Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at **Appendix 3**.

Budget Savings (Omnibus) Bill 2016

Purpose	Introduces a range of budget-related savings measures
Portfolio	Treasury
Introduced	House of Representatives, 31 August 2016
Rights	Social security; adequate standard of living; freedom of movement (see **Appendix 2**)
Previous report	7 of 2016

Background

2.3 The committee first reported on the Budget Savings (Omnibus) Bill 2016 (the bill) in its *Report 7 of 2016*, and requested further information from the Treasurer.[1]

2.4 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.

2.5 A response to the committee's inquiries was received from the Minister for Social Services (the minister) on behalf of the Treasurer on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Schedule 10—Newly arrived residents waiting period

2.6 Schedule 10 of the bill removed the exemption from the 104-week waiting period for new migrants who are family members of Australian citizens or long-term residents. The legislation now stipulates that such migrants are prevented from accessing social security payments for the first 104 weeks of their initial settlement period in Australia, unless the migrant is a permanent humanitarian entrant.

2.7 The committee therefore sought the advice of the Treasurer on whether this measure was compatible with the right to social security and right to an adequate standard of living.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 2-11.

Minister's response

2.8 The minister noted that this amendment aligns this cohort of migrants (relatives of Australian citizens or long-term residents) with newly arrived residents who are also subject to a 104-week waiting period. The minister also noted that permanent humanitarian entrants will continue to be exempt from this waiting period. The minister concluded that, to the extent that this is a limitation on human rights, this limitation is reasonable and proportionate.

2.9 However, the minister did not address the committee's specific questions, namely, whether the removal of the waiting period is aimed at achieving a legitimate objective, whether there is a rational connection between the limitation and the objective, and whether the limitation is reasonable and proportionate for the achievement of that objective.

2.10 The right to social security encompasses the right to access and maintain benefits in order to alleviate and reduce poverty; and the right to an adequate standard of living requires the government to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

2.11 While noting that the response states that the measure is to ensure that all newly arrived migrants will be required to serve the same 104-week newly arrived residents waiting period, no reasoning or evidence is provided as to why this is a pressing or substantial concern or constitutes a legitimate objective for human rights purposes. Managing limited budgetary resources may be capable of being a legitimate objective for the purposes of international human rights law, although this is not expressly identified in the minister's response.

2.12 In order to be a justifiable limitation on the rights to social security and an adequate standard of living, such a limitation must also be rationally connected and proportionate to the achievement of that objective.

2.13 The measure would appear to be rationally connected to the objective of managing limited budgetary resources as it will lead to a reduction of public money spent on such payments.

2.14 However, there are serious questions as to whether the measure is proportionate. Even recognising that permanent humanitarian entrants will continue to be exempt from all social security payment waiting periods, there remain broader questions in relation to the proportionality of the measures.

2.15 More generally, the minister's response provides no information on how the family members of Australian citizens or long-term residents will be able to meet basic living expenses during the 104-week waiting period and what specific arrangements, if any, will be open to them in situations of crisis.

Committee response

2.16 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.17 **The measure engages and limits the rights to social security and an adequate standard of living.**

2.18 **Noting the preceding legal analysis and the insufficient information provided by the minister, the measure cannot be assessed as a proportionate limitation on the rights to social security and an adequate standard of living.**

Schedule 16—Carer allowance

2.19 Schedule 16 of the bill removed provisions that apply to backdate a person's start day in relation to payment of carer allowance in certain circumstances, and in so doing, aligned carer allowance and carer payment start day provisions. Prior to the passage of the bill, a carer's allowance could be backdated up to 12 weeks before the date of the claim where a person was caring for a child with a disability, or an adult with a disability as a result of acute onset.

2.20 The committee therefore sought the advice of the Treasurer on whether this measure was compatible with the right to social security.

Minister's response

2.21 In justifying the limitation on the right to social security, the minister's response identifies the objective of the measure as ensuring that the social security system remains sustainable and targeted to those recipients with the greatest need.

2.22 The minister also noted that carer allowance is not an income support payment, and may be paid in addition to an income support payment, such as carer payment. Accordingly, a carer would not be excluded from accessing other social security benefits.

2.23 The minister's response concludes that the measure is compatible with human rights because it does not affect a person's entitlement to income support payments; the reduction in the period from when a carer allowance is payable is reasonable, necessary and proportionate in achieving a legitimate aim; and does not limit or preclude eligible persons from the benefits under the *Social Security Act 1991*.

2.24 It is noted that ensuring the social security system remains sustainable and targeted to those with the greatest need is a legitimate objective for the purposes of international human rights law. The measures in Schedule 16 appear rationally connected to achieving that objective and in light of the minister's explanation regarding eligibility for the allowance, and continued access to other social security payments, the measure appears proportionate to achieving that objective.

2.25 Therefore, the measure is likely to constitute a justifiable limit on the right to social security.

Committee response

2.26 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.27 **Noting the preceding legal analysis, the committee considers that the measure is likely to be compatible with the right to social security.**

Schedule 18—Pension means testing for aged care residents

2.28 Schedule 18 removed the social security income and assets test exemptions that were available to aged care residents who were renting their former home and paying their aged care accommodation costs by periodic payments. The changes were prospective, and align the pension income test with the aged care means test, such that net rental income earned on the former principal residence of new entrants into residential aged care is treated the same way under both tests, regardless of how the resident chooses to pay their aged care accommodation costs.

2.29 The committee therefore sought the advice of the Treasurer on whether this measure was rationally connected and proportionate to the stated objectives of the limitation on the right to social security, and whether it will affect a person's ability to access an aged care facility.

Minister's response

2.30 The minister's response noted that the measure was consistent with the right to social security, as it pursues a number of objectives, such as being sustainable by reducing pension outlays; targeted to those in need; and fair, by ensuring equality between individuals with similar income and assets. The human rights analysis in the previous report accepted that these may be legitimate objectives for the purposes of international human rights law.[2]

2.31 The minister also explained that those who are likely to be affected by this measure 'will hold substantial levels of private income and assets' and 'have the capacity to be more self-reliant'.

2.32 Noting in particular the minister's advice that the measure will affect those people who have substantial levels of private income and assets and have the capacity to be more self-reliant, it appears that the measure is likely to be a proportionate limitation on the right to social security.

Committee response

2.33 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.34 **Noting the preceding legal analysis, the committee considers that the measure is likely to be compatible with the right to social security.**

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 8.

Schedule 19—Employment income (nil rate periods)

2.35 Schedule 19 of the bill removed two income test exemptions for parents in 'employment nil rate periods', the Family Tax Benefit Part A income test and the parental income test that applies to dependent children receiving youth allowance and ABSTUDY living allowance. The effect of the changes is that an income support recipient is no longer able to retain entitlement to their income support payment (which was available for up to 12 weeks) if their income support payment is not payable due to employment income, either wholly or in part.

2.36 The committee therefore sought the advice of the Treasurer on whether this measure was compatible with the right to social security.

Minister's response

2.37 In justifying the measure, the minister stated that the current exemption causes an inequality between families, where families subject to the exemptions can receive greater financial assistance than families not subject to the exemptions, even though both families may have the same income. The minister also advised that the measure will encourage greater self-sufficiency 'by reducing perverse incentives for families to maintain contact with the income support system rather than move to higher labour force attachment'.

2.38 The objective of these amendments, particularly in reducing incentives to remain connected to the social income support system rather than the workforce, is likely to be considered a legitimate objective for the purposes of international human rights law. Although the minister's reply could have set out further detail in relation to the proportionality of the measures, as the families affected appear to have higher financial means, this measure appears likely to be a proportionate limitation to achieve the stated objective.

Committee response

2.39 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.40 **Noting the preceding legal analysis, the committee considers that the measure is likely to be compatible with the right to social security.**

Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016

Purpose	Amends the *Fair Work Act 2009* in relation to enterprise agreements or workplace determinations that cover emergency management bodies
Portfolio	Employment
Introduced	House of Representatives, 31 August 2016
Rights	Freedom of association; collectively bargain; just and favourable conditions of work (see **Appendix 2**)
Previous report	7 of 2016

Background

2.41 The committee reported on the Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (the bill) in *Report 7 of 2016*, and requested further information from the Minister for Employment in relation to the human rights issues identified in that report.[1]

2.42 No response was received to the committee's request before the bill passed both Houses of Parliament and received Royal Assent.[2]

2.43 Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.[3]

Prohibition of terms affecting emergency services volunteers in enterprise agreements

2.44 The bill amended the *Fair Work Act 2009* (Fair Work Act) to provide that an enterprise agreement covering 'designated emergency management bodies' must not include terms that adversely affect a body that manages emergency services volunteers (volunteer body). 'Designated emergency management bodies' include fire-fighting bodies, State Emergency Services, bodies prescribed by the regulations, and bodies established for a public purpose by or under a Commonwealth, state or territory law. As noted in the initial human rights analysis, the prohibited terms as defined by the bill could restrict the scope of negotiation and bargaining outcomes

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 21-24.

2 The bill passed both Houses of Parliament on 10 October 2016 and received Royal Assent on 12 October 2016, becoming the *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016*.

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

for numerous matters in enterprise agreements, including matters relating to staffing levels or occupational health and safety. The amendments in the bill would also have the effect of invalidating certain terms in existing enterprise agreements.

2.45 As stated in the committee's initial report on the measure, prohibiting the inclusion of particular terms in an enterprise agreement engages and limits the right to just and favourable conditions of work, the right to freedom of association and the right to collectively bargain.[4]

2.46 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[5]

2.47 The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention 98 which envisages that parties will be free to reach their own settlement of a collective agreement.[6] Where matters are excluded from the scope of bargaining, the outcomes that may be reached between the parties are restricted.

2.48 The ILO's Freedom of Association Committee (FOA Committee) has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.[7] However, the FOA Committee has noted that there are circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that:

4 These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

6 ILO, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]. See, also, ILO Committee of Experts on the Application of Conventions and Recommendations**,** *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973),* ILO Doc 062009AUS098 (2009).

7 See ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

> any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.[8]

2.49 The statement of compatibility recognised that the bill engaged collective bargaining rights and the right to freedom of association, but did not provide a substantive assessment as to whether the restriction on the freedom to collectively bargain was justifiable for the purposes of international human rights law.

2.50 Accordingly, the committee sought further advice from the Minister for Employment as to:

- whether the measure was aimed at achieving a legitimate objective for the purposes of human rights law;
- whether the measure was rationally connected to the achievement of that objective;
- whether the limitation was a reasonable and proportionate measure to achieve the stated objective; and
- whether consultation had occurred with the relevant workers' and employers' organisations in relation to the measure.

2.51 In the absence of this information, it is not possible to conclude that the measure is compatible with the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work.

Committee response

2.52 **The committee has concluded its examination of this issue.**

2.53 **The committee observes that the prohibition of terms in enterprise agreements engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work. While there are circumstances in which it may be legitimate for the government to limit the outcomes of a bargaining process, the statement of compatibility has not justified this limitation.**

2.54 **Noting in particular that a response was not received from the minister regarding human rights issues identified in the committee's initial assessment of the bill, the committee is unable to conclude on the information before it that the**

8 ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

measure is compatible with the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work.[9]

9 Any subsequent response received from the Attorney-General will be published on the committee's website. See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Plebiscite (Same-Sex Marriage) Bill 2016

Purpose	Seeks to establish the legislative framework for, and authorise federal spending on, a compulsory vote in a national plebiscite to ask Australians whether the law should be changed to allow same-sex couples to marry
Portfolio	Attorney-General
Introduced	House of Representatives, 14 September 2016
Right	Equality and non-discrimination (see **Appendix 2**)
Previous report	7 of 2016

Background

2.55 The committee reported on the Plebiscite (Same-Sex Marriage) Bill 2016 (the bill) 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]

2.56 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 26 October 2016. However, a response was not received by this date.

2.57 Accordingly, the committee's concluding remarks on the bill are based on the information available at the time of finalising this report.[2]

Public funding of the campaigns regarding the plebiscite proposal

2.58 The bill sets up a framework for a national plebiscite to ask registered voters whether the law should be changed to allow for same-sex marriage. As part of this framework, section 11A of the bill provides for up to $15 million in public funding to be made equally available to two committees established to conduct public campaigns either not in favour of the proposal (the No Case) or in favour of the proposal (the Yes Case). The committee previously noted its concerns to arise in relation to the funding of both the Yes Case and the No Case.

2.59 Under the right to equality and non-discrimination in article 26 of the International Covenant on Civil and Political Rights, 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, religion and 'any other status'.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 25-29.

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

While sexual orientation is not specifically listed as a protected ground, the treaty otherwise prohibits discrimination on 'any ground', and the United Nations Human Rights Committee has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[3] On this basis, by restricting marriage to being between a man and a woman the existing law[4] appears to directly discriminate against same-sex couples on the basis of sexual orientation.[5]

2.60 The previous analysis stated that while the plebiscite relates to possible amendments to the *Marriage Act 1961* and the framework proposed by the bill engages the right to equality and non-discrimination, the statement of compatibility makes no reference to it.

2.61 Australia's obligations under international human rights law in relation to the right to equality and non-discrimination are threefold:

- to respect—which requires the government not to interfere with or limit the right to equality and non-discrimination;
- to protect—which requires the government to take measures to prevent others from interfering with the right to equality and non-discrimination; and
- to fulfil—which requires the government to take positive measures to fully realise the right to equality and non-discrimination.

2.62 The previous analysis noted that in relation to a number of other grounds of discrimination the federal Parliament has adopted a significantly different approach to that taken in this bill. In particular, federal legislation directly prohibits discrimination on the basis of race, sex, disability and age.[6] In contrast, this bill establishes, and provides substantial public funding to, a 'Committee for the No Case' whose sole function is to publicly campaign against changing the law to promote the right to equality and non-discrimination for same-sex couples. Were the campaign conducted by the 'Committee for the No Case' to lead to vilification against persons on the basis of their sexual orientation, this would not further respect for the principles of equality and non-discrimination.

2.63 The committee further noted its concern that the funding of the Yes Case may lead to vilification against persons on the basis of their religious belief.

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3 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).

4 See section 5, definition of 'marriage' in the *Marriage Act 1961.*

5 See the discussion of the international human rights law position in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 113-114.

6 See *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984*; *Disability Discrimination Act 1992*; and *Age Discrimination Act 2004*.

2.64 In this regard, the right to equality and non-discrimination also applies in relation to religion. Further, article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. The right includes the right to have no religion or to have non-religious beliefs protected.

2.65 The right to freedom of religion requires that the state should not, through legislative or other measures, impair a person's freedom of religion. While the right to hold a religious or other belief or opinion is an absolute right, the right to exercise one's belief can be limited given its potential impact on others. The right can be limited as long as it can be demonstrated that the limitation is reasonable and proportionate and is necessary to protect public safety, order, health or morals or the rights of others. The right to non-discrimination often intersects with the right to freedom of religion and each right must be balanced against one another.

2.66 Arguments made against same-sex marriage may be based on religious beliefs. Additionally, one potential issue in the debate regarding the inclusion of same-sex marriage in the Marriage Act is the scope for marriage celebrants to refuse to officiate same-sex weddings on conscience grounds (this issue is considered in detail in relation to the proposed Marriage Legislation Amendment bills at [1.137] to [1.146] of this report). While criticism of religious ideas in good faith is likely to be protected by freedom of expression, speech which espouses hatred for persons of a particular religion may amount to vilification.

2.67 As noted above, the statement of compatibility did not identify or address the engagement of the right to equality and non-discrimination. Accordingly, the committee sought the advice of the Attorney-General as to whether the measure is compatible with the right and whether any guidelines in relation to the expenditure of funding or other safeguards will apply.

Committee response

2.68 **The committee has concluded its examination of this issue.**

2.69 **The committee observes that public funding of the campaigns regarding the plebiscite proposal engages the right to equality and non-discrimination, and that the statement of compatibility has not addressed this issue.**

2.70 **The committee considers that there is potential for international human rights concerns to arise in relation to the funding of both the Yes Case and the No Case. In this respect, the committee considers that there may be risks in relation to vilification on the basis of sexual orientation or religious belief.**

2.71 **The committee further notes that article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs.**

2.72 **Noting that 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 is unable to conclude on the information before it that the measure would further respect for the principles of equality and non-discrimination.**

2.73 **Noting the human rights concerns raised above, the committee draws the human rights implications of the public funding of the campaigns in respect of the plebiscite proposal to the attention of the Parliament.**

Obligations on broadcasters

2.74 The bill proposes to impose a requirement on broadcasters that for a month before the plebiscite vote they must give a reasonable opportunity to a representative of an organisation that is not in favour, or is in favour, of the plebiscite proposal to broadcast 'plebiscite matter' during that period.[7] This would apply to commercial television and radio broadcasters, community broadcasters, subscription television and persons providing broadcasting services under a class licence. It also applies to the Special Broadcasting Service (SBS) if, during the plebiscite period, SBS broadcasts plebiscite matter in favour or not in favour of the plebiscite.

2.75 'Plebiscite matter' is broadly defined to include matter commenting on the plebiscite itself, and also includes any matter commenting on same-sex marriage (not necessarily connected to the plebiscite).[8]

2.76 The previous analysis noted that the statement of compatibility states that the bill would promote the right to freedom of expression by ensuring that broadcasters cannot selectively broadcast only one side of the debate. It also states that it would promote the right to participate in public affairs by ensuring that the free press and other media are able to comment on public issues and inform public opinion.[9] The statement of compatibility goes on to say:

> While this requirement may affect the editorial independence of broadcasters, the requirement would be time limited. The impact on broadcasters would be balanced with the promotion of the rights to freedom of expression by to [sic] participate in public affairs. The requirement to give reasonable opportunities is consistent with the approach taken to federal elections and referendums in the *Broadcasting Services Act 1992*.[10]

7 See proposed Subdivision B of Part 3 of the bill.

8 See proposed section 4 of the bill, definition of 'plebiscite matter'.

9 Explanatory memorandum (EM), statement of compatibility (SOC) 7-8.

10 EM, SOC 8.

2.77 The statement of compatibility makes no reference to the right to equality and non-discrimination.

2.78 The previous analysis noted that under the *Broadcasting Services Act 1992* (Broadcasting Act), broadcasters are currently required to give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election during the election period. However, this is limited to political parties that were represented in either House of Parliament immediately before the election.[11] It is also confined to 'election matters' which relates to soliciting votes for a candidate, supporting a political party or commenting on policies of the party or matters being put to the electors.

2.79 In contrast, the bill would require broadcasters to give an opportunity to representatives of *any* organisation opposed to or in favour of the plebiscite. It would also apply to the broadcasting of material relating not only to the plebiscite, but also to same-sex marriage more broadly (not restricted to the question of whether the law should be amended).

2.80 The right to freedom of expression requires states to ensure that public broadcasting services operate in an independent manner and should guarantee their editorial freedom.[12] The previous human rights assessment considered that while enabling both sides of a debate in a national plebiscite to air their views may be a legitimate objective in promoting freedom of expression and the right to participate in public affairs, it is a limitation on editorial freedom and must be proportionate to the legitimate aim sought to be achieved.

2.81 The only safeguard cited in the statement of compatibility is that the requirement relating to the plebiscite is time limited. By contrast, the corresponding requirement in the Broadcasting Act for election matter restricts broadcasting opportunities to existing political parties already represented in the Parliament. This provides a safeguard towards helping to ensure that broadcasters are not required to broadcast the advertisements of organisations unlikely to be elected. The current provisions in the bill provide no equivalent safeguard. In addition, the proposed definition of 'plebiscite matter' is not equivalent to that in relation to 'election matters' because it is not restricted to the question of whether the law should be amended, but includes any matter commenting on same-sex marriage more broadly.

2.82 The previous analysis further noted that Australia's international human rights law obligation is to respect, protect and fulfil the right to equality and non-discrimination.

2.83 Requiring broadcasters to give a reasonable opportunity to the representative of any organisation opposed to the plebiscite proposal to discuss

11 See clause 3 of Schedule 2 to the *Broadcasting Services Act 1992*.

12 See Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, [16].

same-sex marriage generally could lead to vilification of persons on the basis of their sexual orientation, which would not further respect for the principles of equality and non-discrimination.

2.84 The committee also noted its concern as to whether the proposed access to broadcasting could lead to vilification against persons on the basis of their religious belief. The right to equality and non-discrimination also applies in relation to religion.

2.85 The committee therefore stated that requiring broadcasters to give a reasonable opportunity to the representatives of *any* organisation in relation to 'plebiscite matters' engages the right to equality and non-discrimination. The statement of compatibility has not identified or addressed the engagement of this right.

2.86 In view of these concerns, the committee sought the advice of the Attorney-General as to whether the measure is compatible with the right to equality and non-discrimination and whether any guidelines or other safeguards will apply.

2.87 The committee further considered the concerns regarding limitations on the editorial freedom of broadcasters and whether appropriate safeguards are in place. The committee therefore sought the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there are sufficient safeguards in place with respect to the right to freedom of expression.

Committee response

2.88 **The committee has concluded its examination of this issue.**

2.89 **The committee observes that certain obligations on broadcasters engage the right to freedom of expression and the right to equality and non-discrimination, and that the statement of compatibility has not addressed this issue.**

2.90 **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 is thereby unable to conclude on the information before it that the measure is compatible with the right to freedom of expression and the right to equality and non-discrimination.**

Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712][1]

Purpose	Supports the merger of CrimTrac and the Australian Crime Commission
Portfolio	Attorney-General
Authorising legislation	*Australian Crime Commission Act 2002*
Last day to disallow	21 November 2016
Right	Privacy (see **Appendix 2**)
Previous report	7 of 2016

Background

2.91 The committee first reported on the instrument in its *Report 7 of 2016*, and requested further information from the Attorney-General.[2]

2.92 The Minister for Justice's response to the committee's inquiries was received on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Collection and use of 'national policing information'

2.93 The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (the regulation) prescribes a list of 210 bodies that collect 'national policing information', and provides that the kind of information prescribed is information that is held by or used to administer twenty listed systems. The prescription of these bodies and systems was intended to allow the Australian Crime Commission (ACC) to carry out CrimTrac's former functions following the merger of the two agencies. As national policing information is likely to include private, confidential and personal information, the collection, use and disclosure of such information by the ACC engages and limits the right to privacy.

2.94 The statement of compatibility for the regulation provides limited assessment of its impact on the right to privacy; it does not explain why it is necessary that the collection and use of the prescribed information is not subject to the *Privacy Act 1988* (Privacy Act), the protections for personal information contained in the Australian Privacy Principles or oversight by the Australian Information Commissioner, and provides no information on what other safeguards

1 The same human rights issues apply in respect of the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (No. 1) [F2016L01378].

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 30-32.

will apply to the collection and use of national policing information by the ACC (including whether any such safeguards are comparable to those contained in the Privacy Act and Australian Privacy Principles).

2.95 The committee therefore sought advice as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy (including safeguards that are comparable to those contained in the Privacy Act).

Minister's response

2.96 The minister acknowledges that the collection and disclosure of national policing information engages and limits the right to privacy, but states that the limitation is reasonable and proportionate to achieve the objective of enabling the ACC to fulfil its national policing information functions, and that the *Australian Crime Commission Act* 2002 (ACC Act) provides sufficient safeguards to protect the right to privacy. The minister also states that the ACC has technical and administrative mechanisms in place to ensure that national policing information is collected, used and stored securely.

2.97 The minister advises that the majority of bodies prescribed as 'national policing information bodies' by the regulation are included solely because they are 'accredited bodies' to submit applications for police history checks for employment and other vetting purposes. The minister states that the prescription of these bodies as national policing information bodies is necessary to ensure that information submitted in support of a person's application for a police record check is protected against inappropriate disclosure, and does not have the effect of authorising disclosure information to the ACC in circumstances where they could not otherwise have lawfully done so. The minister also advises that non-government bodies who wish to be accredited for this purpose must undergo police checks to ensure they are suitable bodies to deal with sensitive personal information, and must agree to comply with the requirements of the Privacy Act in dealing with personal information collected or received as a result of the police history checking process.

2.98 The minister also advises that each prescribed national policing information system was originally established to meet a particular information need of Australian police agencies and that the information held on each system does not go beyond what is reasonably necessary for the purposes of that system.

2.99 The minister notes that while the ACC is not subject to the Privacy Act, the agency is experienced in ensuring sensitive information is appropriately handled and secured and that its safeguards and accountability mechanisms are specifically designed for the sensitive nature of its operations. Further, the minister notes that the ACC is subject to the *Freedom of Information Act 1982* (Cth) and that individuals may seek access to and correct their personal information held by the ACC.

2.100 Finally, the minister notes that the Privacy Impact Assessment prepared as part of the proposal to merge the ACC and CrimTrac recommended that the ACC develop and publish, in consultation with the Office of the Australian Information Commissioner, an information handling protocol that addresses the way in which the agency will treat personal information. The minister advises that preparation of this information handling protocol is currently underway.

2.101 The safeguards outlined in the minister's response are likely to improve the proportionality of the limitation on the right to privacy resulting from the collection, use and disclosure of national policing information. In particular, it is noted that contractual arrangements with non-government bodies seeking to be accredited for the purposes of conducting police history checks require these bodies to comply with the Privacy Act when dealing with personal information through the police check process. It is also noted that guidance in the form of an information handling protocol is being prepared in consultation with the Office of the Australian Information Commissioner, who generally oversees the operation of the Privacy Act and Australian Privacy Principles.

2.102 The legislative and administrative safeguards identified in the minister's response may ensure that the regulation will only impose proportionate limitations on the right to privacy. Nonetheless, a conclusion that the regulation is compatible with human rights is difficult to reach without the detail of the information handling protocol being available.

Committee response

2.103 **The committee thanks the Minister for Justice for his response and has concluded its examination of the regulation.**

2.104 **The preceding legal analysis indicates that there are a range of measures that may assist to ensure that the regulation is a proportionate limit on the right to privacy including relevant safeguards.**

2.105 **Noting the minister's advice that an information handling protocol that addresses the way in which the ACC will treat personal information is currently being prepared, the committee requests that a copy of this document be provided to the committee once it is finalised.**

Biosecurity (Human Health) Regulation 2016 [F2016L00719]

Purpose	Sets out the requirements for human biosecurity measures to be taken under the *Biosecurity Act 2015*
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Last day to disallow	21 November 2016
Right	Privacy (see **Appendix 2**)
Previous report	7 of 2016

Background

2.106 The committee reported on the Biosecurity (Human Health) Regulation 2016 (the regulation) in its *Report 7 of 2016*, and requested further information from the Minister for Health.[1]

2.107 The minister's response to the committee's inquiries was received on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirements for taking, storing and using body samples

2.108 Section 10 of the regulation sets requirements for taking, storing, transporting, labelling and using body samples obtained from an individual who has undergone a specified kind of examination to determine the presence of a human disease as a requirement of a human biosecurity control order. A human biosecurity control order may require an individual to undergo medical examination and have body samples taken including without consent in certain circumstances.

2.109 Requirements for taking, storing, transporting, labelling and using body samples engage and limit the right to privacy. However, the previous human rights analysis noted that the right to privacy is not addressed in the statement of compatibility for the regulation.

2.110 The previous analysis considered that the measure pursues a legitimate objective, being to determine the presence of human diseases entering Australia, and was rationally connected to that objective. However, the previous analysis also raised questions in relation to the proportionality of the proposed measures. In particular, it expressed concerns regarding the lack of adequate safeguards including in relation to medical procedures that may be intrusive and how long records of testing will be retained.

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 33-35.

2.111 Accordingly, the committee sought the advice of the minister as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its stated objective, in particular whether there are adequate safeguards in place in relation to the taking, storing, transporting, labelling and use of body samples under the regulation.

Minister's response

2.112 The minister's response advises that individuals operating under section 10 of the regulation will always be qualified medical professionals. The minister also notes that the included reference to appropriate professional standards captures all standards and requirements that apply to medical professionals in their care and treatment of patients, as well as standards for laboratories in the storage, transportation and labelling of body samples.

2.113 The minister states that she considers that adherence to existing professional medical standards and requirements appropriately manage human rights concerns, including privacy and respect for personal rights and liberties.

2.114 Adherence to existing medical professional standards and requirements may ensure that the measure operates in a manner that respects the right to privacy. However, neither the regulation, the explanatory statement nor the minister's response specify which medical and professional standards will apply. In order to be compatible with human rights, the professional standard or requirement would need to include explicit requirements that body samples be taken in the least personally intrusive way and include proportionate requirements about the retention and destruction of body samples. It is not possible to assess the human rights compatibility of the provisions without knowing the content of the relevant medical or professional standard, when the regulation itself is silent on how body samples are to be taken, used, stored and destroyed.

2.115 Body samples can contain very personal information. Without specific information from the minster as to the safeguards in place in relation to the taking, storing, transporting, labelling and use of body samples under the regulation, it is not possible to conclude that the measure is a permissible limitation on the right to privacy.

Committee response

2.116 **The committee thanks the minister for her response and has concluded its examination of this issue.**

2.117 **The committee observes that the taking, storing, transporting, labelling and use of body samples, engages and limits the right to privacy; and that the minister has not provided sufficient information so as to enable a conclusion that the regulation is compatible with this right.**

2.118 **The committee recommends that consideration be given to amending the measures to include effective safeguards in relation to the taking, storing,**

transporting, labelling and use of body samples to protect the privacy of individuals, for example, explicit requirements that samples be taken in the least personally intrusive way and requirements about the length of time samples may be retained.

Census and Statistics Regulation 2016 [F2016L00706]

Purpose	Prescribes the statistical information to be collected for the census
Portfolio	Treasury
Authorising legislation	*Census and Statistics Act 1905*
Last day to disallow	21 November 2016
Right	Privacy (see **Appendix 2**)
Previous report	7 of 2016

Background

2.119 The committee reported on the Census and Statistics Regulation 2016 [F2016L00706] (the regulation) in its *Report 7 of 2016*, and requested a response from the Treasurer by 26 October 2016.[1]

2.120 The Treasurer's response to the committee's inquiries was received on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Statistical information to be collected from persons for the census

2.121 Sections 9–12 of the regulation set what 'statistical information' is to be collected from persons for the census. This includes a person's name, address, sex, age, marital status, relationship to the other persons at the residence, level of educational attainment, employment, income, rent or loan repayments, citizenship, religion, ancestry, languages spoken at home and country of birth. Failing to provide this statistical information may result in an offence.[2]

2.122 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of such information.

2.123 However, this right may be subject to permissible limitations in a range of circumstances.

2.124 The compulsory collection, use and retention of personal information by government through an official census engages and limits the right to privacy.[3] The statistical information that is to be collected, used and retained under the regulation reveals very significant information about an individual and their personal life,

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 36-39.

2 See, *Census and Statistics Act 1905* sections 14 and 15.

3 See, *X v United Kingdom* 9072/82 ECHR (6 October 1982).

including matters such as country of birth, ancestry, marital status, living arrangements and income. This information provides a very detailed picture of an individual's life.

2.125 Additionally, the information collected may be used on its own or with other information to identify, contact or locate a person.

2.126 The *Census and Statistics Act 1905* (the Act) provides for penalties of up to $180 per day for failure to comply with a direction to provide the prescribed statistical information.[4]

2.127 While the right to privacy may be subject to reasonable limits, the previous human rights analysis noted that the statement of compatibility provides no assessment of whether the limitation arising from sections 9–12 of the regulation is a permissible limit on the right to privacy. The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility provide 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.

2.128 In relation to the apparent objective of the measures, the initial human rights analysis noted that the regulation is likely to be considered as pursuing a legitimate objective for the purposes of international human rights law. Collecting detailed information on the population and the socio-economic status of households in Australia is an important mechanism for governments to make informed decisions on resource distribution, including the implementation of housing, healthcare, education and infrastructure programs. Further, the availability of accurate statistical data is a particularly important tool for governments to fulfil a range of human rights obligations, including in relation to economic, social and cultural rights and rights to equality and non-discrimination.

2.129 The initial human rights analysis also observed that the measures appear to be rationally connected to their objective, in that the categories of information collected by the census, such as a person's age, income and educational attainment, may provide a valuable evidence base for policy development and government decision-making.

2.130 However, it is unclear whether the measures are a proportionate means of achieving their apparent objective. To be proportionate limitations of the right to privacy, the measures must be accompanied by appropriate safeguards and be sufficiently circumscribed with respect to the collection, use, retention and disclosure of personal information. A measure that lacks these elements may not be the least rights restrictive way of achieving the objective of the measure, in which case it would be incompatible with the right to privacy.

4 See, *Census and Statistics Act 1905* section 14.

2.131 The initial human right analysis noted that the regulation itself makes no provision for how the statistical information collected under it may be used, retained, stored and disclosed; and that the regulation is also silent as to how long the information, including identifying information such as names and address, will be retained.

2.132 The Act does make provision in relation to when statistical information may or may not be disclosed. For example, it permits the minister, with the written approval of the Australian Statistician, to make legislative instruments providing for the disclosure of information provided in the census.[5] The Act also provides that information of a personal or domestic nature relating to a person shall not be disclosed in a manner that is likely to enable the identification of that person,[6] and makes provision for the non-disclosure of census information to agencies or to a court or a tribunal.[7] Recognising these provisions, the initial human rights analysis nonetheless identified concerns regarding whether effective safeguards are in place to ensure limits placed on the right to privacy are proportionate.

2.133 Accordingly, the committee sought the advice of the Treasurer as to whether the limitation on the right to privacy is a reasonable and proportionate measure for the achievement of its stated objective, in particular whether there are sufficient safeguards in place in relation to the collection, use, storage, disclosure and retention of personal information under the regulation.

Treasurer's response

2.134 The Treasurer's response advises that the regulation does not make any substantive changes to the matters previously prescribed in the Census and Statistics Regulation 2015; that he does not consider that human rights have been engaged or affected by the inclusion of these matters in this regulation; and that the compulsory collection, use and retention of personal information through the census is authorised by the Act. However, the Treasurer also states that he considers the statistical information to be collected from persons for the census is a reasonable, necessary and proportionate method in pursuit of a legitimate objective, given the privacy safeguards in place.

2.135 Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where an instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the limitation. The fact that a new regulation does not make substantive changes to what may previously have been provided for through regulation does not mean that the new regulation does not engage and limit human rights. Indeed, the committee's mandate involves examining regulations that come

5 See, *Census and Statistics Act 1905* section 13.

6 See, *Census and Statistics Act 1905* subsection 13(3).

7 See, *Census and Statistics Act 1905* section 19A.

before the Parliament for compatibility with human rights.[8] As noted in the initial human rights analysis of the current regulation, the compulsory collection, use and retention of personal information by government through an official census engages and limits the right to privacy. As such, the statement of compatibility for this regulation should provide an assessment of this limitation.

2.136 The Treasurer's response states that the ABS maintain significant safeguards to protect census data and complies with its obligations under the *Privacy Act 1988* (the Privacy Act), and manage personal information in accordance with the Australian Privacy Principles (APPs). However, the Treasurer's response does not provide specific information on the operation of the Privacy Act and the APPs in the context of information collected under the census. It is noted, for instance, that an agency may collect or disclose personal information where authorised to do so under another Australian law.[9] In this case, the other Australian law would be the regulation and its enabling legislation, the Census Act. This means that the Privacy Act and the APPs in and of themselves do not provide a sufficient answer in relation to the issue of effective safeguards.

2.137 The Treasurer draws the committee's attention to the ABS Privacy policy and a Census Privacy policy that are available online. However, as noted in the initial human rights analysis of the regulation with reference to these materials, administrative and discretionary safeguards are less stringent than the protection of safeguards that are placed on a statutory footing.[10]

2.138 In relation to those concerns, the Treasurer's response argues that in addition to these administrative safeguards, sections 13 and 19 of the Act also protect information that was collected under the census. Section 19 of the Act provides it is an offence for a person who is or has been a Statistician or an officer to, either directly or indirectly, divulge or communicate to another person (other than the person from whom the information was obtained) any information in the census. These provisions are undoubtedly important safeguards. Exceptions apply where the person divulges or communicates the information for the purposes of the Act or the minister makes a legislative instrument providing for disclosure under section 13(1)-(2) of the Act. Section 13(3) provides that information of a personal or domestic nature relating to a person shall not be disclosed in accordance with a determination in a manner that is likely to enable the identification of that person. Sections 13(3) and 19 are undoubtedly important safeguards. However, as noted in the initial human rights analysis of the regulation, despite these sections, there remain questions about how the statistical information collected under the regulation will be used (including within the ABS) and retained, including for what period of time.

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8 See, *Human Rights (Parliamentary Scrutiny) Act 2011* section 7.

9 Australian Privacy Principles (APP) 3.4; APP 6.2.

10 See, *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

2.139 As was acknowledged in the initial human rights analysis, the Treasurer noted that the continued collection of information through the census has a range of potential benefits for human rights, including enabling governments to make more informed decisions on how to distribute resources, including government funds.

2.140 The Treasurer also noted that the collection of personal information, including names and addresses, is critical to ensuring the quality and value of the census, and have been collected in every census conducted by the ABS, and their collection is consistent with international practice. There is no information provided about what international practices are being referred to. With respect to the retention of statistical information, the Treasurer advised that the retention of names and addresses is consistent with the *Archives Act 1988* and that this information is destroyed when no longer required in accordance with the Administrative Disposal Authority and the ABS' Records Disposal. However, the response does not explain how these details represent effective safeguards.

2.141 The Treasurer's response does not specifically and directly address issues raised regarding the collection and retention of statistical information, other than names and addresses, including matters such as country of birth, ancestry, marital status, living arrangements and income. The Treasurer's response also does not address concerns raised in the initial human rights analysis about prolonged linking and retention of names and addresses with other statistical information and whether this represents the least rights restrictive approach. Noting the sensitive information that is required to be disclosed through the census, the initial human rights analysis stated that such linking may increase the risk of misuse of information and adverse impacts on an individual. The analysis noted that all names and addresses collected in the 2011, 2006 and all previous censuses were destroyed approximately 18 months after the conduct of the censuses.[11]

2.142 In this respect, the prolonged retention of names and addresses collected in the 2016 census as a matter of ABS policy[12] may point to the need to have more specific standards in the Act or regulation about how statistical data may be used, stored and retained. Under international human rights law, permissible limits on human rights must be prescribed by law. This means that a measure limiting a right must be set out in legislation (or be permitted under an established rule of the common law). It must also be accessible and precise enough so that people know the

11 See, Australian Bureau of Statistics, *Privacy, confidentiality & security*, http://www.abs.gov.au/websitedbs/censushome.nsf/home/privacy.

12 See Australian Bureau of Statistics, *Retention of names and addresses collected in the 2016 Census of Population and Housing,* http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Retention+of+names+and+addresses+collected. This policy provides that for the 2016 Census, the ABS will destroy names and addresses when there is no longer any community benefit to their retention or four years after collection (i.e. August 2020), whichever is earliest.

circumstances under which government agencies may restrict their rights.[13] The Treasurer has not addressed these specific concerns in his response.

2.143 Therefore, while the administrative and legislative safeguards noted in the initial human rights analysis, and explained by the Treasurer, may ensure that the measure operates in a manner that is proportionate and compatible with human rights, there is a risk that in some cases statistical information obtained by the 2016 census may be used, disclosed or retained in circumstances where they are not the least rights restrictive way to achieve the objective of informing decisions on how to distribute resources. Accordingly, based on the information provided, the Act or the regulation would need to include a wider range of safeguards to ensure compatibility with the right to privacy.

Committee response

2.144 **The committee thanks the Treasurer for his response and has concluded its examination of this issue.**

2.145 **The committee observes that the compulsory collection, use and retention of personal information by government through an official census engages and limits the right to privacy; and that the Treasurer has not provided sufficient justification so as to enable a conclusion that the regulation is compatible with this right.**

2.146 **The committee therefore recommends that consideration be given to amending the measure to include effective safeguards in relation to the collection, use, storage, disclosure and retention of personal information under the regulation, for example, explicit standards in the Act or regulation about how statistical data may be used, stored and retained and placing the current administrative safeguards on a statutory footing.**

13 See, *Sunday Times v the United Kingdom* (no. 1) ECHR, judgment of 26 April 1979, Series A no. 30, 31, [49]; *Larissis and Others v Greece* judgment of 24 February 1998, Reports 1998-I, 378, § 40.

Federal Financial Relations (National Partnership payments) Determinations No. 104—8 (March 2016)—(July 2016)

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	*Federal Financial Relations Act 2009*
Last day to disallow	Exempt
Rights	Health; social security; adequate standard of living; children; education (see **Appendix 2**)
Previous report	7 of 2016

Background

2.147 The committee has previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.[1]

2.148 The committee then reported on a number of new Federal Financial Relations (National Partnership payments) Determinations (the determinations) in its *Report 7 of 2016* (previous report), and requested a response from the Treasurer by 26 October 2016.[2]

2.149 The Treasurer's response to the committee's inquiries was received on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

1 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 10-14; and *Thirtieth Report of the 44th Parliament* (10 November 2015) 102.

2 This includes the Federal Financial Relations (National Partnership payments) Determination No. 104 (March 2016) [F2016L01193]; Federal Financial Relations (National Partnership payments) Determination No. 105 (April 2016) [F2016L01194]; Federal Financial Relations (National Partnership Payments) Determination No. 106 (May 2016) [F2016L01201]; Federal Financial Relations (National Partnership Payments) Determination No. 107 (June 2016) [F2016L01202]; Federal Financial Relations (National Partnership Payments) Determination No. 108 (June 2016) [F2016L01203]; and Federal Financial Relations (National Partnership Payments) Determination No. 108 (July 2016) [F2016L01211]. See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 40-43.

2.150 This report entry also includes the consideration of two new related Federal Financial Relations (National Partnership payments) Determinations that have been received since the committee's initial examination in its previous report.[3]

Payments to the states and territories for the provision of health, education, employment, housing and disability services

2.151 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs), which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

2.152 The *Federal Financial Relations Act 2009* provides for the Treasurer, by legislative instrument, to determine the total amounts payable in respect of each NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to the determinations sets out the amount payable under the NPPs, contingent upon the attainment of specified benchmarks or outcomes relating to such things as healthcare, employment, disability, education, community services and affordable housing.

2.153 Setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights. As such, the previous analysis noted that the determinations could engage a number of rights, including the right to health; the right to social security; the right to an adequate standard of living including housing; the rights of children; and the right to education.

2.154 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. This includes specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

2.155 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.[4] Any

3 These are the Federal Financial Relations (National Partnership Payments) Determination No. 110 (August 2016) [F2016L01582] and Federal Financial Relations (National Partnership payments) Determination No. 111 (September 2016) [F2016L01586].

4 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills; see Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17.

backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

2.156 The previous analysis noted that NPPs may be regarded as pursuing the legitimate objective of providing tied funding in accordance with mutually-agreed performance benchmarks and outcomes. However, the explanatory statements to the determinations do not provide any particular or general assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or be regarded as retrogressive (where funding is reduced).

2.157 Accordingly, the committee requested further advice from the Treasurer as to whether the setting of benchmarks for the provision of funds under the NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education); whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as, health, education or housing); and whether any retrogressive measures or trends pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

Treasurer's response

2.158 The Treasurer acknowledges the concern set out in the previous analysis regarding whether setting benchmarks for the provision of funds under the NPPs is compatible with human rights. The response states that the setting of performance requirements promotes the progressive realisation of human rights by creating an incentive for the efficient delivery of services, projects and reforms where NPPs support human rights in sectors such as health, education, housing and community services. As noted above at [2.154], the progressive realisation of ESC rights is a fundamental aspect of Australia's obligations under international human rights law.

2.159 The previous human rights assessment of the determinations also raised concerns regarding whether there have been any retrogressive trends over time in relation to the allocation of NPPs. The Treasurer advises that there has been a general increase in funding since the IGA was signed in 2008 and the payment of NPPs commenced. Specifically, total Commonwealth payments to the states and territories have increased from $84.0 billion in 2008-09 to $106.2 billion in 2015-16. The response also notes that the total payments to the states and territories are estimated to be at $116.5 billion in 2016-17. Further, the Treasurer advises that the states and territories meet the overwhelming majority of performance requirements in National Partnership agreements. This indicates that setting mutually-agreed benchmarks for the provision of payments under the NPPs is likely to be positively impacting a number of service areas that affect the progressive realisation of ESC rights.

2.160 In relation to potential issues of decreases in funding and the impact this may have on the capacity of states and territories to deliver essential services, the Treasurer states that there is no evidence to suggest that the setting of performance requirements would lead to a situation where states and territories frequently become ineligible for NPPs due to a failure to meet those requirements. He states that where payments do cease, this is usually because the agreed project or reform is completed and no further funding is required. As such, decreases in payments are usually a direct result of the achievement of the agreement's stated objective. This in itself could indicate potential steps towards the progressive realisation of ESC rights in that state or territory.

2.161 The Treasurer also sets out other reasons for fluctuations in payments that do not necessarily reflect retrogressive trends (for example, structural changes to funding mechanisms as a result of the full implementation of the National Disability Insurance Scheme).

2.162 The Treasurer's response demonstrates that while it is possible that there may be fluctuations from month to month in the funding amounts distributed to states and territories under the NPPs, generally trends show an increase in funding over time. Further, the provision of such funding for the achievement of objectives that would promote human rights in areas such as healthcare, employment, disability, education, community services and affordable housing, would assist the progressive realisation of a number of ESC rights.

Committee response

2.163 **The committee thanks the Treasurer for his response and has concluded its examination of the determinations.**

2.164 **The committee welcomes the useful information in relation to the operation and impact of NPPs set out in this response.**

2.165 **The preceding legal analysis indicates that, based on the information provided, the NPPs are unlikely to constitute a retrogressive measure for the purposes of international human rights law.**

2.166 **Based on the information provided, NPPs are likely to assist and provide a mechanism for the progressive realisation of a number of economic, social and cultural rights.**

2.167 **The committee recommends that the above information provided by the Treasurer be included in future statements of compatibility for related NPP determinations to assist the committee to fully assess the continued compatibility of NPPs with human rights.**

Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016 [F2016L00770]

Purpose	Amends the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 to insert additional decision-making principles that are relevant to making a determination that a person is a 'vulnerable welfare payment recipient' for the purposes of the *Social Security (Administration) Act 1999*
Portfolio	Social Services
Authorising legislation	*Social Security (Administration) Act 1999*
Last day to disallow	21 November 2016
Rights	Equality and non-discrimination; social security; adequate standard of living; private life (see **Appendix 2**)
Previous report	7 of 2016

Background

2.168 The committee first reported on the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016 [F2016L00770] (the instrument) in its *Report 7 of 2016*, and requested further information from the Minister for Social Services.[1]

2.169 The minister's response to the committee's inquiries was received on 27 October 2016. The response is discussed below and is reproduced in full at **Appendix 3**.

Time limits on 'vulnerable welfare recipient' determinations

2.170 The instrument amends the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 [F2013L01078] (the 2013 principles) to place a 12-month limit on certain determinations made by the Secretary of the Department of Social Services (the secretary) that result in vulnerable young people being automatically subject to compulsory income management. The committee examined the income management regime in its *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013 review) and

1 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 44-48.

2016 Review of the Stronger Futures measures (2016 review).[2] In its 2016 review, the committee noted that the income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.[3]

2.171 The statement of compatibility for the instrument recognised that the rights to social security and privacy were limited by the measure. However, no information was provided as to why a 12-month period of automatic compulsory income management is more appropriate than a shorter period, or why a period of automatic compulsory income management prior to individual assessment is necessary at all. Additionally, the statement of compatibility provided no information as to why young people who are automatically subject to income management because they have been recently released from gaol or psychiatric confinement will continue to be subject to open-ended determinations.

2.172 The committee therefore sought 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; why a shorter period of operation for a determination, or the removal of the automatic trigger for vulnerable income management for young people, is not more appropriate; and why the 12-month limit on a determination does not apply to young people who have recently been released from gaol or psychiatric confinement.

Minister's response

2.173 The minister advises that the time limits on 'vulnerable welfare recipient' determinations were introduced in response to findings of the Consolidated Place-Based Income Management Evaluation 2015 (the PBIM evaluation).[4] The minister states that the findings of this report show that the effectiveness of income management in improving financial stability for vulnerable people is maximised in the short-term, that 12 months is at the lower limit of the time that the program has been shown to be most effective, and that a shorter determination, or the elimination of the trigger, would not be appropriate considering the balance of this evidence. The minister further states that by improving financial stability the measure promotes, or is a proportionate limitation on, the right to equality and non-discrimination, the right to social security, and the right to privacy.

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2 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

3 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 61.

4 Deloitte Access Economics, *Consolidated Place Based Income Management Evaluation Report 2012-2015* (Department of Social Services, 27 May 2015) available at https://www.dss.gov.au/sites/default/files/documents/11_2015/deloitte_access_economics_consolidated_evaluation_report_201115.pdf.

2.174 The minister also states that the 12-month limit on a determination still applies to young people who have recently been released from gaol or psychiatric confinement, but that subsequent determinations based on this trigger may still be made. The minister states that compulsory income management is necessary to achieve the policy objective of short term financial stability for young people in receipt of these crisis payments, regardless of whether the person has been subject to a previous determination based on any of the triggers.

2.175 However, while the minister's response relies on evidence from the PBIM evaluation, the response does not appear to take into account specific findings from the PBIM evaluation in relation to young people who are automatically subject to income management, as opposed to people who volunteer for income management, or are placed on income management as a result of being assessed by a social worker.

2.176 In particular, the PBIM evaluation report states that longitudinal survey results indicated that income management did not have a significant impact on financial stability for people subject to the vulnerable measure of income management.[5] The PBIM evaluation ultimately suggests the removal of automatic triggering arrangements, as the measure has achieved relatively few positive outcomes compared to voluntary income management, or income management for people who are individually assessed by a social worker, and because the trigger mechanism 'is not sufficiently targeted to distinguish between consumers who stand to benefit from the program and those who do not.'[6]

2.177 The PBIM evaluation, which was referred to by the minister, indicates that the automatic trigger provisions for income management do not appear to be effective in achieving, or are a proportionate means of achieving, the stated objective of improving financial stability for vulnerable people.

2.178 As noted in the committee's initial report on the measure, restricting the time that a vulnerable welfare recipient determination can operate will allow a young person's suitability for income management to be individually assessed after the 12-month period has expired. The initial human rights analysis therefore considered that the instrument is an improvement to continuing automatic compulsory income management as it allows for consideration of a young person's individual suitability for the program once the 12-month period has expired.

2.179 However, subjecting a person to compulsory income management for any length of time engages and limits human rights. Additionally, automatic triggering arrangements mean that there is not a requirement to make an individual

5 Deloitte Access Economics, *Consolidated Place Based Income Management Evaluation Report 2012-2015* (Department of Social Services, 27 May 2015) 61.

6 Deloitte Access Economics, *Consolidated Place Based Income Management Evaluation Report 2012-2015* (Department of Social Services, 27 May 2015) 66.

assessment of whether income management is appropriate for a young person who receives these payments, unlike the process for making other vulnerable welfare recipient determinations under the 2013 principles.[7] As this committee observed in its 2016 review, the absence of individual assessment is relevant to the proportionality of the income management measure:

> In assessing whether a measure is proportionate some of the relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, whether affected groups are particularly vulnerable, and whether there are other less restrictive ways to achieve the same aim…[8]

2.180 The committee's 2016 review found that the compulsory income management regime does not operate in a flexible manner. Evidence also indicates that the blanket application of the regime disproportionately affects Indigenous Australians and the exemption process is not conducive to allowing Indigenous Australians to apply for an exemption and to succeed in that application. On this basis, the committee's 2016 review concluded that the income management regime may be a disproportionate measure and therefore incompatible with Australia's international human rights law obligations.[9]

2.181 On the basis of the evidence, the automatic imposition of income management, even where time limited to 12 months, continues to raise the human rights concerns set out in the committee's previous reports. In light of the specific findings of the PBIM evaluation in relation to young people who are automatically subject to income management, the minster's response does not provide sufficient justification as to why a 12-month period of automatic compulsory income management is more appropriate than a shorter period, or why a period of automatic compulsory income management prior to individual assessment is necessary at all.

Committee response

2.182 **The committee thanks the minister for his response and has concluded its examination of this issue.**

2.183 **Subjecting a person to compulsory income management for any length of time engages and limits the right to equality and non-discrimination, the right to social security and the right to privacy and family. The imposition of the limit on**

7 See Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 [F2013L01078] section 7.

8 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 52.

9 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 52, 56.

automatic compulsory income management for 'vulnerable welfare payment recipients' is preferable to the preceding open-ended arrangements. Notwithstanding this, the minister has not provided sufficient justification so as to enable a conclusion that the 12-month limit on the automatic imposition of compulsory income management is sufficient to ensure that compulsory income management is a proportionate limitation of these rights.

2.184 **The committee recommends that, in order for the measure to be compatible with the right to equality and non-discrimination, the right to social security and the right to privacy and family, consideration be given to amending the income management regime to remove the automatic triggering arrangements for vulnerable young people.**

Mr Ian Goodenough MP

Chair