

## 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.<sup>1</sup>

### Legislative instrument

#### Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024<sup>2</sup>

<b>FRL No.</b>	<a href="#">F2024L00381</a>
<b>Purpose</b>	This legislative instrument specifies, for the Subclass 050 (Bridging (General)) visa, a code of behaviour for the purposes of Public Interest Criterion 4022
<b>Portfolio</b>	Home Affairs
<b>Authorising legislation</b>	<i>Migration Regulations 1994</i>
<b>Disallowance</b>	Exempt from disallowance
<b>Rights</b>	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](#).<sup>3</sup>

#### 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.

<sup>1</sup> See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

<sup>2</sup> 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.

<sup>3</sup> 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).<sup>4</sup> It appears this would apply to persons previously held in immigration detention where the minister has decided to grant the detainee a visa.<sup>5</sup> 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.<sup>6</sup>

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

---

<sup>4</sup> 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.

<sup>5</sup> See *Migration Act 1958*, section 195A.

<sup>6</sup> 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,<sup>7</sup> 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.<sup>8</sup> 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).<sup>9</sup> 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

---

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

<sup>8</sup> 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.

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

particular protected attribute.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

---

<sup>10</sup> *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*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2013, [23.39].

<sup>11</sup> International Covenant on Civil and Political Rights, article 22.

<sup>12</sup> International Covenant on Civil and Political Rights, article 19.

<sup>13</sup> 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.

<sup>14</sup> International Covenant on Civil and Political Rights, article 17.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

2.14 If visa cancellation led to immigration detention for a protracted period,<sup>19</sup> 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

---

<sup>16</sup> International Covenant on Civil and Political Rights, article 9.

<sup>17</sup> 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).

<sup>18</sup> 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'.

<sup>19</sup> 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,<sup>20</sup> 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,<sup>21</sup> and the right to be presumed innocent until proven guilty according to law.<sup>22</sup>

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 response<sup>23</sup>**

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)**

---

<sup>20</sup> *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.

<sup>21</sup> International Covenant on Civil and Political Rights, article 14(7).

<sup>22</sup> International Covenant on Civil and Political Rights, article 14(2).

<sup>23</sup> 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
<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)**

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.<sup>24</sup> 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.<sup>25</sup> 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',

---

<sup>24</sup> 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](http://www.data.gov.au), the relevant [dataset](#) states that information about Bridging Visa E (subclass 050 and 051 has been removed from the report.

<sup>25</sup> 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.<sup>26</sup>

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'.<sup>27</sup> 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

---

<sup>26</sup> Migration Act, subsection 116(1)(g) and Migration Regulations, subsection 2.43(1)(p).

<sup>27</sup> *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.<sup>28</sup>

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.

<sup>28</sup> 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 44<sup>th</sup> 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**