Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

The establishment of the committee builds on Parliament's established tradition of legislative scrutiny. The committee's scrutiny of legislation is undertaken as an assessment against Australia's international human rights obligations, to enhance understanding of and respect for human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, in relation to most human rights, prescribed limitations on the enjoyment of a right may be justified under international law if certain requirements are met. Accordingly, a focus of the committee's reports is to determine whether any limitation of a human right identified in proposed legislation is justifiable. A measure that limits a right must be **prescribed by law**; be in pursuit of a **legitimate objective**; be **rationally connected** to its stated objective; and be a **proportionate** way to achieve that objective (the **limitation criteria**). These four criteria provide the analytical framework for the committee.

A **statement of compatibility** for a measure limiting a right must provide a **detailed and evidence-based assessment** of the measure against the limitation criteria.

Where legislation raises human rights concerns, the committee's usual approach is to seek a response from the legislation proponent, or else draw the matter to the attention of the proponent on an advice-only basis.

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in Guidance Note 1 (see **Appendix 4**).

1 These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

Table of contents

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.

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

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Criminal Code Amendment (War Crimes) Bill 2016;
- Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016;
- Migration Amendment (Visa Revalidation and Other Measures) Bill 2016;
- Privacy Amendment (Re-identification Offence) Bill 2016;
- Seafarers and Other Legislation Amendment Bill 2016;
- Seafarers Safety and Compensation Levies Bill 2016;
- Seafarers Safety and Compensation Levies Collection Bill 2016;
- Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2016 (No. 1) [F2016L01444];
- Australian Border Force (Secrecy and Disclosure) Amendment (2016 Measures No. 1) Rule 2016 [F2016L01461];
- Defence Force Discipline Appeals Regulation 2016 [F2016L01452];
- Defence Regulation 2016 [F2016L01568];
- Migration Legislation Amendment (2016 Measures No. 3) Regulation 2016 [F2016L01390]; and
- Sex Discrimination Amendment (Exemptions) Regulation 2016 [F2016L01445].

3.2 The committee continues to defer its consideration of the following legislation:

- Appropriation Bill (No. 1) 2016-2017;[1]
- Appropriation Bill (No. 2) 2016-2017;[2]
- Racial Discrimination Amendment Bill 2016;[3]

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1 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

2 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

- Racial Discrimination Law Amendment (Free Speech) Bill 2016;[4]
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2016 [F2016L00799];[5]
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment List 2016 (No. 1) [F2016L00047];[6]
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 2) [F2016L00117];[7]
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons - Iran) Amendment List 2016 (No. 3) [F2016L01100];[8]
- Charter of the United Nations (Sanctions—Iran) (Export Sanctioned Goods) List Determination 2016 [F2016L01208];[9]
- Charter of the United Nations (Sanctions—Iran) Regulation 2016 [F2016L01181];[10] and
- Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 1) [F2016L01209].[11]

4 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

5 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

6 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 4.

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

8 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

9 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

10 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

11 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 113.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015).

2 Parliamentary Joint Committee on Human Rights, *Guidance Note 1* (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);
- respect for family life (prohibiting interference with personal family relationships);

- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a

religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates 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. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

3 The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

4 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

The Hon Christian Porter MP
Minister for Social Services

MC16-009043

Ms Toni Dawes
Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

27 OCT 2016

Dear ~~Ms Dawes~~ Toni

Thank you for your letter of 12 October 2016 to the Office of the Treasurer, regarding the Parliamentary Joint Committee on Human Rights - Report 7 of 2016. Your letter has been referred to me as the matter raised falls within my portfolio responsibilities.

I have noted the comments in the Committee's report and have provided my response to these comments in the enclosed document. The Treasurer will respond to your letter separately.

Thank you for raising this matter with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Social Services Legislation Amendment Budget Savings (Omnibus) Bill 2016

The Parliamentary Joint Committee on Human Rights, in 'Report 7 of 2016' has sought advice from the Treasurer on whether certain measures included in the Budget Savings (Omnibus) Bill 2016 (the Bill) are compatible with human rights, as defined in the Act.

Specifically the Committee has questioned the compatibility of some of the proposed changes with the right to equality and non-discrimination, the right to social security, and the right to an adequate standard of living. This document provides responses to the Committee's request for advice on compatibility of the measures identified with those rights.

Schedule 10 - Newly arrived residents waiting period

Committee comment:

1.22 As recognised by the statement of compatibility to the bill, waiting periods engage the right to social security. The preceding analysis explains why the amendments constitute a limitation on the right to social security.

1.23 The committee seeks the advice of the Treasurer as to:

- whether the removal of exemptions for the newly arrived resident's waiting period is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This Schedule aligns the newly arrived residents waiting period that is applied to working-age social security payments (e.g. Newstart Allowance, Youth Allowance), concession cards and farm household allowance by removing the exemption provided to family members of Australian citizens or permanent resident visa holders. This ensures all newly arrived migrants will be required to serve the same 104-week newly arrived residents waiting period.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, consideration has been given to the human rights implications particularly with reference to the right to social security contained within Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is concluded that the Bill does not place limitations on human rights.

This measure aligns the 104-week newly arrived resident's waiting period for income support payments for all migrants (except for permanent humanitarian entrants) by removing an exemption which allows some people to qualify for income support payments earlier than others.

Permanent Humanitarian entrants will continue to be exempt from all social security payment waiting periods.

In conclusion, these amendments are compatible with human rights. To the extent that they may limit a person's access to social security, the limitation is reasonable and proportionate.

Schedule 16 - Carer Allowance

Committee comment:

1.31 As recognised by the statement of compatibility to the bill, the removal of the backdating provisions for carer allowance payments beyond the date of lodgement of a claim or the date of first contact engages the right to social security. The preceding analysis explains why the amendments constitute a limitation on the right to social security.

1.32 The committee seeks the advice of the Treasurer as to:

- whether the removal of the backdating provisions is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective (including the availability of other forms of financial support).

This Schedule amends the *Social Security Administration Act 1999* to change the earliest date of effect for a grant of carer allowance to the date the claim is lodged or the date of first contact with the Department of Human Services. New claims for carer allowance received after 1 January 2017 will no longer be able to be backdated up to 12 weeks before the person contacted the Department of Human Services about carer allowance.

The start day for carer allowance for a person caring for a child under the age of 16 years can currently be backdated up to 12 weeks before the date of claim for a person caring for a child with disability.

The start day for carer allowance (adult) can currently be backdated up to 12 weeks before the date of claim for a person caring for an adult with a disability, provided the disability is due to an acute onset.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, this Schedule engages the right to social security as recognised in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum level of benefits to all individuals and families that will enable them to cover essential living costs. Carer allowance itself is not an income support payment and may be paid in addition to an income support payment, such as carer payment. Carer allowance recipients, therefore, have access to additional personal income or social security income support to cover essential living costs. Other social security payments are not affected by this measure.

The United Nations Committee on Economic, Cultural and Social Rights (the committee) has stated that a social security scheme should be sustainable and that the conditions for benefits must be reasonable, proportionate and transparent (see General Comment No. 19). This measure will ensure that the social security system remains sustainable and targeted to those recipients with the greatest need.

The amendments will also align the date of effect for the grant of carer allowance with other social security payments made under the Social Security Act.

In conclusion the amendments made by this Schedule are compatible with human rights because:

- they do not affect a person's entitlement to income support payments, such as carer payment;
- to the extent that the changes reduce the period from which carer allowance is payable, the reduction is reasonable, necessary and proportionate to achieving a legitimate aim; and
- they do not limit or preclude eligible persons from gaining or maintaining access to carer allowance under the Social Security Act, 1991.

Schedule 18 – Pension Means Testing for Aged Care Residents

Committee comment:

1.40 As recognised by the statement of compatibility to the bill, the changes to means testing for the pension in respect of new aged care residents engages and limits the right to social security.

1.41 The committee seeks the advice of the Treasurer as to:

- whether the differential treatment of new entrants to aged care is rationally connected to and a proportionate means of achieving the objective; and
- whether the limitation will affect a person's ability to access an aged care facility.

This Schedule improves the sustainability and equity of the income support system by removing the social security income and assets test exemptions that are available to aged care residents who are renting their former home and paying their aged care accommodation costs by periodic payments.

New entrants to residential and flexible aged care from the commencement of this Schedule have: the net rental income from their former home assessed under the social security income test; and the value of their former home assessed under the social security assets test after two years, unless the home is occupied by a protected person, such as their partner, in which case it will continue to be exempt.

The changes will not impact income support recipients who enter residential and flexible aged care before commencement provided they remain in care or are only absent from care for a period not exceeding 28 days. They will continue to be eligible for these income and assets test exemptions.

This Schedule commences on the first 1 January or 1 July to occur after the day this Act receives the Royal Assent

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, this Schedule is consistent with supporting the right to social security. The social security system uses income and assets testing to ensure the social security system:

- is sustainable, by reducing pension outlays
- is targeted to those in need, by reducing pension support to those who have the financial capacity to be more self-reliant
- encourages self-provision, by progressively withdrawing pension payments as an individual's level of income and asset increases to ensure that people with additional private income and assets are better off than those relying solely on the pension; and
- is fair, by ensuring individuals with similar levels of income and assets receive similar levels of assistance through the pension.

While the effect of this Schedule will be that pension payments for some recipients who enter aged care from the commencement of this Schedule will be lower than would have been the case if the income and assets test exemptions had not been removed, those affected will hold substantial levels of private income and assets. They have the capacity to be more self-reliant and it is appropriate that they:

- use their income and assets to help support themselves; and
- do not get higher pension payments that other people in aged care who have similar levels of income and assets, but who are not eligible for the income or assets test concessions.

In conclusion, the amendments in this Schedule are compatible with human rights because they do not limit access to social security.

Schedule 19 – Employment income (nil rate periods)

Committee comment:

1.48 As recognised by the statement of compatibility to the bill, the removal of two income test exemptions engages the right to social security. The preceding analysis explains why the amendments constitute a limitation.

1.49 The committee seeks the advice of the Treasurer as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the changes are otherwise aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

This Schedule, from 1 July 2018, removes existing income test exemptions for parents in employment nil rate periods under the: family tax benefit Part A income test; and the parental income test that applies to dependent young children receiving youth allowance and ABSTUDY living allowance.

Human rights implications

As outlined in the Explanatory Memorandum to the Bill, the Schedule is consistent with supporting the right to social security.

The Schedule removes the exemption from the income test for family tax benefit Part A recipients and the exemption from the parental income test for dependent young people receiving youth allowance and ABSTUDY living allowance if the parent is receiving either a social security pension or social security benefit, the rate of which is reduced to nil, either wholly or in part, because of employment income.

Removal of the exemptions recognises that they cause an inequity between families, where those families subject to the exemptions can receive greater financial assistance from family and youth payments than families not subject to the exemptions, even though they have the same income.

Removal of the exemptions also recognises that a family with income, including employment income sufficient to reduce their social security payment to nil, has financial means greater than a family that is receiving a social security payment. 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.

In conclusion, the amendments in the Schedule are compatible with human rights because they do not limit access to social security.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MC16-141201

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

I am writing in relation to Report 7 of 2016, in which the Parliamentary Joint Committee on Human Rights sought further advice about the limitation on the right to privacy imposed by the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016* (the Regulation). In its Report, the Committee has sought the advice of the Attorney-General on these matters. As I have portfolio responsibility for the subject matter of the Regulation, I am pleased to provide the response to the Committee's request.

The Regulation prescribes a number of bodies that may collect, and a number of information systems that may hold, 'national policing information' for the purpose of the *Australian Crime Commission Act 2002* (ACC Act). National policing information includes operational information collected and used by law enforcement agencies and basic identifying information of people applying for police records checks.

The Committee has noted in its Report that the Regulation prescribes a list of 310 bodies that collect national policing information. For the record, I can advise that the Regulation, in Item 4 of Schedule 1, prescribes a list of 210 such bodies (numbered from 101 to 310).

The Regulation is essential to enable the Australian Criminal Intelligence Commission (ACIC) to undertake its function of receiving, holding and sharing national policing information to and from relevant agencies. The Regulation creates a reasonable and proportionate limitation on the right to privacy in order to achieve this objective, and the ACC Act provides sufficient safeguards to protect the right to privacy.

Reasonable and proportionate limitation

The prescription of each relevant body by the Regulation is necessary and reasonable to ensure either that information needed for the effective performance of policing functions is available to all Australian police agencies or that information submitted in support of a person's application for a police record check is protected against inappropriate disclosure.

Similarly, each information system prescribed by the Regulation meets a particular information need of Australian police agencies, and the information held on each does not go beyond what is reasonably necessary for the purpose of each system.

Safeguards

Access to national policing information is restricted and there are appropriate safeguards against inappropriate access and use. All information held by the ACIC (which includes national policing information) is subject to robust information protection provisions set out in the ACC Act. Additional restrictions are applied to national policing information, with the approval of the ACIC Board being required for disclosure to bodies other than a small list of law enforcement agencies (namely, police agencies, DIBP, ASIO, ASIC, the ATO, the Independent Commission Against Corruption of New South Wales and the Crime and Corruption Commission of Queensland).

As with the other types of sensitive information that it holds, the ACIC has also put technical and administrative mechanisms in place to ensure that national policing information continues to be collected, used and stored securely.

The ACIC is also subject to a strict system of oversight and accountability that is specifically designed to ensure that the ACIC exercises its powers appropriately while maintaining the appropriate balance between secrecy and accountability. Should an individual have a complaint about how the ACIC deals with their personal information, depending on the nature of that complaint, the ACIC's conduct can be examined by the Commonwealth Ombudsmen, the Integrity Commissioner or the Parliamentary Joint Committee on Law Enforcement.

While the ACIC is not subject to the *Privacy Act 1988*, it is an agency that deals with a diverse range of sensitive information as part of its core business and is very experienced in ensuring information is appropriately handled and secured. Its safeguards and accountability mechanisms are specifically designed for the sensitive nature of its operations. The ACIC is also subject to the *Freedom of Information Act 1982* (Cth) and individuals have a right to seek access to and correction of their personal information where held by the ACIC.

Further information

Further information on the Regulation's limitation on the right to privacy, and the safeguards in place to prevent inappropriate use of personal information, is set out in Attachment A.

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

Encl:
Attachment A: Further information on the privacy implications of the Regulation
Attachment B: 'Privacy Impact Assessment, Proposed CrimTrac and Australian Crime Commission Merger'

Attachment A

Further Information on the privacy implications of the Australian Crime Commission Amendment (National Policing Information) Regulation 2016

In its Report 7 of 2016, the Parliamentary Joint Committee on Human Rights (the Committee) sought further advice in relation to the *Australian Crime Commission Amendment (National Policing Information) Regulation 2016* (the Regulation). In particular, the Committee has sought further information about the limitation on the right to privacy by the Regulation, whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective and whether there are sufficient safeguards to protect the right to privacy of individuals (including safeguards that are comparable to those contained in the *Privacy Act 1988*).

The Regulation amends the *Australian Crime Commission Regulations 2002* (ACC Regulations), prescribing for the purposes of the *Australian Crime Commission Act 2002* (ACC Act) a number of items relating to the collection and disclosure of 'national policing information' by the Australian Criminal Intelligence Commission (ACIC). In particular, the Regulation prescribes a number of 'national policing information bodies' and 'national policing information systems'.

Limitation on the right to privacy

National policing information will often encompass personal information of individuals. The collection and disclosure of national policing information, which is in part facilitated by the Regulation, therefore engages and limits the right to freedom from unlawful or arbitrary interferences with a person's privacy under Article 17 of the *International Covenant on Civil and Political Rights*. Lawful interferences with the right to privacy will be permitted, provided they are reasonable in the particular circumstances. The UN Human Rights Committee has interpreted 'reasonableness' in this context to imply that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.[1]

The Regulation is necessary

The Regulation is essential to enable ACIC to undertake its function of receiving, holding and sharing national policing information to and from relevant agencies. Section 7A(fa) of the ACC Act provides that the ACIC has the following 'national policing information functions':

> ... to provide systems and services relating to national policing information, including the following:
> (i) collecting, correlating and organising national policing information;
> (ii) providing access to national policing information;
> (iii) supporting and facilitating the exchange of national policing information;
> (iv) providing nationally coordinated criminal history checks on payment of a charge imposed by the Charges Act.

'National policing information' comprises all the information held on the national policing information systems maintained by the ACIC. This includes information collected and used by police and law enforcement agencies for law enforcement purposes as well as basic identifying information collected by 'accredited agencies' from applicants for the purpose of conducting national police records checks.

To be 'national policing information' under the ACC Act, particular information must *both* have

[1] *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

been collected by an Australian police agency or another prescribed body *and* have been incorporated into a prescribed ACIC system. As noted above, the Regulation prescribes both bodies and systems that contribute to this definition.

'National policing information' is a subset of 'ACC information' under the ACC Act. ACC information includes all information held by the ACIC (subsection 4(1) of the ACC Act).

Sufficient safeguards are in place

General safeguards for information held by ACIC

All information held by the ACIC, including national policing information, is subject to the information protection provisions of the ACC Act.

The ACC Act contains strict limitations on the dissemination of any information in the ACIC's possession. The ACIC can only disclose information in its possession to other government agencies if the ACIC CEO considers it appropriate, disclosing the information is relevant to a listed permissible purposes, and the disclosure would not be contrary to a Commonwealth, state or territory law (section 59AA).

In addition to this, the ACIC can only disclose information to bodies corporate that have been prescribed by the regulations and where the body has undertaken in writing not to use or disclose that information except for the purpose it was shared with it (section 59AB).

Specific safeguards for handling of national policing information by ACIC

The ACC Act imposes additional restrictions on the disclosure of national policing information, by requiring ACIC Board approval before disclosure is made to a body that is not set out in the ACC Act or prescribed in the ACC Regulations. The ACC Act sets out all Australian Police agencies, Department of Immigration and Border Protection (DIBP), the Australian Security Intelligence Organisation, the Australian Securities and Investments Commission and the Australian Taxation Office. The heads of these agencies (the Commissioner of the Australian Border Force in the case of DIBP) are all members of the ACIC Board. This level of Board oversight will ensure close scrutiny of the release of any information to non-law enforcement bodies.

The ACC Regulations prescribe the Independent Commission Against Corruption of New South Wales and the Crime and Corruption Commission of Queensland. These two bodies are able to receive national policing information in connection with their function of combating corruption.

Using or disclosing information in the ACIC's possession in breach of these provisions is an offence punishable by up to 2 years imprisonment.

As with the other types of sensitive information it holds, the ACIC has also put technical and administrative mechanisms in place to ensure that national policing information continues to be collected, used and stored securely.

Safeguards for handling of national police information by other bodies

Most information defined as 'national policing information' is collected by Australian police services. Access to, and use of, that information is strictly limited by the ACC Act to police services, ACIC Board agencies and a limited number of law enforcement agencies prescribed in the regulations or approved by the ACIC Board.

Accredited agencies collect limited personal information from individuals to allow the agency to apply for national police history checks for employment and other vetting purposes. These agencies have access only to the results of police history checks conducted at their request. They are required to deal with the personal information in those results in accordance with the Privacy Act through contractual obligations with the ACIC.

Section 59AAA of the ACC Act also provides rules that apply to the disclosure of information from a nationally coordinated criminal history check. This information may be disclosed to the person to whom it relates and to an 'accredited body', being a body approved by the CEO of the ACIC under subsection 46A(5) of the ACC Act to apply on behalf of individuals for police checks of those individuals. These rules reflect the fact that, unlike other national policing information services provided by the ACIC, the criminal history check is a service provided to members of the public for a fee.

ACIC's accountability framework

The ACIC is also subject to a robust accountability framework. Should an individual have a complaint about how the ACIC deals with their personal information, depending on the nature of that complaint, the ACIC's conduct can be examined by:

- the Commonwealth Ombudsman – who can investigate complaints about the ACIC's actions and decisions to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair
- the Integrity Commissioner – who can investigate allegations of corrupt activity by current and former staff of the ACIC, and
- the Parliamentary Joint Committee on Law Enforcement – whose role is to monitor and review the ACIC's performance.

While the ACIC is not subject to the Privacy Act, it is an agency that deals with a diverse range of sensitive information as part of its core business and is very experienced in ensuring information is appropriately handled and secured. Its safeguards and accountability mechanisms are specifically designed for the sensitive nature of its operations. The ACIC is also subject to the *Freedom of Information Act 1982* (Cth) and individuals have a right to seek access to and correction of their personal information where held by the ACIC.

A Privacy Impact Assessment ('PIA', copy at **Attachment B**) was prepared by the Attorney-General's Department (AGD), the Australian Crime Commission (ACC) and CrimTrac as part of the proposal to merge the ACC and CrimTrac to form the ACIC.[2] A recommendation of that assessment was for the ACIC to 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 preparation of this information handling protocol is currently underway.

<u>The limitation is proportional to the end sought</u>

As noted above, the Regulation prescribes national policing information bodies and national policing information systems for the purpose of the definition of 'national policing information'

[2] The PIA was attached to the joint submission from AGD, the ACC and CrimTrac to the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Australian Crime Commission Amendment (National Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015* in February 2016.

under the ACC Act. Prescription of these bodies and systems is necessary to enable ACIC to undertake its national policing information functions provided for under the ACC Act, and the Regulation does not go beyond what is reasonably necessary for the ACIC to undertake those functions..

'National policing information bodies'

Most national policing information is collected and uploaded to relevant national policing information systems by Australian police agencies. These agencies are already collectively specified in the definition of 'national policing information' in the ACC Act, and therefore do not need to be prescribed as national policing information bodies in regulations.

There are a few cases where information of significant value to policing is supplied to national policing information systems by other agencies. For example:

- DIBP uploads bridging visa data to the National Police Reference System (NPRS) and fingerprint information from checks made at the border to the National Automated Fingerprint Identification System
- AGD uploads certain information obtained in the performance of its functions to the NPRS and the National Firearms Identification Database (NFID), and
- the New Zealand Police contribute policing information to data held on the systems.

Each of these agencies is prescribed as a national policing information body by the Regulation. The prescription of these agencies is a necessary and reasonable measure to ensure that information needed for the effective performance of policing functions is available to all Australian police agencies.

Contributors of information for national police history checks

Most of the bodies prescribed as national policing information bodies by the Regulation are included solely because they are 'accredited bodies' to submit applications for nationally coordinated police history checks to the National Police Checking Service Support System (NSS). As noted above, these checks are a service provided to the public for a fee. Applications for a check are submitted by persons who are typically applicants for any of the following:

- recruitment and job applications
- volunteer and not for profit positions
- working with children or vulnerable groups
- licencing or registration schemes applications
- work-related checks due to legislation or regulations
- Australian citizenship and visa applications, and
- adoption applications.

The police history checking service plays an important role in ensuring that bodies such as charities, educational institutions, government agencies and healthcare providers can ensure as far as possible that they do not employ or confer any benefits on unsuitable applicants.

Where a person seeks a nationally coordinated police history check, an accredited body will submit identifying details of the applicant to the NSS to enable the check to be conducted. This information is treated as 'national policing information', being used in initial checks of the NPRS and disclosed to police agencies in each jurisdiction (if any) in which the checks indicate the person may have a

criminal record.

Before the ACIC CEO approves non-government bodies to be accredited bodies, they must be subject to police checks to ensure they are suitable bodies to deal with sensitive personal information. Approval is also dependent on their agreement to comply with the requirements of the Privacy Act in dealing with information for the purposes of the criminal record checking process.

Categorising information as 'national policing information' means that the information may be disclosed to a much narrower group of entities than if it were simply treated as 'ACC information'. Prescribing these accredited bodies under the Regulation is necessary to allow the information they submit on behalf of individuals to become 'national policing information'. The results of the check are available to the accredited body that made the application and the individual concerned. Other than this, the results are only available to the limited group of government bodies that may receive national policing information.

The prescription of these accredited bodies as national policing information bodies by the Regulation is a necessary and reasonable measure to ensure that information submitted in support of a person's application for a police record check is protected against inappropriate disclosure. Moreover, it does not have the effect of authorising these bodies to disclose information to the ACIC in circumstances where they could not otherwise have lawfully done so.

National Policing Information Systems

The Regulation prescribes a list of ACIC systems as national policing information systems, allowing the information that they hold to be treated as by national policing information. Information held in these systems relates directly to the day to day operations of the ACIC's national policing information function. Each system was originally established by CrimTrac to meet a particular information need of Australian police agencies and contains information that is necessary to enable the system to operate or is otherwise of a type likely to be of significant value to police in connection with the purpose of the system.

Details of the purposes of, and types of information held in, each system were provided in Attachment B (pages 18 – 38) to the PIA (copy at **Attachment B**).

The purpose of prescribing these systems is to set clear limits around the concept of national policing information. The PIA demonstrates that the information held on each system is necessary for the function of the system and that the purpose of each system is in the public interest.

The purpose of the prescriptions in the Regulation is to ensure that the ACIC has authority (where needed) to hold the information in each of the prescribed systems and that the information can be dealt with as national policing information. This limits its disclosure to a narrower range of recipients than ACC information generally may be disclosed to. The information held on each of the prescribed systems does not go beyond what is reasonably necessary for the purposes of that system.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH AND AGED CARE
MINISTER FOR SPORT

Ref No: MC16-030506

25 OCT 2016

Ms Toni Dawes
Committee Secretary
Joint Parliamentary Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dawes

Thank you for your correspondence of 12 October 2016 regarding the Parliamentary Joint Committee on Human Rights (the Committee) assessment of the Biosecurity (Human Health) Regulation 2016 (the Regulation), in particular the requirements for taking, storage, transportation and labelling of body samples as a requirement of a human biosecurity control order.

Individuals operating under section 10 of the Regulation will always be a qualified medical professional. 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.

I consider that adherence to existing professional medical standards and requirements appropriately manage human rights concerns, including privacy and respect for personal rights and liberties.

Thank you for bringing this matter to my attention.

Yours sincerely

The Hon Sussan Ley MP

TREASURER

Ref: MC16-019165

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 12 October 2016 concerning the Parliamentary Joint Committee on Human Rights' request for the Treasurer to provide a response in their Human Rights Scrutiny Report released on 11 October 2016 (Report 7 of 2016). The Committee requested information on the compatibility with human rights of the Budget Savings (Omnibus) Bill 2016; the *Census and Statistics Regulation 2016* (F2016L00706); and the *Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016).*

I have referred the response on the Budget Savings (Omnibus) Bill 2016 to the Minister for Social Services as it concerns policy matters within his portfolio.

A detailed response to the Committee's requests relating to the *Census and Statistics Regulation 2016* and the *Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016)* is attached.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Scott Morrison MP

27 / 10 / 2016

Parliament House Canberra ACT 2600 Australia
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ATTACHMENT

Census and Statistics Regulation 2016

The Parliamentary Joint Committee of Human Rights (the Committee) noted that the statement of compatibility accompanying the Regulation did not address any limitations imposed by sections 9 to 12 of that Regulation on the prohibition on the interference with privacy contained in Article 17 of the International Covenant on Civil and Political Rights. The Committee has requested advice on whether any such limitation is a reasonable and proportionate measure for the achievement of a legitimate objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy.

Sections 9 to 12 of the Regulation list the matters in relation to which the Statistician may collect statistical information for the purpose of taking the Census. These matters were previously prescribed in the *Census and Statistics (Census) Regulation 2015*, and were consolidated into the Regulation to simplify the Australian Bureau of Statistics' regulatory framework. The Regulation did not make any substantive changes to those matters. I do not consider that human rights have been engaged or affected by the movement of these matters into a new legislative instrument.

I also note that the compulsory collection, use and retention of personal information through the Census is authorised by the *Census and Statistics Act 1905*, not the Regulation.

However, given the Committee's concerns, I would like to provide the Committee with information on the significant safeguards that the Australian Bureau of Statistics (ABS) has in place to protect Census data, which support the ABS' ongoing commitment to maintaining community trust and protecting the confidentiality of individuals and businesses.

The ABS complies with its obligations under the Privacy Act 1988, and manages personal information in accordance with the Australian Privacy Principles. In accordance with Australian Privacy Principle 1, the ABS publishes both an ABS Privacy Policy and a Census Privacy Policy on their website at www.abs.gov.au. I refer you to these policies for detailed information on the safeguards put in place to protect the privacy of Census data.

In addition, 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 given under the Census and Statistics Act 1905 (the Act) (including information collected under the Census) (section 19 of the Act). The penalty for this offence is 120 penalty units or imprisonment for 2 years, or both.

Exceptions apply where the person divulges or communicates the information for the purposes of the Act, or in accordance with a determination made under section 13 of the Act. The Act does not allow personal or domestic information to be disclosed in a manner likely to enable the identification of a particular person.

As the Committee noted in their report, the continued collection of information through the Census has a range of potential benefits for human rights. Statistics compiled by the ABS are used by governments to make more informed decisions on how to distribute resources, including government funds. This may impact on many different aspects of government planning, including those relating to housing, healthcare, education and infrastructure.

The collection of personal information, including names and addresses, is critical to ensuring the quality and value of the Census. Names and addresses have been collected in every Census conducted by the ABS, and their collection is consistent with international practice.

The retention of statistical information, including names and addresses, is consistent with the *Archives Act 1988*. This information may be destroyed when no longer required in accordance with the Administrative Functions Disposal Authority and the ABS' Records Disposal Authority.

I consider that the prescription of matters in sections 9 to 12 of the Regulation is a reasonable, necessary and proportionate method in pursuit of a legitimate objective, given the privacy safeguards in place.

Federal Financial Relations (National Partnership payments) Determination No. 104-8 (March 2016) – (July 2016)

The Committee has requested advice on whether the setting of benchmarks for the provision of funds through National Partnership payments is compatible with human rights.

National Partnership payments are made by the Commonwealth to the States and Territories to support the delivery of specified services or projects, and to facilitate and reward the undertaking of nationally-significant reforms. The *Federal Financial Relations Act 2009* requires the Treasurer to determine National Partnership payments to be made to each State and Territory. As these payments are generally made on the 7th day of each month, the Treasurer usually makes a determination at least once a month.

Each National Partnership agreement sets out mutually-agreed objectives, outcomes, outputs and performance requirements for the specific services, project or reform to be delivered under that agreement. Each agreement is negotiated between the Commonwealth and the relevant States and Territories. Through the negotiation process, the States and Territories have input into the setting of benchmarks to be used to measure progress in delivering services, projects and reforms. The benchmarks in National Partnership agreements are agreed by all parties as achievable and as supporting achievement of the mutually-agreed policy objectives.

The States and Territories meet the overwhelming majority of performance requirements in National Partnership agreements. The associated funding is then paid by way of the determinations for National Partnership payments, consistent with the terms and conditions of the relevant agreement. 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 National Partnership payments support human rights in sectors such as health, education, housing and community services.

The Committee also sought my advice on whether there have been any retrogressive trends over time indicating reductions in payments which may impact on human rights. National Partnerships are time-limited agreements and, as mentioned above, the overwhelming majority of funding available under National Partnerships is paid to the States and Territories. There is no evidence to suggest that the setting of performance requirements leads to a situation where states and territories frequently become ineligible for National Partnership payments due to failure to meet those requirements. To the extent that payments cease under individual agreements, this is usually because the agreed project or reform is completed and no further funding is required. In such cases, localised decreases in payments are a direct result of the achievement of the agreement's stated objective.

At an aggregate level, total National Partnership payments vary from month to month and year to year for a variety of reasons. Different projects and reforms are delivered over different time periods, and annual funding allocations under individual agreements vary over the term of the agreement depending on the pace at which services, projects or reforms are expected to occur. Structural changes to the way that services are provided can also generate changes to funding arrangements. For example, funding mechanisms for the provision of disability services are currently changing significantly as the Commonwealth and the States and Territories move to full implementation of the National Disability Insurance Scheme. In this case, and more generally, changes to National Partnership payments for sectors that support human rights do not necessarily reflect trends in Commonwealth funding for service provision in those sectors.

There is no evidence to suggest that there are retrogressive trends in National Partnership payments which may impact on human rights. Since the Intergovernmental Agreement on Federal Financial Relations was agreed in November 2008, total Commonwealth payments to the States and Territories have increased from $84.0 billion in 2008-09 to $106.2 billion in 2015-16. Total payments to the States and Territories are estimated to be $116.5 billion in 2016-17.

The Hon Christian Porter MP
Minister for Social Services

MS16-001424

27 OCT 2016

Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for the opportunity to provide comment on the Parliamentary Joint Committee on Human Rights' *Report 7 of 2016*.

The Committee has requested clarification about the engagement and limitation on human rights associated with the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016* (the Principles). It asks whether they are reasonable and proportionate to the objectives the Vulnerable Welfare Payment Recipient Measure (Vulnerable Measure).

The changes to the Principles place a 12-month limit to automatic Vulnerable Measure determinations. The changes were applied in response to findings of the Consolidated Placed-Based Income Management Evaluation 2015 (the PBIM evaluation), which show that the effectiveness of the Vulnerable Measure as a financial stabiliser is maximised in the short-term.

The changes to the Principles were designed through an evidence base to ensure any limitations to the Vulnerable Measure pursues a legitimate objective, is rationally connected to achieving that objective, and imposes only a proportionate limitation on human rights.

Is the limitation reasonable and proportionate for the achievement of its stated objective?

The limitations imposed by the Vulnerable Measure are reasonable and proportionate to the objectives of the program, and as the Committee notes, the new arrangements create a time limit for determinations, and are preferable to the preceding arrangements.

The broad objective of the Vulnerable Measure is to promote short-term financial stability in vulnerable welfare recipients by helping direct funds towards priority needs such as food, housing, clothing and utilities. To achieve this, the Department of Human Services (DHS) sets aside fifty per cent of clients' welfare payments by allocating funds for priority items and preventing expenditure of excluded items.

The automatic triggers under the Vulnerable Measure are applied to payments that are associated with financial vulnerability, including:

- the Unreasonable to Live at Home allowance;
- the Special Benefit payment; and
- crisis payments due to prison and psychiatric confinement release.

Short-term financial stability improvements were observed in the PBIM evaluation, which noted the positive impact of the Vulnerable Measure in relation to housing stability and the ability to provide for self, such as ensuring money is available for food.

Equality and non-discrimination

The criteria for determinations under the Vulnerable Measure make no reference to race or gender. The instrument primarily influences individuals in Place-Based income management locations on the Vulnerable Measure, of which 22 per cent are Indigenous and 47 per cent are female (as at 28 August 2016). These proportions reflect the degree to which Indigenous and female populations are represented in vulnerable trigger payment populations. The Principles provide minimal limitations to the right for equality and non-discrimination as the determinations are not linked to race or gender, and to the extent that these rights are engaged, it is reasonable and proportionate to the financial stability enhanced by the Vulnerable Measure.

The right to social security

Young people subject to the Vulnerable Measure retain their right to the same rate of social security, while being provided assistance to acquire essential items. The requirement to allocate a percentage of their social security payments on self-maintenance, via food, clothing and housing costs supports the aim of this right.

The Committee noted a broader aim of Social Security, being to prevent social exclusion and promote social inclusion. In the medium to long term, social inclusion is enhanced by assisting welfare recipients' short term financial sustainability and encouraging more sound spending patterns.

The right to privacy and family

While the Vulnerable Measure limits a person's right to freely dispose of tax payer resources, this limitation is capped at 12 months to ensure that it is proportionate and reasonable to the objective of developing and enhancing financial stability. The purpose of the Vulnerable Measure is to help vulnerable people stabilise their circumstances and promote general welfare while addressing issues of vulnerability. Practically, the Vulnerable Measure is consistent with the right to privacy and family as the objective proportionally outweighs any asserted human rights limitations to this right.

The Committee noted in its 2016 Review of Stronger Futures measures that the right to privacy is linked to notions of individual autonomy and human dignity. The changes to the instrument are compatible with these notions as there is evidence to suggest that the Vulnerable Measure promotes short-term financial stability for many customers and, with the introduction of the 12-month limit, will promote long-term autonomous development for individuals to progress their lives freely.

Why was a shorter period of operation for a determination, or the removal of the automatic trigger for vulnerable income management for young people, not deemed more appropriate?

The policy change was developed in response to the PBIM evaluation, which showed that the program broadly had a positive influence over financial stability and management for customers and had encouraged changes in spending on goods for which restrictions were applied. The longitudinal survey showed that positive indicators of financial stability and purchase restraint flattened between 12 and 18 months after participants were triggered (during the second wave of interviews). Twelve months is at the lower limit of that time that the program has shown to be most effective. A shorter determination, or the elimination of this trigger, would not be appropriate considering the balance of this evidence.

Why does the 12-month limit on a determination not apply to young people who have recently been released from jail or psychiatric confinement?

The Committee should note that the 12-month limit to vulnerable determinations still applies to individuals who are on crisis payment triggers for prison release or psychiatric confinement. New Subsection 8(1B) in the Vulnerable Principles introduces a limitation of 12 months' duration to any determination based upon an occurrence of the circumstances in paragraph 8(1)(a) or (b) of the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013*, which outline the eligibility for crisis payment triggers. Similarly, a single release from gaol or psychiatric confinement can only result in one determination, limited to a maximum of 12 months' duration.

The Vulnerable Principles are drafted to allow for subsequent determinations (each of which is individually limited to 12 months) to be made should an individual become eligible for a Vulnerable determination trigger on multiple occasions. For example, if a person was placed on the Vulnerable Measure due to being granted the Unreasonable To Live At Home (UTLAH) rate of payment, their period on the program would cease after 12 months. However, should they subsequently qualify due to having received a Crisis Payment following release from prison, a second 12 month period of participation in the program would apply. However, the 12-month limit applies to each individual determination following release from prison in exactly the same way as it applies to those determinations made due to the person being granted UTLAH.

As the underpinning policy rationale for automatic triggers now emphasises short-term financial stability as a policy objective, there is a need for income management to apply to all individuals subject to Vulnerable determinations that apply to people receiving a crisis payment due to release from prison or psychiatric confinement, independent of whether an individual has received a previous determination.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in *the Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

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

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia's jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right 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 legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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[1] Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

[2] For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- 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.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

[3] The Attorney-General's Department guidance may be found at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Parliamentaryscrutiny.aspx#role

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance to on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. 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).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, *A v Australia* (2000) UN doc A/55/40, [522]; *Concluding Observations on Australia in 2000 (2000) UN doc A/55/40,* [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately two-thirds of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that civi; penalties may be 'criminal' for the purpose of human rights law. See, for example, *Osiyuk v Belarus* (1311/04); *Sayadi and Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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