'. The minister stated that the code 'contributes to the safety of the Australian community and the integrity of the migration system by ensuring that non-citizens who may not be familiar with all of their duties and obligations under Australian law are explicitly informed of key behavioural expectations'. It is not clear, however, why the code must be enforceable in order to achieve this objective, particularly if it has never been used to cancel a person's visa, and if the powers to cancel a visa or undertake other enforcement activity exist elsewhere in the migration legislative framework. It appears that the provision of the information set out in the code to BVE holders in any other

non-enforceable form (for example, a letter) would fulfil the same function of drawing the matters contained within to their attention.

2.34 As to review of the exercise of this power, the minister advised that a decision by a delegate of the minister to refuse to grant a subsequent Bridging visa or to cancel a Bridging visa (including on the basis of breaching the visa condition to comply with the code if the person signed it) is subject to merits review by the Administrative Appeals Tribunal and judicial review. The minister stated that only judicial review is available for such decisions made personally by the minister. The availability of merits review in some instances assists with the proportionality of the measure. However, judicial review in Australia 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. Further, it is not clear that a decision to impose the condition that a visa holder must sign the code of behaviour is itself reviewable.

Conclusion

2.35 There is a significant risk that the imposition of the code of behaviour, and corresponding enforcement action, may constitute an impermissible limit on the human rights identified. Consequently, there is a risk that the measure, which applies primarily to nationals of Sri Lanka and Iran in practice, constitutes an impermissible limit on the right to equality and non-discrimination.

Committee view

2.36 The committee thanks the minister for this response, and notes that it was received after the requested timeframe.

2.37 The committee notes that this measure repeals and replaces the previous such legislative instrument, which was made in 2013. The committee notes that this measure will operate for 12 months pending further consultation and review.

2.38 The committee considers that it is not clear that the code satisfies the quality of law test (as many of the terms used are vague and it is unclear when a person may engage in conduct which would breach the code). As to legitimate objective, the committee considers that, as no information has been provided to demonstrate that these BVE holders present a particular risk to community safety, it is not clear that the measure is directed towards a legitimate objective, which is pressing and substantial enough to warrant limiting rights. The committee also considers that it is unclear why the code of behaviour is required to be enforceable if it has not been enforced in practice and noting that it replicates other enforcement powers which are already available. The committee notes, in particular, the minister's advice that: the code is intended to draw a visa holder's attention to the types of behaviours which could cause them to fail the existing character cancellation framework; the code has not

itself been used to cancel a person's visa since it was introduced in 2010; and that any such enforcement action would be taken under other existing enforcement measures in the migration legislative framework in practice. The committee considers that this raises questions as to whether the code has been shown to be rationally connected (that is, capable of achieving) the stated objective, or constitutes the least rights restrictive means by which to achieve its stated objective. The committee considers that there is a risk that the imposition of the code of behaviour, and corresponding enforcement action, may constitute an impermissible limit on multiple human rights. The committee notes that this reflects the conclusion the committee made when it examined the original code of behaviour in 2013.²⁸

2.39 The committee further considers that there is a risk that the measure, which applies primarily to nationals of Sri Lanka and Iran in practice, constitutes an impermissible limit on the right to equality and non-discrimination. The committee also notes the minister's advice that, while no person has had financial payments reduced because of their visa being cancelled pursuant to this measure, the minister is unable to advise whether a person's financial payment may have been otherwise reduced for a breach of the code. The committee considers that, as it is not clear when a person may be regarded as breaching the code, how a reduction in financial assistance would be calculated and whether an affected person would still be able to meet their basic needs, there is a risk that such enforcement activity would constitute an impermissible limit on the rights to social security or an adequate standard of living.

2.40 Further, the committee reiterates its expectation that legislative instruments which are exempt from disallowance should include a statement of compatibility with human rights where the measure engages and limits human rights, particularly where the committee has previously raised concerns in relation to the measure.

Suggested action

2.41 The committee recommends that in the event the minister enforces the code, that the minister consider the committee's concerns, and human rights implications of the instrument. The committee recommends that the current review of the code of behaviour requirement give close consideration to the committee's comments.

²⁸ See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [[F2013L02102](#)] and Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [[F2013L02105](#)] *Seventh Report of the 44th Parliament* (June 2014) pp. 90–96. The committee notes that it has also expressed concern regarding other similar codes of behaviour. See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Bridging Visa Conditions) Regulations 2021 [[F2021L00444](#)], *Report 7 of 2021* (16 June 2021), pp. 50–75 and *Report 9 of 2021* (4 August 2021), pp. 66–108.

2.42 The committee recommends that a statement of compatibility with human rights be prepared in relation to this legislative instrument, noting the numerous human rights engaged and limited.

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

Mr Josh Burns MP

Chair