Chapter 1

New and continuing matters

1.1 This chapter provides assessments of the human rights compatibility of:

- bills introduced into the parliament between 10 and 20 October 2016 (consideration of seven bills from this period have been deferred);[1]
- legislative instruments received between 19 August and 13 October 2016 (consideration of six legislative instruments from this period have been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See Appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, '*Journals of the Senate*', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

1.5 The committee seeks a response or further information from the relevant minister or legislation proponent with respect to the following bills and instruments.

Fairer Paid Parental Leave Bill 2016

Purpose	Proposes to amend the *Paid Parental Leave Act 2010* to provide that primary carers of newborn children will no longer receive both employer-provided primary carer leave payments and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme; and remove the requirement for employers to provide paid parental leave to eligible employees
Portfolio	Social Services
Introduced	House of Representatives, 20 October 2016
Rights	Social security; work and maternity leave; equality and non-discrimination (see **Appendix 2**)

Background

1.6 The committee has previously examined the measures contained in the Paid Parental Leave Amendment Bill 2014 (2014 bill) and Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Fifth Report of the 44th Parliament*, *Eighth Report of the 44th Parliament*, *Twenty-fifth Report of the 44th Parliament*, and *Thirty-seventh Report of the 44th Parliament*.[1]

1.7 Following the commencement of the 45th Parliament, the Fairer Paid Parental Leave Bill 2016 (the 2016 bill) was reintroduced to the House of Representatives on 20 October 2016. While key measures in the 2016 bill remain the same, there have also been some amendments to this bill (when compared to the measures in the 2015 bill).

1 The bill reintroduces a measure previously introduced in the Paid Parental Leave Amendment Bill 2014 (2014 bill), which would remove the requirement for employers to provide paid parental leave to eligible employees. See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 13-16; *Eighth Report of the 44th Parliament* (24 June 2014) 54-57. The committee then considered the Fairer Paid Parental Leave Bill 2015 (2015 bill) in its *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 47-55; and *Thirty-seventh Report of the 44th Parliament* (2 May 2016) 36-44.

Restrictions on paid parental leave scheme

1.8 Schedule 1 to the 2016 bill would amend the *Paid Parental Leave Act 2010* (PPL Act) to provide that primary carers of newborn children will no longer receive both employer-provided primary carer leave payments (such as maternity leave pay) and the full amount of parental leave pay under the government-provided paid parental leave (PPL) scheme.

1.9 Primary carers who are entitled to receive employer-provided parental leave payments will not be eligible to receive payments under the government's PPL scheme, unless their employer-provided payments are valued at less than the total amount of payments under the government's PPL scheme.

1.10 The 2016 bill sets out that these provisions will take effect from the first 1 January, 1 April, 1 July or 1 October after the bill receives Royal Assent. This means that, for example, if the bill were to pass and receive Royal Assent prior to 1 January then there may be parents who are currently pregnant but who will no longer qualify for the PPL scheme.

Compatibility of the measure with human rights

1.11 The previous human rights assessment considered that the measures engage the rights to social security, work and maternity leave, and equality and non-discrimination.

1.12 This is because under the proposed measures primary carers who receive employer-funded parental leave pay will have their government-funded entitlements reduced or removed. In reducing the social security support available to new parents, the measure is a retrogressive measure for the purposes of international human rights law, and engages the right to social security and the right to maternity leave.[2] Further, where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination. As women are the primary recipients of the paid parental leave scheme, reductions to this scheme under the bill will disproportionately impact upon this group and the right to equality and non-discrimination is therefore engaged.

1.13 The committee was previously able to conclude that the measures were compatible with these rights on the basis of further information provided by the Minister for Social Services.[3] In particular, on the basis of this further information the previous analysis accepted that the measures are a permissible limit on human rights as they pursue a legitimate objective, are rationally connected to that objective and a proportionate means of achieving that objective. Some of this further information previously provided by the minister has been included in the statement of

2 For further discussion of retrogressive measures, see *Guidance Note 1* at Appendix 4.

3 See Parliamentary Joint Committee on Human Rights, *Thirty-seventh Report of the 44th Parliament* (2 May 2016) at [2.134], [2.149] and [2.160].

compatibility to the 2016 bill. However, previous information setting out the legitimate objective of the measure as creating savings in the context of budgetary concerns has not been included in the new statement of compatibility. While it is unclear as to whether this is still the objective of the measure, it appears from the statement of compatibility that there may also be additional objectives that are being pursued by the measure including to create savings to allow expenditure in other key areas of benefit to families.[4] These objectives may also be considered legitimate objectives for the purposes of international human rights law.

1.14 Yet, there are some aspects of the 2016 bill that raise questions as to the proportionality of the reintroduced measures. As set out above at [1.10], the provisions in the bill will take effect from the first 1 January, 1 April, 1 July or 1 October after the bill receives Royal Assent. The 2015 bill allowed a period of approximately one year from the date of introduction of the bill for the proposed measures to come into effect, ensuring expectant parents who had planned care arrangements around the existing parental leave provisions would not be affected by the changes. The 2016 bill contains a significant reduction in the period of time before the provisions would take effect. Accordingly, it has the potential to reduce the amount of payments for expectant parents, or recent parents, who may have been anticipating both employer-provided parental leave and PPL payments and made leave arrangements and other plans accordingly. The statement of compatibility for the bill does not explain why there has been a reduction in the proposed time period prior to the entry into force of the measures. The potential adverse impact of the measures, specifically on parents who are currently pregnant, or have recently had a baby, may affect the proportionality of the 2016 bill.

Committee comment

1.15 **On the basis of information provided by the minister, the previous human rights assessments of the 2014 and 2015 bills concluded that proposed restrictions to the paid parental leave scheme were compatible with human rights.**

1.16 **However, in the 2016 bill the proposed period of time before which the measures would enter into force has been reduced from the previous 2015 bill. The statement of compatibility has not identified or addressed this issue.**

1.17 **The committee observes that the preceding legal analysis raises questions as to whether the reduction in time before the measures take effect is proportionate in the context of the scheme. That is, the committee has concerns as to whether the limitations on human rights imposed by restrictions to the paid parental leave scheme remain proportionate in light of this change.**

4 For further legitimate objectives, see the explanatory memorandum, statement of compatibility, 2.

1.18 **The committee therefore seeks the advice of the Minister for Social Services as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, why it is necessary to reduce the period of time before the proposed measures will enter into force.**

Privacy Amendment (Notifiable Data Breaches) Bill 2016

Purpose	Proposes to amend the *Privacy Act 1988* to impose a data breach notification requirement on entities regulated by the Act
Portfolio	Attorney-General
Introduced	House of Representatives, 19 October 2016
Rights	Privacy; effective remedy (see **Appendix 2**)

Background

1.19 The Privacy Amendment (Notifiable Data Breaches) Bill 2016 (the bill) seeks to impose a mandatory data breach notification requirement on entities regulated by the *Privacy Act 1988* (Privacy Act).[1] A data breach arises where there has been unauthorised access to, or unauthorised disclosure of, personal information about one or more individuals, or data is lost in circumstances likely to give rise to unauthorised access or disclosure. Failure to comply with these obligations is deemed to be an interference with the privacy of an individual for the purposes of the Privacy Act. The bill allows for a number of exceptions to this mandatory notification requirement.[2]

1.20 The statement of compatibility notes that the bill promotes the right to privacy by providing the protection of the law against unlawful interference with privacy.[3]

Accessing personal data and the right to an effective remedy

1.21 A mandatory data breach notification scheme, requiring certain entities to notify persons if their personal information may have been interfered with, promotes the right to privacy. It also promotes the right to an effective remedy as knowledge of a data breach enables an affected person to bring legal proceedings if appropriate.

1.22 The bill appears to address the government's intention, earlier expressed to the committee in the context of the committee's consideration of the

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1 Pursuant to Schedule 1, item 3, proposed section 26WL in respect of an 'eligible data breach', as defined by section 26WE.

2 As set out in the explanatory memorandum (EM), statement of compatibility (SOC) 60-63. The exceptions address remedial action by the entity; circumstances where another entity notifies an agency of the data breach; where notification would prejudice the activities of a law enforcement body; where the Australian Information Commissioner makes a declaration for an exception; where disclosure would be inconsistent with other laws of the Commonwealth; and notification under both the bill and the *My Health Records Act 2012.*

3 EM, SOC 59.

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (TIA bill), to introduce legislation to enact a mandatory data breach notification scheme. [4]

1.23 In the committee's consideration of the TIA bill in its *Thirtieth report of the 44th Parliament*, the committee welcomed the Attorney-General's advice that such legislation would be introduced. The committee noted that, depending on the extent of the notification scheme, such a bill may address many of the committee's concerns in relation to that bill as to whether a person could seek redress in respect of breaches of their right to privacy and freedom of expression relating to the interception of their telecommunications data.[5] The committee also noted that it would assess any such proposed legislation in future to determine whether it addresses these concerns.[6]

1.24 In its conclusion of its consideration of the TIA bill, the committee also noted that a mechanism that ensures that individuals are notified when their telecommunications data has been accessed is essential to ensuring that persons are able to exercise their right to an effective review.[7]

1.25 However, the current bill applies only to unauthorised access to, or disclosure of, personal information or data loss. It does not apply to lawful interception of telecommunications data pursuant to the *Telecommunications (Interception and Access) Act 1979*.

Committee comment

1.26 **The bill imposes data breach notification requirements on entities regulated by the Privacy Act, and in so doing, promotes the right to privacy and is likely to be compatible with international human rights law.**

1.27 **The committee notes that the Attorney-General previously advised the committee that the government would be introducing a mandatory data breach**

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4 See Parliamentary Joint Committee of Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 10-22;*Twentieth Report of the 44th Parliament* (18 March 2015) 39-74; and *Thirtieth report of the 44th Parliament* (10 November 2015) 138. The Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (TIA bill) amended the *Telecommunications (Interception and Access) Act 1979* to introduce a mandatory data retention scheme. It passed both Houses of Parliament on 26 March 2015 and received Royal Assent on 13 April 2015.

5 Parliamentary Joint Committee of Human Rights, *Thirtieth report of the 44th Parliament* (10 November 2015) 139. See also the International Covenant on Civil and Political Rights, articles 2(3), 17 and 19.

6 Parliamentary Joint Committee of Human Rights, *Thirtieth report of the 44th Parliament* (10 November 2015) 139.

7 Parliamentary Joint Committee of Human Rights, *Thirtieth report of the 44th Parliament* (10 November 2015) 139.

notification scheme in the context of the interception of telecommunications data. The committee responded at the time that a mechanism ensuring that individuals are notified when their telecommunications data has been accessed is essential to ensuring that people are able to exercise their right to an effective remedy (which applies whether their data has been accessed lawfully or unlawfully).

1.28 **The current notification requirements do not apply to the lawful interception of telecommunications data. The committee therefore seeks the Attorney-General's advice as to whether the bill could be amended to ensure individuals are notified when their telecommunications data has been lawfully accessed (noting that there may be circumstances where such notification would need to be delayed to avoid jeopardising any ongoing investigation).**

Social Services Legislation Amendment (Transition Mobility Allowance to the National Disability Insurance Scheme) Bill 2016

Purpose	Proposes to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to restrict the eligibility criteria for mobility allowance, to provide that the allowance will no longer be payable to individuals who transition to the National Disability Insurance Scheme (NDIS) and to close the mobility allowance program from 1 July 2020
Portfolio	Social Services
Introduced	House of Representatives, 13 October 2016
Right	Equality and non-discrimination (see **Appendix 2**)

Discontinuing the mobility allowance program

1.29 Schedule 1 of the bill seeks to amend the *Social Security Act 1991* to replace the current definitions which determine who is qualified to receive mobility allowance. Mobility allowance is a payment designed to assist with transport costs for persons with a disability who participate in work and certain approved activities and who are unable to use public transport without substantial assistance.

1.30 The amendments will provide that the mobility allowance provisions only apply to persons aged between 16 and 65 (the current age requirement is only that the person be over 16). This eligibility criterion would apply to new claimants from 1 January 2017. The bill also provides that the mobility allowance will cease on 1 July 2020 consistent with the transition from the mobility allowance to the NDIS.

Compatibility of the measure with the right to equality and non-discrimination

1.31 It is acknowledged that the transition to the NDIS generally promotes the rights of persons with disabilities and may involve the reallocation of resources. However, limiting access to the mobility allowance so that those aged over 65 would no longer quality for this additional allowance engages and limits the right to equality and non-discrimination on the basis of age.[1]

1 Note that persons aged 65 and older also do not quality for support under the NDIS. For the committee's previous examination of this issue see the analysis of the National Disability Insurance Scheme Legislation Amendment Bill 2013 and DisabilityCare Australia Fund Bill 2013 and eleven related bills in Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 187-196; *Third Report of the 44th Parliament* (4 March 2014) 91-100; and *Seventh Report of the 44th Parliament* (18 June 2014) 76-81.

1.32 The statement of compatibility addresses the issue of age discrimination. It explains that the amendment is intended to provide consistency with the access requirements for the NDIS, which applies to persons under the age of 65, and:

> The National Disability Insurance Scheme is part of a broader system of support available in Australia and persons over the age of 65 who are not eligible for assistance through the National Disability Insurance Scheme can access support through the aged care system. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.[2]

1.33 The statement of compatibility also addresses transitional arrangements for those recipients of the mobility allowance who turn 65 prior to the discontinuation of the mobility allowance program in 2020. These recipients will not be affected by the change, and can continue to be paid the mobility allowance. The statement of compatibility then states:

> Once the mobility allowance program is closed, any remaining recipients will either transition to the National Disability Insurance Scheme or be supported under continuity of support arrangements. Funding for continuity of support arrangements includes current recipients aged 65 or over who will be ineligible to transition to the National Disability Insurance Scheme.[3]

1.34 It is not clear from the statement of compatibility what the 'continuity of support arrangements' for those over 65 years will be once the mobility allowance program is closed. It is also not explained whether those aged 65 and older who are not receiving mobility allowance when the program is closed (but who would qualify for support under the existing law) will be eligible to receive comparable support through the aged care system.

Committee comment

1.35 **While the transition to the NDIS generally promotes the rights of persons with disabilities, the preceding legal analysis raises questions as to the compatibility of the measure with the right to equality and non-discrimination on the basis of age.**

1.36 **The committee seeks the minister's advice as to whether the 'continuity of support' arrangements for existing recipients of mobility allowance provides for the same level of support as that existing under the current allowance.**

1.37 **The committee also seeks the minister's advice as to whether there is comparable assistance under the aged care system for persons aged 65 and older**

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2 Explanatory memorandum (EM), statement of compatibility (SOC) 13.

3 EM, SOC 13.

to participate in work and other approved activities (given there may be persons who are not currently receiving the allowance and who, if the program were not closed, would otherwise be eligible to receive mobility allowance).

Australian Public Service Commissioner's Directions 2016 [F2016L01430]

Purpose	Prescribes standards which Agency Heads and Australian Public Service (APS) employees must comply with to meet their obligations under the *Public Service Act 1999*
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Public Service Act 1999*
Last day to disallow	30 November 2016
Rights	Privacy (see **Appendix 2**)

Background

1.38 The committee reported on the Australian Public Service Commissioner's Directions 2013 [F2013L00448] (the 2013 directions) in its *Sixth Report of 2013*;[1] and on the Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426] (the amendment direction) in its *Eighteenth* and *Twenty-first Reports of the 44th Parliament*.[2]

1.39 The 2013 directions provided, among other things, for the notification in the Public Service Gazette (the Gazette) of certain employment decisions. The committee raised concerns about the compatibility of these measures, particularly in relation to the publication of decisions to terminate employment and the grounds for termination, with the right to privacy and the rights under the Convention on the Rights of Persons with Disabilities (CRPD).

1.40 In response to these concerns, the Australian Public Service Commissioner (the Commissioner) conducted a review of the 2013 directions. As a result, the 2013 directions were amended to remove most of the requirements to publish termination decisions. However, the requirement to notify termination on the grounds of the breach of the Code of Conduct in the Gazette was retained.

1.41 In its previous report, the committee acknowledged that the amendment direction addressed the committee's concerns in relation to their compatibility with the CRPD, and largely addressed the committee's concerns in relation to their compatibility with the right to privacy. However, the committee considered that the

1 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 133-134.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 65-67; and *Twenty-first Report of the 44th Parliament* (24 March 2015) 25-28.

retained measure to publish details of an APS employee when their employment has been terminated on Code of Conduct grounds limited the right to privacy.

Publishing termination decision for breach of the Code of Conduct

1.42 Paragraph 34(1)(e) of the Australian Public Service Commissioner's Directions 2016 (the directions) provides that decisions to terminate the employment of an ongoing APS employee for breach of the Code of Conduct must be published in the Gazette.

Compatibility of the measure with the right to privacy

1.43 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the use and sharing of such information. The requirement to publish details of an APS employee when their employment has been terminated on the grounds of breach of the Code of Conduct in the Gazette engages and limits the right to privacy.

1.44 The statement of compatibility to the directions states that the notification of certain employment decisions in the Gazette promotes APS employees' right to privacy insofar as there is an option for agency heads to decide that a name should not be included in the Gazette because of the person's work-related or personal circumstances.

1.45 As a matter of human rights law, it is not accurate to say that the measure promotes the right to privacy. Rather, the requirement arising from paragraph 34(1)(e) of the directions is a limit on the right to privacy, albeit one that may be justified as reasonable and proportionate. The statement of compatibility may be understood to mean that the limitation on the right to privacy is a reasonable and proportionate one, because there is an option for agency heads not to include a person's name in the Gazette, and therefore a permissible limit under human rights law. However the statement of compatibility provides no assessment of why the requirement arising from paragraph 34(1)(e) of the directions is a reasonable and proportionate limitation.

1.46 The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.47 As noted with respect to the amendment direction, the committee accepts that maintaining public confidence in the good management and integrity of the APS is likely to be a legitimate objective for the purposes of international human rights

law.[3] However, it is unclear how the measure is rationally connected to and proportionate to this objective.

1.48 Neither the statement of compatibility nor the Commissioner's response to the committee's previous inquiries provides significant evidence as to how publishing personal information would achieve its stated objective of showing that the APS deals properly with serious misconduct. It could be argued that the publishing of personal information contributes to showing that the APS deals properly with serious misconduct, by making a public demonstration of the APS's commitment to, and enforcement of, the Code of Conduct. However, the statement of compatibility does not consider whether there are other, less restrictive ways to achieve the same aim.

1.49 The measures would allow APS agencies and other employers to check the employment records of applicants for employment for any history of misconduct. However, there are other methods by which an employer could determine whether a person has been dismissed from the APS for breach of the Code of Conduct, rather than publishing an employee's personal details in the Gazette. For example, it would be possible for the APS to maintain a centralised, internal record of dismissed employees, or to use references to ensure that a previously dismissed APS employee is not rehired by the APS. Indeed, these measures may be more likely to be of use in the hiring process than an employer searching past editions of the Gazette.

1.50 Further, it would be possible to publish information in relation to the termination of employment for breaches of the Code of Conduct without the need to name the affected employee (noting that the limitation on the right to privacy occurs because the name of the person whose employment has been terminated is listed in the Gazette). The statement of compatibility does not explain why other less rights restrictive means cannot be used.

Committee comment

1.51 **The committee notes that publishing details of an Australian Public Service employee when their employment has been terminated for breach of the Code of Conduct engages and limits the right to privacy. The statement of compatibility has not identified or addressed this limitation.**

1.52 **The committee observes that the preceding legal analysis raises questions as to whether there are other less rights restrictive means available to achieve the stated objective.**

1.53 **The committee therefore seeks the advice of the Australian Public Service Commissioner as to whether the limitation is a reasonable and proportionate**

3 See Parliamentary Joint Committee on Human Rights, *Twenty-first Report of the 44th Parliament* (24 March 2015) Appendix 1, Letter from John Lloyd PSM, Australian Public Service Commissioner, to Senator Dean Smith (dated 4 March 2015) 1-2.

measure for the achievement of the apparent objective, and in particular, whether there are other less rights restrictive means to achieve the stated objective.

Further response required

1.54 The committee seeks a further response from the relevant minister or legislation proponent with respect to the following bills and instruments.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	Proposes to establish a scheme to permit the continuing detention of 'high risk terrorist offenders' at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws (see **Appendix 2**)
Previous reports	7 of 2016

Background

1.55 The committee reported on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 in its *Report 7 of 2016,* and requested further information from the Attorney-General in relation to the human rights issues identified in that report.[1]

1.56 In order to conclude its assessment of the bill while it is still before the Parliament, the committee requested that the Attorney-General's response be provided by 27 October 2016. However, a response was not received by this date.

1.57 Accordingly, the committee reiterates its previous request for further information and seeks an additional response as outlined below.[2]

Continuing detention of persons currently imprisoned

1.58 The bill proposes to allow the Attorney-General (or a legal representative) to apply to the Supreme Court of a state or territory for an order providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[3] The Attorney-General may also apply

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 12-20.

2 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

3 See proposed sections 105A.3 and 105A.5.

for an interim detention order pending the hearing of the application for a continuing detention order.[4] The effect of these orders is that a person may be detained in prison after the end of their custodial sentence.[5]

1.59 The particular offences in respect of which a person may be subject to continuing detention will include:

- international terrorist activities using explosive or lethal devices;[6]
- treason;[7] and
- a 'serious offence' under Part 5.3,[8] or an offence under Part 5.5,[9] of the Criminal Code.

1.60 Individuals who have committed crimes under these sections of the Criminal Code are referred to in the bill as 'terrorist offenders'.

1.61 The court is empowered to make a continuing detention order where:

(a) an application has been made by the Attorney-General or their legal representative for the continuing detention of a 'terrorist offender';

(b) after having regard to certain matters,[10] the court is satisfied to a high degree of probability, on the basis of admissible evidence, that the

4 See proposed section 105A.9. An interim detention order can last up to 28 days.

5 See proposed section 105A.9(3).

6 Criminal Code, Schedule 1, Division 72, Subdivision A.

7 Criminal Code, Schedule 1, Division 80, Subdivision B.

8 Criminal Code, Schedule 1, Part 5.3. The offences in Part 5.3 include directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations; financing terrorism; and financing a terrorist.

9 Criminal Code, Schedule 1, Part 5.5. Offences under this part include incursions into foreign countries with the intention of engaging in hostile activities; engaging in a hostile activity in a foreign country; entering, or remaining in, declared areas; preparatory acts; accumulating weapons etc; providing or participating in training; and giving or receiving goods and services to promote the commission of an offence.

offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

(c) the court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[11]

1.62 The Attorney-General bears the onus of proof in relation to the above criteria.[12] The standard of proof to be applied is the civil standard of the balance of probabilities.[13]

1.63 While each detention order is limited to a period of up to three years, further applications may be made and there is no limit on the number of applications.[14] This means that a person's detention in prison could be continued for an extended period of time.

1.64 This bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, unless it is necessary for certain matters set out in proposed section 105A.4(2).[15]

1.65 The measure allows ongoing preventative detention of individuals who will have completed their custodial sentence. The previous analysis observed that the use of preventative detention, that is, detention of individuals that does not arise

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10 Under proposed section 105A.8 the court must have regard to the following matters in deciding whether it is satisfied: (a) the safety and protection of the community; (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert; (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment; (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by: (i) the relevant state or territory corrective services; or (ii) any other person or body who is competent to assess that extent; (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while: (i) on release on parole for any offence; or (ii) subject to a continuing detention order or interim detention order; (g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences); (h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender; (i) any other information as to the risk of the offender committing a serious Part 5.3 offence; (j) any other matter the court considers relevant.

11 Proposed section 105A.7.

12 Explanatory memorandum (EM) 4.

13 See proposed section 105.A.13(1).

14 Proposed section 105A.7(5) and (6).

15 Proposed section 105A.4.

from criminal conviction but is imposed on the basis of future risk of offending, is a serious measure for a state to take.

1.66 While noting that the measure engages and limits a range of human rights, the focus of the initial human rights assessment was on the right to liberty, which includes the right to be free from arbitrary detention. Forms of detention that do not arise from a criminal conviction are permissible under international law, for example, the institutionalised care of persons suffering from mental illness. However, the use of such detention must be carefully controlled: it must reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

1.67 The initial human rights analysis noted that post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.[16] The UN Human Rights Committee (UNHRC) has stated that:

> …to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.[17]

1.68 The initial analysis stated that the question therefore is whether the proposed preventative detention regime is necessary and proportionate, and not arbitrary within the meaning of article 9, bearing in mind the specific guidance in relation to post-sentence preventative detention.

1.69 For the purposes of this initial analysis, it was accepted that the proposed continuing detention order regime pursues the legitimate objective of 'protecting the community from the risk of terrorist attacks',[18] and the measure is rationally connected to this stated objective in the sense that the individual subject to an interim or continuing detention order will be incapacitated while imprisoned. However, the initial analysis reasoned that questions arise as to whether the regime

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16 See, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014)[15], [21]. See, also UN Human Rights Committee, General Comment 8: Article 9, Right to Liberty and Security of Persons (30 June 1982).

17 See, for example, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21].

18 EM 3.

contains sufficient safeguards to ensure that preventative detention is necessary and proportionate to this objective.

1.70 The proposed continuing detention order regime shares significant features with the current continuing detention regimes that exist in New South Wales (NSW),[19] and Queensland.[20] These state regimes apply in respect of sex offenders and/or 'high risk violent offenders' and have the following elements:

- the Attorney-General or the state may apply to the Supreme Court for a continuing detention order for particular classes of offenders;[21]
- the application must be accompanied by relevant evidence;[22]
- the effect of the continuing detention order is that an offender is detained in prison after having served their custodial sentence in relation to the offence;[23]
- the court may make a continuing detention order if it is satisfied to a 'high degree of probability' that the offender poses an 'unacceptable risk' of committing particular offences;[24]
- in determining whether to make the continuing detention order, the court must have regard to a list of factors;[25]

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19 The *Crimes (High Risk Offenders) Act 2006* (NSW) was first enacted in 2006 as the *Crimes (Serious Sex Offenders) Act 2006* to provide for continuing supervision and detention of people convicted of sex offences. The Act was amended in 2013 to extend the regime to people convicted of violent crimes.

20 The *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) was enacted in 2003 to provide for continuing supervision and detention of people convicted of sex offences.

21 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 5; *Crimes (High Risk Offenders) Act 2006* (NSW) section 13A.

22 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 5; *Crimes (High Risk Offenders) Act 2006* (NSW) section 14; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

23 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 14; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

24 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5B, 5E.

25 In NSW this includes community safety, medical assessments, any other information relating to the likelihood of reoffending, the offender's compliance with supervision orders and willingness to engage in assessments or rehabilitation programs, the offender's criminal history, and any other matters that the court considers relevant: see, *Crimes (High Risk Offenders) Act 2006* (NSW) section 17(4). In Queensland this includes medical reports or other information relating to the likelihood that the prisoner will reoffend, the prisoner's criminal history, the prisoner's engagement with rehabilitation programs, community safety, and any other relevant matter: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13.

- the court must consider whether a non-custodial supervision order would be adequate to address the risk;[26]
- the term of continuing detention orders can be made for extended periods of time;[27] and
- the availability of periodic review mechanisms.[28]

1.71 As noted in the previous analysis, these continuing detention schemes were the subject of individual complaints to the UNHRC in *Fardon v Australia*,[29] and *Tillman v Australia.*[30] In *Fardon v Australia,* the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years' imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

1.72 The UNHRC found that the continued detention in both cases was arbitrary in violation of article 9 of the ICCPR. In summary, the UNHRC identified the following as relevant to reaching these determinations:

- as the complainants remained incarcerated under the same prison regime the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence; and is contrary to the prohibition against retrospective criminal laws (article 15 of the ICCPR), particularly as in both instances the enabling legislation was enacted after the complainants were first convicted;
- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the ICCPR;

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26 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

27 In Queensland continuing detention orders may be indefinite; in NSW a continuing detention order may be up to five years. The court may also order further continuing detention orders against the same offender: *Crimes (High Risk Offenders) Act 2006* (NSW) sections 17(4), 18(3).

28 *Crimes (High Risk Offenders) Act 2006* (NSW) section 24AC.

29 UN Human Rights Committee (1629/2007) (18 March 2010).

30 UN Human Rights Committee (1635/2007) (18 March 2010).

- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for continuing detention orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and
- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

1.73 The UNHRC's findings and the Australian government's formal response were not referred to in the statement of compatibility.

1.74 The previous analysis stated that a number of the concerns about the NSW and Queensland schemes are relevant to an assessment of the current continuing detention proposal, including:

- individuals currently incarcerated may be subject to continuing detention contrary to the prohibition on retrospective criminal law;
- the civil standard of proof applies to proceedings (that is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt);[31] and
- the difficulties arising from the court being asked to make a finding of fact in relation to the risk of future behaviour.

1.75 The analysis noted that there are however two points of difference to the NSW and Queensland schemes.

1.76 First, the bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, except in certain circumstances. This safeguard appears to respond to one of the bases upon which the state-level regimes were incompatible with article 9, namely, that the applicants were incarcerated within the same prison regime, and therefore their preventative detention in effect constituted a fresh term of imprisonment after they had served their sentence. However, it is noted the bill nonetheless does provide that persons subject to continuing detention orders are to be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences.

31 See, proposed section 105.A.13(1). Some preventative detention regime proceedings are criminal in nature: *Dangerous Sexual Offenders Act* 2006 (WA) section 40.

1.77 Second, the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[32] Accordingly, the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[33]

1.78 The initial analysis noted that this aspect of the bill appears to be a safeguard against the use of a continuing detention order in circumstances where an alternative to detention is available. However, it is not apparent from the bill how this safeguard would operate in practice including whether and how the court would be able to assess or provide for less restrictive alternatives. Under the NSW and Queensland regimes, if satisfied that a prisoner is a serious danger to the community (in Queensland) or is a high risk sex offender or high risk violent offender (in NSW), it is open to a court to make either a continuing detention order or a supervision order.[34] By contrast, the bill does not empower the court to make an order other than a continuing detention order.[35]

1.79 Further, the previous analysis noted that the proposed legislative test requires consideration of whether the continuing detention order is the least rights restrictive only at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence. It is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. Including a requirement to consider this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate, particularly that post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society.

1.80 Finally, in the proposed scheme the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a continuing detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The bill provides for the court to obtain expert evidence in reaching a determination in relation to risk, though

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32 Proposed section 105A.7.

33 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

34 See *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5B, 5E.

35 The bill does contain an annotation that a control order is an example of a less restrictive measure. However, this does not form part of the operative legislation.

given the nature of the task inherent uncertainties with risk assessments remain.[36] Other jurisdictions have sought to minimise these uncertainties by recommending that a 'Risk Management Monitor' be established to undertake a range of functions including developing best practices for risk assessments; developing guidelines and standards; validating new assessment tools; providing for procedures by which experts become accredited for assessing risk; providing education and training in the assessment of risk; and developing risk management plans.[37] Such a body is intended to act as a safeguard in relation to the quality of risk assessments.

1.81 The committee noted that the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate; however, the analysis above raises questions regarding the adequacy of these safeguards, particularly in light of the UNHRC's determinations in relation to the state-level regimes.

1.82 Accordingly, the committee sought the advice of the Attorney-General as to the extent to which the proposed scheme addresses the specific concerns raised by the UNHRC as set out at [1.72] in respect of existing post-sentencing preventative detention regimes.

1.83 The committee further sought the advice of the Attorney-General as to how the court's consideration of less restrictive measures pursuant to proposed section 105A.7 is intended to operate in practice, including:

- what types of less restrictive measures may be considered by the court;
- what options might be available to the court to assess or make orders in relation to the provision of less restrictive alternatives; and
- whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order.

1.84 The committee also sought the advice of the Attorney-General as to the feasibility of the following recommendations:

- to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);

36 See proposed section 105A.6.

37 Victorian Sentencing Advisory Council, *High Risk Offenders: Post-sentence preventative detention: final report* (2007) 115; NSW Sentencing Council, *High-risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012).

- to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [1.80];
- to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and
- that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.

1.85 In the absence of this information, it is not possible to conclude that the proposed continuing detention regime is compatible with the right to liberty.

Committee response

1.86 **The committee observes that the proposed continuing detention regime engages and limits the right to liberty, and that the statement of compatibility did not sufficiently justify this limitation.**

1.87 **The UNHRC has previously found that substantially similar existing preventative detention regimes in Queensland and NSW were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards.**

1.88 **A response was not received from the Attorney-General regarding the human rights issues identified in the committee's initial assessment of the bill. The committee remains concerned that the measure may not be compatible with the right not to be subject to arbitrary detention.**

1.89 **The committee therefore seeks the further advice of the Attorney-General in relation to the proposed scheme, including the specific matters set out in its previous request at [1.82].**

1.90 **The committee seeks the further advice of the Attorney-General in relation to the following possible amendments which may assist with the human rights compatibility of the scheme:**

- **to address concerns about whether the court would be empowered to make orders in relation to the provision of less restrictive alternatives, that the bill be amended to provide for alternative orders;**
- **to assist with concerns about whether continuing detention would be the least rights restrictive in an individual case, that the bill be amended to provide that, prior to making an application for a continuing detention order, the Attorney-General should be satisfied that there is no other less restrictive measure to address any risk;**
- **to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);**

- **to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [1.80];**
- **to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and**
- **that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.**

Advice only

1.91 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Australian Postal Corporation (Unsolicited Political Communications) Bill 2016

Purpose	Proposes to amend the *Australian Postal Corporation Act 1989* to prevent Australia Post from delivering unaddressed political material to a premises where a sticker or sign specifically requests that unaddressed mail or political material not be delivered
Sponsor	Mr Wilkie MP
Introduced	House of Representatives, 17 October 2016
Rights	Freedom of expression; take part in public affairs (see **Appendix 2**)

Preventing delivery of unaddressed political materials

1.92 The bill would prevent Australia Post delivering unaddressed political materials to a premises if there is a sign displayed at that premises requesting that unaddressed or political material not be delivered.

Compatibility of the measure with human rights

1.93 The right to freedom of expression as set out in article 19 of the International Covenant on Civil and Political Rights (ICCPR) 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. The United Nations Human Rights Committee further sets out in its General Comment No. 25 that the right is particularly important in the context of public and political affairs:

> In order to ensure the full enjoyment of rights protected by article 25 [the right to take part in public affairs], the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold

> peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.[1]

1.94 Any restrictions on the distribution of political materials therefore engages and limits the right to freedom of expression, as political parties and candidates should be able to freely communicate information or opinions to the public prior to elections without undue restriction.

1.95 The statement of compatibility for the bill sets out that any restrictions on the right to freedom of expression are 'considered fair and reasonable in order to protect the rights of others'.[2] However, it does not set out a justification for the limitation in line with the committee's analytical framework, including whether or not the measure pursues a legitimate objective for the purposes of international human rights law, whether the measure is rationally connected to its stated objective, and whether it is a proportionate means of achieving this objective.

1.96 Further, given that the measure relates to political material, the measure also engages and may limit the right to take part in public affairs as set out in article 25 of the ICCPR. This right is an essential part of a democratic government that is accountable to the people, and requires other rights such as freedom of expression, association and assembly to be respected in order for it to be meaningful. As such, any restriction on the communication of voting information, electoral materials, or political communication may serve to limit the ability of citizens to fully and effectively take part in elections and exercise their enjoyment of this right.

1.97 The statement of compatibility to the bill does not address the engagement of the right to take part in public affairs, and so does not provide any justification for any potential limitation.

Committee comment

1.98 **Noting the human rights concerns identified in the preceding legal analysis in relation to the bill, the committee draws the human rights implications of the bill to the attention of Mr Wilkie MP and the Parliament.**

1.99 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

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1 UN Human Rights Committee (UNHRC), General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

2 Explanatory memorandum, statement of compatibility 4.

Criminal Code Amendment (Firearms Trafficking) Bill 2016

Purpose	Proposes to amend the *Criminal Code Act 1995* to provide for mandatory minimum sentences and increased maximum penalties for the offences of trafficking firearms or firearms parts within Australia, and into and out of Australia
Portfolio	Justice
Introduced	Senate, 15 September 2016
Rights	Security of the person and freedom from arbitrary detention; fair trial and fair hearing (see **Appendix 2**)

Background

1.100 The committee previously considered these measures in its *Tenth Report of the 44th Parliament*, *Fifteenth Report of the 44th Parliament*, *Nineteenth Report of the 44th Parliament*, *Twenty-second Report of the 44th Parliament*, *Twenty-fourth Report of the 44th Parliament*, and *Thirty-third Report of the 44th Parliament*.[1] The bill was reintroduced to the Senate on 31 August 2016, in identical form, following the commencement of the 45th Parliament.

1.101 The previous human rights analysis of the measures requested further information from the minister in relation to mandatory minimum sentences, and the imposition of strict liability and absolute liability elements of the proposed offences.

1.102 The committee was able to conclude that the strict liability and absolute liability elements of the proposed offences were compatible with human rights on the basis of additional information provided by the minister.[2] The analysis regarding mandatory minimum sentences is set out below.

1 The measures were originally introduced in the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014; see Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 9-19, *Fifteenth Report of the 44th Parliament* (14 November 2014) 24-34, and *Nineteenth Report of the 44th Parliament* (3 March 2015) 101-107. The measures were then reintroduced in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015; see *Twenty-second Report of the 44th Parliament* (13 May 2015) 35-39; and *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 74-76. They were again reintroduced in the Criminal Code Amendment (Firearms Trafficking) Bill 2015; see *Thirty-third Report of the 44th Parliament* (2 February 2016) 3.

2 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 33-34.

Mandatory minimum sentences for international firearms and firearm parts trafficking offences

1.103 The bill proposes to introduce new offences into the *Criminal Code Act 1995* of trafficking prohibited firearms and firearm parts into and out of Australia (proposed Division 361). The proposed amendments also extend the existing offences of cross-border disposal or acquisition of a firearm and taking or sending a firearm across borders within Australia to include firearm parts as well as firearms (Division 360).

1.104 A mandatory minimum five year term of imprisonment for the new offences in Division 361 as well as for existing offences in Division 360 would also be inserted.

Compatibility of the measure with human rights

1.105 Mandatory minimum sentences of imprisonment engage the right to be free from arbitrary detention.[3] The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

1.106 The proposed mandatory minimum sentencing provisions also engage and limit article 14(5) of the International Covenant on Civil and Political Rights, which protects the right to have a sentence reviewed by a higher tribunal (right to a fair trial). This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

1.107 The previous human rights assessment of the measure noted that mandatory minimum sentencing would not apply to children and that the proposed measures do not impose a minimum non-parole period on offenders. Accordingly, the measure preserves some of the court's discretion as to sentencing.

1.108 Nonetheless, following the committee's correspondence with the minister, the previous human rights assessment of the bill concluded that the proposed mandatory minimum sentencing provisions were likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial: information from the minister had not shown that mandatory minimum sentencing is necessary in pursuit

3 See Appendix 4, *Guidance Note 2*.

of the stated objective, and that less restrictive measures would not achieve the same result.[4]

1.109 In so doing, the previous analysis included concerns that the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost', which is to say, the appropriate sentence for the least serious case. Further, it noted that courts may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence. This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

1.110 The concluding comments on the measures recommended that, in the event that mandatory minimum sentencing provisions are retained, the provision be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.[5] This would ameliorate some of the concerns outlined at paragraph [1.109] above, by ensuring that the scope of the discretion available to judges would be clear on the face of the provision itself.

1.111 The minister subsequently undertook to amend the explanatory memorandum to provide that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This information was included in the revised explanatory memorandum to the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, and the explanatory memorandums of all subsequent reintroductions of the measure.[6]

1.112 The previous human rights analysis considered that this step was likely to provide some protection of judicial discretion in sentencing. However, the committee also reiterated its recommendation that the legislation itself should be amended to clarify the issue.[7]

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4 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 32 at [1.98].

5 See Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (14 November 2014) 32 at [1.99]. The recommendation was reiterated in the *Nineteenth Report of the 44th Parliament* (3 March 2015) 106 at [2.14]; and the *Twenty-second Report of the 44th Parliament* (13 May 2015) 38 at [1.159].

6 See revised explanatory memorandum to the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014, 15.

7 See Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 104-107.

Committee comment

1.113 **The committee thanks the minister for his previous considered engagement in relation to the issue of mandatory minimum sentencing and welcomes the inclusion in the explanatory memorandum of a statement that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'. This statement was included following correspondence between the committee and the minister in relation to these measures as part of the committee's examination of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.**

1.114 **The committee previously noted that while the inclusion of this statement in the explanatory memorandum is likely to provide clarification of the available judicial discretion in sentencing, the previous human rights assessment of the measures concluded that the proposed mandatory minimum sentencing provisions are likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.**

1.115 **The committee also notes its previous recommendation that, if mandatory minimum sentencing was retained, the provisions themselves be amended to clarify to the courts that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.**

1.116 **Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Freedom to Marry Bill 2016

Purpose	Proposes to amend the *Marriage Act 1961* to define marriage as a union of two people and the *Sex Discrimination Act 1984* to provide that it is not unlawful for people who provide goods, services or facilities for marriages to discriminate against someone because of their sexual orientation, gender identity, intersex status, marital or relationship status
Sponsor	Senator Leyonhjelm
Introduced	Senate, 13 September 2016
Right	Equality and non-discrimination (see **Appendix 2**)

Discrimination in relation to marriage services

1.117 The bill seeks to amend the *Marriage Act 1961* (Marriage Act) to permit marriage between two people.[1] The bill also seeks to amend the *Sex Discrimination Act 1984* (Sex Discrimination Act) to permit people providing goods, services or facilities in connection with the solemnisation of a marriage to discriminate against a person because of their sexual orientation, gender identity, intersex status, marital or relationship status. The focus of the below analysis is in relation to the proposed changes to the Sex Discrimination Act; the human rights implications of the proposed amendments to the Marriage Act are dealt with elsewhere in this report.[2]

Compatibility of the measure with the right to equality and non-discrimination

1.118 The right to equality and non-discrimination includes a requirement that states have laws and measures in place to ensure that people are not subjected to discrimination by others. The proposed amendments to the Sex Discrimination Act engage and limit the right to equality and non-discrimination by seeking to permit direct discrimination as described above.

1.119 The statement of compatibility describes the purpose of the bill as being to allow all Australians the right to marry and states that the amendments provide for 'freedom of conscience for people who provide goods, services or facilities for marriages'.[3] However, it provides no assessment of the impact of the proposed amendments to the Sex Discrimination Act on the right to equality and

1 The human rights implications of such an amendment to the Marriage Act are considered in the human rights assessment of the Marriage Legislation Amendment Bill 2016 and Marriage Legislation Amendment Bill 2016 [No. 2].

2 See, human rights assessment of the Marriage Legislation Amendment Bill 2016 and Marriage Legislation Amendment Bill 2016 [No. 2].

3 Explanatory memorandum (EM) 6.

non-discrimination of the provision of goods, services or facilities in the context of the bill. This does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provides a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Committee comment

1.120 **The committee draws to the attention of the legislation proponent the requirement for the preparation of statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the committee's expectations in relation to the preparation of such statements as set out in its *Guidance Note 1*.**

1.121 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

Marriage Legislation Amendment Bill 2016

Marriage Legislation Amendment Bill 2016 [No. 2]

Purpose	Proposes to amend the *Marriage Act 1961* to define marriage as a union of two people
Sponsors	Marriage Legislation Amendment Bill 2016: Mr Shorten MP Marriage Legislation Amendment Bill 2016 [No. 2]: Mr Bandt MP; Ms McGowan MP; Mr Wilkie MP
Introduced	Both bills were introduced into the House of Representatives on 12 September 2016
Rights	Equality and non-discrimination; freedom of religion; respect for the family (see **Appendix 2**)

Background

1.122 As both the text of the Marriage Legislation Amendment Bill 2016 and the Marriage Legislation Amendment Bill 2016 [No. 2] (collectively, the bills) and their explanatory memoranda are identical, this analysis considers both bills together.

1.123 The bills are identical to the Marriage Legislation Amendment Bill 2015, which the committee previously considered and reported on in its *Thirtieth report of the 44th Parliament*.[1] This previous analysis is referred to below.

Changes to the Marriage Act to permit same-sex marriage

1.124 The bills seek to make a number of changes to the *Marriage Act 1961* (Marriage Act) in order to permit same-sex couples to marry.

1.125 As noted in the previous analysis, the bills seek to remove the existing domestic law prohibition on same-sex couples marrying. The committee's task is to assess whether the removal of the prohibition on same-sex marriage is compatible with Australia's human rights obligations. This is distinct from the question of whether international human rights law recognises a right to same-sex marriage, although this is explained as background below.

Compatibility of the measure with the right to equality and non-discrimination

1.126 The statement of compatibility for each bill acknowledges that the right to equality and non-discrimination is engaged 'because it extends the right to marry to any two people regardless of sex, sexual orientation, gender identity or intersex

1 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112-124.

status'. On this basis, the statements of compatibility conclude that the bills promote those rights.

1.127 Under article 26 of the International Covenant on Civil and Political Rights (ICCPR), states are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground, the United Nations Human Rights Committee (the UNHRC) has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[2]

1.128 By restricting marriage to between a man and a woman, the current Marriage Act directly discriminates against same-sex couples on the basis of sexual orientation. The bill proposes to remove this restriction.

1.129 International human rights law jurisprudence has not to date recognised an obligation on states to grant access to same-sex marriage. The committee's previous analysis noted that in *Joslin v New Zealand* (2002) the UNHRC determined that the right to marry in article 23 of the ICCPR is confined to a right of opposite-sex couples to marry.[3] However, international jurisprudence has recognised that same-sex couples are equally as capable as opposite-sex couples of entering into stable, committed relationships and are in need of legal recognition and protection of their relationship.[4]

1.130 The previous analysis also acknowledged that, since *Joslin v New Zealand* was decided in 2002, there has been a significant evolution of the legal treatment of same-sex couples internationally. The ICCPR is a living document and is to be interpreted in accordance with contemporary understanding. The UNHRC has emphasised that the ICCPR should be 'applied in context and in the light of

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2 See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

3 See *Joslin v New Zealand*, UN Human Rights Committee, Communication No. 902/1999 (2002) at paragraph [8.3]: 'In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant'. For further analysis of this case in light of the right to equality and non-discrimination in the context of the proposed measures see Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 114 at [1.494].

4 See European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04 (2010) paragraphs [99]; European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015) paragraph [165].

present-day conditions'.[5] Accordingly, it may be argued that the definition of marriage under the ICCPR is in the process of evolving to include same-sex marriage.

1.131 While international jurisprudence has not recognised a right to same-sex marriage under international human rights law, so that states would be required to remove any prohibition on same-sex marriage, it is clear that a law which prohibits marriage on the grounds of sexual orientation engages the right to equality and non-discrimination. By removing the current prohibition on same-sex couples marrying, the bill promotes the right to equality and non-discrimination.

1.132 Given that discrimination on the grounds of sexual orientation is recognised as a ground on which states are required to guarantee all persons equal and effective protection against, the committee concluded that extending the definition of marriage to include a union between two people (rather than only for opposite-sex couples) promotes the right to equality and non-discrimination.

Committee comment

1.133 **The committee has previously concluded that expanding the definition of marriage to include same-sex couples promotes the right to equality and non-discrimination.**

1.134 **The committee does not express a view as to the merits of the bill as a whole or the principle of same sex marriage itself, both of which are matters of individual conscience and on which there are differences of opinion among members of the committee.**

1.135 **Noting these previous conclusions regarding the right to equality and non-discrimination, the committee draws the human rights implications of this measure to the attention of the Parliament.**

1.136 **The committee notes that its attention was drawn to the previous dissenting report in the *Thirtieth report of the 44th Parliament*.[6]**

Compatibility of the measure with the right to freedom of religion

1.137 The previous human rights assessment considered that the measures engage and limit the right to freedom of religion under article 18 of the ICCPR.

1.138 The Marriage Act currently grants a minister of religion of a recognised denomination the discretion whether to solemnise a marriage. The bills would amend the Marriage Act to extend this discretion to ensure that nothing in the Marriage Act 'or in any other law' imposes an obligation on a minister of religion to

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5 UN Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998 (5 August 2002) paragraph [10.3]. See also European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015).

6 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 151.

solemnise any marriage. The reference to 'any other law' extends to federal anti-discrimination laws. Accordingly, ministers of religion would be free not to solemnise a same-sex marriage for any reason, including if this was contrary to their religious beliefs.

1.139 Importantly, provided that a minister of religion is authorised by their religion to solemnise marriages, they retain absolute discretion under the law as to whether or not they wish to solemnise a particular marriage. This individual discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.

1.140 In contrast, under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. This would apply even if the civil celebrant had a religious objection to the marriage of same-sex couples. In such a circumstance, the proposed measure would engage and limit the right to freedom of religion under article 18 of the ICCPR.

1.141 The previous analysis considered that the objective of the bill, in allowing any two people to marry and thereby recognising the right of all people to equality before the law, is a legitimate objective for the purposes of international human rights law. It also considered that the measure is clearly rationally connected to this objective. The central question is whether, by providing an exemption from anti-discrimination laws only for ministers of religion and not for civil celebrants, the measure is proportionate to the objective of promoting equality and non-discrimination.

1.142 Article 18(3) of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.[7]

1.143 The UNHRC has concluded that the right to exercise one's freedom of religion may be limited to protect equality and non-discrimination.[8] As set out above, the right to equality and non-discrimination has been extended to sexual orientation. The previous human rights analysis considered that it is therefore permissible to limit the right to exercise one's freedom of religion in order to protect the equal and non-discriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.

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7 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) paragraph [8].

8 See, *Eweida & Ors v United Kingdom* [2013] ECHR 37.

1.144 In assessing the proportionality of the limitation, it is relevant that civil celebrants, acting under the Marriage Act, are performing the role of the state in solemnising marriages.[9] In *Eweida and Ors v United Kingdom*,[10] the European Court of Human Rights dismissed Ms Ladele's complaint that she was dismissed by a UK local authority (the Islington Council) from her job as a register of births, death and marriages, because she refused on religious grounds to have civil partnership duties of same-sex couples assigned to her. The court upheld the finding of the UK courts that the right to freedom of religion (under article 9 of the European Human Rights Convention) did not require that Ms Ladele's desire to have her religious views respected should 'override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community.'[11]

1.145 Regarding the question of proportionality, the previous human rights analysis considered that the measures appear to take the least rights restrictive approach to the limit placed on the right to freedom of religion, because they maintain the exception for ministers of religion to refuse to solemnise a marriage on any basis. The absence of an exception for celebrants who officiate a civil marriage ceremony aligns with the existing difference in the position of religious and civil marriage celebrants. Accordingly, the previous analysis considered that not granting civil celebrants the discretion to refuse to solemnise same-sex marriages on the ground that the couple are of the same sex, regardless of their personal religious views, is a proportionate limit on the right to freedom of religion to ensure the right of same-sex couples to equality and non-discrimination.

1.146 Nothing in the bills affects the body of existing anti-discrimination law provisions which prohibit persons who provide goods or services to the public from discriminating against persons on the basis of their sexual orientation.

Committee comment

1.147 **Under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex.**

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9 On this point, in the context of civil marriage celebrants in South Africa and Canada, see *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19 [97]; *Barbeau v British Columbia (A-G)* 2003 BCCA 251; *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA) [53].

10 *Eweida & Ors v United Kingdom* [2013] ECHR 37.

11 *London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] ICR 532.

1.148 **This engages and limits the right to freedom of religion under article 18 of the ICCPR, insofar as a civil celebrant has a religious objection to the marriage of same-sex couples.**

1.149 **The committee notes that the preceding legal analysis indicates this limitation is permissible under international human rights law.**

1.150 **Noting the previous human rights assessment, the committee draws the human rights implications of this measure to the attention of the Parliament.**

Compatibility of the measure with the right to respect for the family

1.151 To the extent that the bills would expand the protections afforded to married couples under Australian domestic law to same-sex couples, they may engage the right to respect for the family. The statement of compatibility states that it supports families 'by extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents'.[12]

1.152 The previous analysis noted that the right to respect for the family under international human rights law applies to a diverse range of family structures, including same-sex couples, and the bill is consistent with this right.

1.153 For example, recognising the diversity of family structures worldwide, the UNHRC has adopted a broad conception of what constitutes a family, noting that families 'may differ in some respects from State to State…and it is therefore not possible to give the concept a standard definition'.[13] Consistent with this approach, the European Court of Human Rights noted in 2010 that same-sex couples without children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.[14]

1.154 Similarly, the UN Committee on the Rights of the Child noted in 1994 that the concept of family includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', and stated:

> …[the Convention on the Rights of the Child (CRC)] is relevant to 'the extended family and the community and applies in situations of nuclear

12 Explanatory memorandum (EM), statement of compatibility (SOC) 2.

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

14 European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) paragraphs [93]–[94].

family, separated parents, single-parent family, common-law family and adoptive family'.[15]

1.155 The previous analysis considered that this statement on family diversity, along with the UNHRC's more recent inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents, is consistent with the view that the CRC extends protection of the family to same-sex families.[16] It further considered that the UNHRC has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.[17]

Committee comment

1.156 **The previous human rights assessment of the measures concluded that expanding the definition of marriage promotes the right to respect for the family.**

1.157 **The committee does not express a view as to the merits of the bill as a whole or the principle of same sex marriage itself, both of which are matters of individual conscience and on which there are differences of opinion among members of the committee.**

1.158 **Noting these previous conclusions regarding the right to respect for the family, the committee draws the human rights implications of this measure to the attention of the Parliament.**

1.159 **The committee notes that its attention was drawn to the previous dissenting report in the *Thirtieth report of the 44th Parliament*.[18]**

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15 UN Committee on the Rights of the Child, *Report on the Fifth Session*, 5th sess, UN Doc CRC/C/24 (8 March 1994) Annex 5 ('Role of the Family in the Promotion of the Rights of the Child'). See also UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003).

16 UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003). Privacy, family life and home life are protected by article 16 of the CRC, as well as by article 17(1) of the ICCPR, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

17 UN Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th sess, UN Doc CRC/C/111 (28 November 2001) [558].

18 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 151.

Compatibility of the measure with rights of the child

1.160 The statement of compatibility for each bill states that they promote the best interests of children by:

> …extending the stability embodied in a marriage relationship to all families, regardless of the sex, sexual orientation, gender identity or intersex status of the parents.[19]

1.161 They also state that the bills do not affect the status quo regarding the parentage of children and therefore do not 'adversely affect the rights of children'.[20]

1.162 As the bills relate strictly to marriage they do not directly engage the rights of the child.[21] The regulation of marriage provides legal recognition for a relationship between two people, which in and of itself has no impact on whether the persons in that relationship have children—there are many married couples who do not have children and many unmarried couples that do have children.

1.163 Further, the bills would not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children. The previous analysis considered that such laws therefore fall outside the scope of the committee's examination of the bill for compatibility with human rights.

1.164 In addition, the previous analysis noted that whether or not a child's parents or guardians are married has no legal effect on the child. In compliance with the requirements of international human rights law, there are no laws in Australia that discriminate against someone on the basis of their parents' marital status.[22] Therefore, amending the definition of marriage in the Marriage Act will not affect the legal status of the children of married or unmarried couples.

1.165 The previous assessment noted that the CRC refers to 'parents' and 'legal guardians' interchangeably and refers to 'family' without referencing mothers or

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19 EM, SOC 3.

20 EM, SOC 3.

21 The previous human rights assessment of the measures noted that they propose to make one amendment which would engage the rights of the child, which is namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child.

22 See article 2 of the CRC which states that all rights should be ensured to children without discrimination of any kind, irrespective of the child's or parent's social origin or birth. See also article 26 of the ICCPR which requires state parties to guarantee equal protection against discrimination on any ground, including social origin, birth or other status.

fathers.[23] The preamble notes that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[24] There is no reference to marriage in the CRC. Provisions in the CRC relating to a child's right to know its parents and a right to remain with its parents,[25] are not engaged by the bill, which is limited to the legal recognition of relationships.

1.166 There is an obligation in the CRC to take into account the best interests of the child 'in all actions concerning children', and this legal duty applies to all decisions and actions that directly or indirectly affect children. The UN Committee on the Rights of the Child has said that this obligation applies to 'measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure'.[26] This applies to the legislature in enacting or maintaining existing laws, and the UN Committee on the Rights of the Child has given the following guidance as to when a child's interests may be affected:

> Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.[27]

1.167 In this regard, the previous human rights assessment of the measures considered that it is not certain whether the legal recognition of a parent's relationship would have a major impact on a child. If it were considered to have a major impact on a child, then it is necessary to assess whether legislating to allow same-sex marriage would promote or limit the rights of the child to have his or her best interests assessed and taken into account as a primary consideration.

1.168 There is no evidence to demonstrate that legal recognition of same-sex parents' relationships would be contrary to the best interests of the children of those couples.

1.169 There is some evidence to suggest that legal recognition of same-sex couples would promote the best interests of children of those couples. The previous human

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23 Fathers are not mentioned in the CRC and mothers are only referred to in the context of pre and postnatal care.

24 See the Preamble to the CRC.

25 See articles 7 and 9 of the CRC.

26 UN Committee on the Rights of the Child*, General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (2013) paragraph [19].

27 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (2013) paragraph [20].

rights assessment identified some evidence suggesting that children living with cohabiting, but unmarried, parents may do less well than those with married parents.[28] That analysis also noted that there is also some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married.[29]

1.170 Further, to the extent that any existing laws provide greater protection for married couples compared to non-married couples, the previous human rights assessment of the measures considered that extending the protection of marriage to same-sex couples may indirectly promote the best interests of the child.

Committee comment

1.171 **The committee notes that the previous human rights assessment of the measures concluded that, as they are limited to the legal recognition of a relationship between two people, and do not regulate procreation or adoption, the rights of the child are not engaged by the bills.**

1.172 **The committee further notes that the previous human rights assessment concluded that, to the extent that the obligation to consider the best interests of the child is engaged, the measures do not limit, and may promote, the obligation to consider the best interests of the child.**

1.173 **The committee does not express a view as to the merits of the bill as a whole or the principle of same sex marriage itself, both of which are matters of individual conscience and on which there are differences of opinion among members of the committee.**

1.174 **Noting these previous conclusions regarding the rights of the child, the committee draws the human rights implications of this measure to the attention of the Parliament.**

1.175 **The committee notes that its attention was drawn to the previous dissenting report in the *Thirtieth report of the 44th Parliament*.[30]**

28 See Lixia Qu and Ruth Weston, Australian Institute of Family Studies, *Occasional Paper No. 46: Parental marital status and children's wellbeing* (2012).

29 Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, Williams Institute, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experience and Impact of Marriage on Same-sex Couples* (2009) 10.

30 Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 151.

National Integrity Commission Bill 2013

Purpose	Establishes a National Integrity Commission to investigate corruption in relation to public officials and Commonwealth agencies, Australian Federal Police and the Australian Crimes Commission
Sponsor	Senator Milne (restored to the Notice Paper by Senator Siewert)
Introduced	Senate, 13 November 2013
Rights	Reputation; freedom of expression and assembly; not to incriminate oneself (see **Appendix 2**)

Background

1.176 The committee previously examined the National Integrity Commission Bill 2013 (the bill) in its *First Report of the 44th Parliament*.[1] In that report the committee considered that a number of provisions in the bill gave rise to human rights concerns, and requested further information from the legislation proponent in order to conclude its consideration of the bill.

1.177 The bill was restored to the Notice Paper by Senator Siewert following the commencement of the 45th Parliament.

Compatibility of the bill with human rights

1.178 The previous human rights analysis found that a number of measures in the bill raised human rights concerns. Accordingly, the committee wrote to the legislation proponent seeking further information regarding these concerns, but to date a response has not been received by the committee. The previous human rights assessment of the bill and the committee's requests are summarised further below.

1.179 The bill would create and confer wide-ranging powers on the National Integrity Commissioner (the commissioner) to inquire into and report on matters relating to alleged or suspected corruption in a range of government agencies. The previous human rights analysis noted that it was unclear whether the National Integrity Commission (the commission) would have the ability to make findings critical of a person without the person first having had the opportunity to respond to the issue. The analysis stated that if this were the case, there would be an interference with the person's right to reputation. The committee therefore requested further information from the legislation proponent to clarify this issue.

1 See Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 41-47.

1.180 Proposed section 63(1) of the bill provides that a person commits an offence if they knowingly insult, disturb or use insulting language towards the commissioner during the exercise of his or her powers. The previous analysis considered that this therefore limited the right to freedom of expression. Proposed section 63(2) provides that a person commits an offence if they knowingly create a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry. The previous analysis found that this new offence may limit both the right to freedom of expression and the right to freedom of assembly. The committee therefore requested further information from the legislation proponent as to whether the offences created by clauses 63(1) and 63(2) may be justified as permissible restrictions on the exercise of freedom of expression and the right of assembly under the International Covenant on Civil and Political Rights.

1.181 Further, the bill would confer power on the commissioner to order the provision of information or the production of documents or things. Failure to provide such documents would constitute an offence which is punishable by up to two years' imprisonment. A similar punishment would also apply to a person who has been summoned to attend a hearing before the commissioner and fails to answer a question that the commissioner requires them to answer. Partial use immunity would be provided for these offences, meaning that no information or documents provided are admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. However, no derivative use immunity would be provided.[2] The previous human rights analysis considered that these measures engaged the right not to incriminate oneself, but that this limitation had not been adequately justified in the statement of compatibility for the bill. The committee therefore requested further information from the legislation proponent as to why the limitations of the right to not incriminate oneself by the above new clauses are not accompanied by derivative use immunity as well as use immunity.

Committee comment

1.182 **Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of Senator Siewert and the Parliament.**

1.183 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

2 Derivative use immunity is where any evidence obtained as an indirect consequence of the compelled statement or disclosure is not admissible in evidence against the witness.

Regulatory Powers (Standardisation Reform) Bill 2016

Purpose	Proposes to amend a number of Acts to remove current provisions providing for regulatory regimes and to apply the standard provisions of the *Regulatory Powers (Standard Provisions) Act 2014*
Portfolio	Attorney-General
Introduced	Senate, 12 October 2016
Right	Privacy (see **Appendix 2**)

Background

1.184 The committee previously considered the Regulatory Powers (Standard Provisions) Bill 2012 (2012 bill) in its *Sixth report of 2012* and *Tenth report of 2013*; and the Regulatory Powers Bill (Standard Provisions) Bill 2014 (2014 bill) in its *Fifth report of the 44th Parliament*.[1]

1.185 In its *Fifth report of the 44th Parliament*, the committee welcomed particular changes between the 2012 bill and the 2014 bill,[2] but reiterated that a final assessment of the compatibility of the application of the standard provisions in the bill to a specific regulatory scheme would need to be made in the context of that particular bill.

1.186 The 2014 bill passed both Houses of Parliament on 10 July 2014 and received Royal Assent on 21 July 2014, becoming the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

1.187 The committee then considered the Regulatory Powers (Standardisation Reform) Bill 2016 (2016 bill) in its *Thirty-sixth report of the 44th Parliament*.[3] Following the commencement of the 45th Parliament, the current bill was reintroduced to the Senate on 12 October 2016, in identical form to the previous iteration of the bill.

1 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2012* (31 October 2012) 22-24; *Tenth report of 2013* (27 June 2013) 97-98; and *Fifth report of the 44th Parliament* (16 March 2016) 17-20.

2 Including the removal of the ability of the provisions of the bill to be triggered by regulation, and the inclusion of explicit protection for the privilege against self-incrimination and legal professional privilege.

3 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 2.

Implementing the Regulatory Powers Act with respect to 15 Commonwealth Acts

1.188 The bill proposes to amend 15 Commonwealth Acts in order to implement the Regulatory Powers Act including in relation to monitoring powers, investigation powers, civil penalty provisions, infringement notices, enforceable undertakings and injunctions. Existing provisions in the Commonwealth Acts will be replaced by the relevant standard provisions in the Regulatory Powers Act, some with minor adjustments to the application of the standard provisions of that Act. [4]

Compatibility of the measure with human rights

1.189 The statement of compatibility to the bill usefully refers to the previous human rights assessment of the 2014 bill (now Regulatory Powers Act) and states:

> As noted by the Parliamentary Joint Committee on Human Rights in its consideration of the Regulatory Powers (Standard Provisions) Bill 2014, it is necessary to consider the human rights impact in the specific context of each legislative regime that triggers the Regulatory Powers Act. Accordingly, the human rights impact is considered separately for each of the Acts to be amended by this Bill.[5]

1.190 In accordance with the committee's previous advice, the statement of compatibility then discusses in detail the application of the relevant provisions of the Regulatory Powers Act to the specific context of each of the 15 Commonwealth Acts that are amended by the bill and assesses the human rights compatibility of these amendments against Australia's human rights obligations.

1.191 Based on the information contained in this detailed assessment, the bill is likely to be compatible with human rights.

Committee comment

1.192 **The previous human rights analysis of the Regulatory Powers Act noted that it would be necessary to consider the human rights implications of the Act in the specific context of each legislative regime that applies provisions in the Act.**

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4 The Acts are the *Australian Sports Anti-Doping Authority Act 2006*; *Building Energy Efficiency Disclosure Act 2010*; the *Coal Mining Industry (Long Service Leave) Administration Act 1992*; the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*; the *Defence Act 1903*; the *Defence Reserve Service (Protection) Act 2001*; the *Greenhouse and Energy Minimum Standards Act 2012*; the *Horse Disease Response Levy Collection Act 2011*; the *Illegal Logging Prohibition Act 2012*; the *Industrial Chemicals (Notification and Assessment) Act 1989*; the *Paid Parental Leave Act 2010*; the *Personal Property Securities Act 2009*; the *Privacy Act 1988*; the *Tobacco Plain Packaging Act 2011*; and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

5 Explanatory memorandum 4.

1.193 **The committee welcomes the detailed human rights assessment contained in the statement of compatibility to the bill relating to the proposed application of the Regulatory Powers Act to each of the affected 15 Commonwealth Acts.**

1.194 **Noting the preceding legal analysis, the committee considers that the bill is likely to be compatible with human rights.**

Comptroller-General of Customs Directions (Use of Force – Norfolk Island) 2016 [F2016L01033]

Purpose	Gives directions to customs officers exercising powers on Norfolk Island with respect to the use of force
Portfolio	Immigration and Border Protection
Authorising legislation	*Customs Act 1901*
Last day to disallow	21 November 2016
Right	Life (see **Appendix 2**)

Background

1.195 The *Comptroller-General of Customs (Use of Force) Directions 2015* (the Australian directions) set out directions to customs officers exercising powers on mainland Australia in accordance with the Operational Safety Order (2015) (OSO 2015). This includes directions in relation to the deployment of approved firearms and other approved items of personal defence equipment, and the use of force.

1.196 The committee considered and reported on the Australian directions in its *Twenty-sixth* and *Twenty-ninth reports of the 44th Parliament*.[1] That human rights assessment of the Australian directions raised concerns in relation to whether the use of force (including lethal force) in accordance with procedures set out in the OSO 2015 was a justifiable limitation on the right to life.

1.197 The OSO 2015 was not publicly available at the time of the committee's initial examination of the Australian directions but was referred to in those directions. The human rights analysis of the Australian directions considered that it was necessary also to examine the OSO 2015 in order to determine whether there were sufficient safeguards with respect to the use of force. Upon provision of and review by the committee of the OSO 2015, the committee was able to conclude that it appeared to contain sufficient safeguards to justify the potential limitation on the right to life. Based on this assessment, as well as a commitment by the Australian Border Force Commissioner that a redacted version of the OSO 2015 would be published on the Department of Immigration and Border Protection's website, the committee concluded that the OSO 2015 and the Australian directions were likely to be compatible with human rights.

1 Parliamentary Joint Committee on Human Rights, *Twenty-sixth Report of the 44th Parliament* (18 August 2015) 4-6; and *Twenty-ninth Report of the 44th Parliament* (13 October 2015) 43-46.

1.198 The current instrument (the Norfolk directions) sets out identical directions to those contained in the Australian directions with respect to customs officers exercising powers on Norfolk Island.

Use of force

1.199 The Norfolk directions permit the use of force by customs officers exercising powers on Norfolk Island in accordance with procedures set out in the OSO 2015, including where an officer of customs is exercising powers to: direct; detain; physically restrain; arrest; enter or remain on coasts, airports, ports, bays, harbours, lakes and rivers; execute a seizure or search warrant; remove persons from a restricted area; or board, detain vessels or require assistance.

Compatibility of the measure with the right to life

1.200 The use of force engages and may limit the right to life. The right to life imposes an obligation on the state to protect people from being killed arbitrarily by the state or being killed by others or identified risks.

1.201 The statement of compatibility for the Norfolk directions is identical to the statement of compatibility for the Australian directions, and notes that:

> [The Norfolk directions] promote the inherent right to life as they only direct officers of Customs to use lethal force when reasonably necessary… when other options are insufficient and only in self‑defence from the immediate threat of death or serious injury or in defence of others against who there is an immediate threat of death or serious injury. [The Norfolk directions] specifically states that lethal force is an option of last resort, and that an officer of Customs who considers using lethal force must do so with a view to preserving human life.[2]

1.202 In line with an undertaking by the Australian Border Force Commissioner in previous correspondence to the committee, a redacted version of the OSO 2015 is now publicly available on the Department of Immigration and Border Protection's website.[3]

Committee comment

1.203 **The committee notes that the previous human rights assessment of the OSO 2015 and the Australian directions concluded that both were likely to be compatible with human rights on the basis of further information provided by the Australian Border Force Commissioner. Similarly, the committee considers that the Norfolk Directions are likely to be compatible with human rights.**

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2 Explanatory statement, statement of compatibility 4.

3 See, Department of Immigration and Border Protection, Operational Safety Order (2015) at: http://www.border.gov.au/about/access-accountability/plans-policies-charters/policies/practice-statements/border.

1.204 **The committee further notes that a redacted version of the OSO 2015 is now available on the Department of Immigration and Border Protection's website in accordance with the Australian Border Force Commissioner's undertaking to the committee. The committee thanks the Australian Border Force Commissioner for his engagement on this issue.**

Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424]

Purpose	Delays the cessation of the Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 until 14 March 2017
Portfolio	Social Services
Authorising legislation	*Social Security (Administration) Act 1999*
Last day to disallow	28 November 2016
Rights	Social security; private life; equality and non-discrimination (see **Appendix 2**)

Extending a trial of cashless welfare arrangements

1.205 The Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] (the determination) extends a trial of cashless welfare arrangements in Ceduna and its surrounding region for six months, bringing the total period of the trial to 12 months.[1]

Compatibility of the measure with human rights

1.206 The committee has considered these measures in previous reports in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card bill),[2] and the Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (declinable transactions determination).[3] The Debit Card bill amended the *Social Security (Administration) Act 1999* to provide for a trial of cashless welfare arrangements in prescribed locations. Persons on working age welfare payments in the prescribed locations would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling. The trial arrangements are currently operating in two trial locations of Ceduna and East Kimberley. Explanatory material for the Debit Card bill and declinable transactions

1 The same human rights issues are raised in respect of Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599].

2 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 58-61.

determination noted that the policy intention was for the trial to take place for only 12 months in each location.[4]

1.207 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to a private life and the right to equality and non-discrimination.[5]

Committee comment

1.208 **The effect of the determination is to extend the trial of cashless welfare arrangements in Ceduna and its surrounding region for six months.**

1.209 **Noting the human rights concerns raised by the previous human rights assessments of the trial, and concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee draws the human rights implications of the determination to the attention of the Parliament.**

4 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, explanatory memorandum 4; Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], explanatory statement 6.

5 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

Bills not raising human rights concerns

1.210 Of the bills introduced into the parliament 10 and 20 October 2016, the following did not raise human rights concerns:[1]

- Aged Care (Living Longer Living Better) Amendment (Review) Bill 2016;
- Appropriation (Parliamentary Departments) Bill (No. 1) 2016-2017;
- Banking Commission of Inquiry Bill 2016;
- Commonwealth Electoral Amendment (Foreign Political Donations) Bill 2016;
- Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016;
- Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2016;
- Criminal Code Amendment (Private Sexual Material) Bill 2016;
- Customs Amendment (2017 Harmonized System Changes) Bill 2016;
- Customs Tariff Amendment (2017 Harmonized System Changes) Bill 2016;
- Customs Tariff Amendment (Expanded Information Technology Agreement Implementation and Other Measures) Bill 2016;
- Foreign Acquisitions and Takeovers Amendment (Strategic Assets) Bill 2016;
- Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016;
- Passenger Movement Charge Amendment Bill 2016;
- Register of Foreign Ownership of Agricultural Land Amendment (Water) Bill 2016;
- Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Bill 2016;
- Social Services Legislation Amendment (Family Assistance Alignment and Other Measures) Bill 2016;
- Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill 2016;
- Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016;
- VET Student Loans Bill 2016;
- VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016;
- VET Student Loans (Charges) Bill 2016; and

1 This may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights.

- Veterans' Affairs Legislation Amendment (Budget and Other Measures) Bill 2016.