

## **Ministerial responses — Report 6 of 2024<sup>1</sup>**

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1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 6 of 2024*; [2024] AUPJCHR 44.

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**THE HON ANDREW GILES MP**

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MS24-000859

Mr Josh Burns MP  
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Dear Mr Burns

*Josh,*

I refer to your correspondence of 16 May 2024 on behalf of the Parliamentary Joint Committee on Human Rights to the Minister for Home Affairs, the Hon Clare O'Neil MP concerning the compatibility with human rights of the *Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024*. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

In its Report 4 of 2024, the Committee requested further information about this instrument. Please find attached for the Committee's consideration the response to the Committee's questions.

I appreciate the extension until 7 June 2024 in which to provide the response.

Thank you for raising these matters.

Yours sincerely

ANDREW GILES

*14/6* / 2024

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## Report 4 of 2024 – Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024 [F2024L00381]

In Report 4 of 2024, the Parliamentary Joint Committee on Human Rights (the Committee) sought further information from the Minister in relation to the Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024 (Code of Behaviour Instrument).

The purpose of the Code of Behaviour Instrument was to specify the Code of Behaviour for certain visa holders for a further year. As this instrument was not subject to disallowance, it was not accompanied by a Statement of Compatibility with Human Rights.

Public Interest Criterion (PIC) 4022 in Schedule 4 to the Migration Regulations 1994 (the Regulations) is prescribed as a criterion for grant of a subclass 050 (Bridging (General)) visa (known as a Bridging visa E or BVE). To satisfy PIC 4022, a non-citizen may be required to sign a Code of Behaviour that has been approved by the Minister in accordance with Part 4 of Schedule 4 to the Regulations. In accordance with clause 050.619, if the subclass 050 BVE holder has signed the Code, visa condition 8566 must be imposed. Condition 8566 states that ‘if the person to whom the visa is granted has signed a code of behaviour [...] the holder must not breach the code’. Condition 8566 notes that the requirement to sign a Code of Behaviour may be imposed by either PIC 4022 or in accordance with section 195A (Minister’s personal power to grant a visa to an unlawful non-citizen in immigration detention) of the *Migration Act 1958* (the Act). The consequence of breaching a visa condition, including condition 8566 relating to breaching the Code of Behaviour, is that the discretionary power under section 116(1)(b) of the Act to cancel the visa for breach of a visa condition is enlivened.

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. The Code is intended to ensure that persons who are granted a visa due to an exercise of the Minister’s personal power under section 195A of the Act, and any subsequent visa grants by a delegate, are held more accountable for their actions.

For all adult UMAs who are considered for the grant of a BVE, the Code is intended to apply to them to ensure that those persons who have arrived in Australia who are granted a bridging visa have a clear understanding of which behaviour is considered appropriate while they are in the Australian community, the importance of abiding by the law, respecting Australian values and cooperating with government authorities.

All visa holders in Australia are subject to the Character Framework in the *Migration Act 1958*, further discussed below.

### Committee view

1.148 The committee notes 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.

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

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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 notes 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. The committee considers that as the Migration Act 1958 and related legislation has undergone substantial amendment since that time, and given the time that has elapsed, it is appropriate to seek further contemporaneous information from the minister in relation to this measure.

1.150 As such the committee seeks the minister's advice in relation to:

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

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.

| <b>Citizenship Country</b> | <b>Total</b> |
|----------------------------|--------------|
| 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          |
| <b>Total</b>               | <b>7,024</b> |

**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](http://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](http://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)**

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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 non-citizens 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

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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

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- 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.