Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 7 and 10 November 2016;[1]
- legislative instruments received between 14 October and 3 November 2016 (consideration of nine legislative instruments from this period has 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.

Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016

Purpose	Seeks to amend a range of legislation to reflect the establishment of the Law Enforcement Conduct Commission of New South Wales and its inspector and support its functions; to provide the Independent Broad-based Anti-corruption Commission of Victoria with investigative powers; and amend the *Proceeds of Crime Act 2002* in respect of the meaning of lawfully acquired property or wealth
Portfolio	Attorney-General
Introduced	House of Representatives, 19 October 2016
Right	Privacy (see **Appendix 2**)

Access to communications and telecommunications data by the NSW Law Enforcement Conduct Commission

1.6 The bill proposes to amend Commonwealth legislation to replace references to the New South Wales (NSW) Police Integrity Commission (PIC) with the NSW Law Enforcement Conduct Commission (LECC) and its Inspector.

1.7 The proposed amendments seek to include the LECC in the definition of 'eligible authority' under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and thereby permit the Attorney-General to declare the LECC to be an 'interception agency'.[1] Additionally, proposed amendments seek to have the LECC included in the definition of 'criminal law-enforcement agency' in the TIA Act. The effect of being declared an 'interception agency' and inclusion as a 'criminal law enforcement-agency' will be to permit officers of the LECC to:

- apply for interception warrants to access the content of private communications (such as telephone calls);[2]

1 Subject to the requirement that the respective state legislation meets the requirements in section 35 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

2 'Communication' is defined in section 5 of the TIA Act as 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms.' See also, TIA Act section 46.

- issue preservation notices requiring a telecommunications carrier to preserve all stored communications that relate to a named person or telecommunications service;[3]
- apply for a warrant to access stored communications content;[4] and
- seek access to telecommunications data (metadata).[5]

Compatibility of the measure with the right to privacy

1.8 As the TIA Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the Attorney-General in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of permitting an agency to access powers under the TIA Act without the benefit of a foundational human rights assessment of the TIA Act from the Attorney-General.

1.9 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information. It also includes the right to control the dissemination of information about one's private life. As the effect of the proposed measures would be to permit the LECC to access an individual's private communications and telecommunications data in a range of circumstances, the measures engage and limit the right to privacy.

1.10 A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.11 The statement of compatibility identifies that the measures engage the right to privacy and states that the measures 'are designed to achieve the legitimate objective of providing effective frameworks to identify, investigate and punish corruption and to protect public order through enforcing the law'.[6] This would constitute a legitimate objective for the purposes of international human rights law. Access to telecommunications data and communications would also appear to be

3 See section 107H of the TIA Act.

4 See section 109 of the TIA Act.

5 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

6 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

rationally connected to this stated objective, in the sense that it is likely to assist in the LECC's investigative functions.[7]

1.12 The statement of compatibility also sets out a range of further information that addresses issues of whether the measures are proportionate to the stated objective. The focus of this assessment is on the proposed role of the LECC in the context of the mechanisms under the TIA Act.

1.13 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, as referenced in the statement of compatibility, the TIA Act sets out exceptions that enable law enforcement agencies and other agencies to apply for access to communications and telecommunications data:

- chapter 4 of the TIA Act provides for warrantless access to telecommunications data (metadata) in respect of 'enforcement agencies'; and
- chapters 2 and 3 of the TIA Act provide for warranted access by an 'interception agency' to the content of communications, including both communications passing across telecommunications services,[8] and stored communications content.

1.14 The committee previously examined chapter 4 of the TIA Act in the context of its consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (which amended the TIA Act). This previous analysis considered that a scheme for accessing private or confidential information must be sufficiently circumscribed to ensure limitations on the right to privacy are proportionate (that is, are only as extensive as is strictly necessary).[9] However, the previous human rights analysis raised serious concerns regarding whether the internal self-authorisation process for access to telecommunications data by 'enforcement agencies' provided sufficient safeguards in relation to the right to privacy.

1.15 Specifically, this previous analysis noted that chapter 4 of the TIA Act permits an 'authorised officer' of an 'enforcement agency' to authorise a service provider to disclose existing telecommunications data where it is 'reasonably necessary' for the enforcement of, 'a law imposing a pecuniary penalty or the protection of the public revenue'. Accordingly, there are no significant limits on the type of investigation to which this self-approval process may apply. This could mean that metadata is accessed in a range of circumstances that go beyond what is strictly necessary, which

7 EM, SOC 11.

8 That is, the interception of live communications.

9 See, Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) at [1.161].

extends the approach beyond that required to amount to a permissible limitation under international human rights law.[10]

1.16 The previous human rights analysis also raised concerns about accessed data subsequently being used for an unrelated purpose and safeguards around the period of retention of such data and absence of a warrant process.

1.17 Accordingly, the committee made a number of recommendations for amending the provisions of the TIA Act so as to avoid the disproportionate limitation on the right to privacy. These recommendations were in relation to the purposes for which data could be accessed, safeguards relating to prior review (such as a warrant process) and safeguards in relation to the use and retention of such data after it was accessed.[11]

1.18 The statement of compatibility does not address these previous concerns regarding the right to privacy, nor the committee's proposed recommendations. Without sufficient safeguards in chapter 4 of the TIA Act to ensure the proportionality of the limitation of the right to privacy, permitting the LECC to be an 'enforcement agency' and accordingly access to telecommunications data under chapter 4, raises these same concerns.

1.19 As noted above, allowing the LECC to be declared an 'interception agency' and thereby permitting it to access the content of private communications via warrant under chapter 2 and chapter 3 of the TIA Act, also has implications in relation to the right to privacy. In relation to access to the content of private communications, the warrant regime may, in key respects, assist to ensure that access to private communications is sufficiently circumscribed. However, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy, as questions arise as to the proportionality of the broad access that may be granted in relation to 'services' or 'devices' under these chapters of the TIA Act.

1.20 The committee has not previously considered chapters 2 and 3 of the TIA Act in detail. Accordingly, further information from the Attorney-General in relation to the human rights compatibility of the TIA Act would assist a human rights assessment of the proposed measures in the context of the TIA Act.

Committee comment

1.21 **Providing the LECC with a range of powers to access communications and telecommunications data under the TIA Act engages and limits the right to privacy.**

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10 Parliamentary Joint Committee on Human Rights, *Fifteenth Report of the 44th Parliament* (November 2014) at [1.44] to [1.49].

11 See, Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015); and *Fifteenth Report of the 44th Parliament* (14 November 2014) [1.44] to [1.49].

1.22 **The committee notes that the previous human rights assessment of the TIA Act in relation to telecommunications data considered that the scheme did not impose a proportionate limit on the right to privacy and made a number of recommendations. While the statement of compatibility has not addressed these issues, the committee considers the bill to raise the same concerns as have previously been identified.**

1.23 **In light of the human rights concerns regarding the scope of powers under the TIA Act, the committee notes that the preceding legal analysis raises questions as to whether permitting the LECC to access such powers constitutes a proportionate limit on the right to privacy.**

1.24 **The committee therefore requests the further advice of the Attorney-General as to:**

- **whether permitting the LECC to access such powers under the TIA Act constitutes a proportionate limit on the right to privacy (including in respect of matters previously raised by the committee); and**
- **whether an assessment of the TIA Act could be undertaken to determine its compatibility with the right to privacy (including in respect of matters previously raised by the committee).**

Definition of 'lawfully acquired' under the POC Act

1.25 Under the *Proceeds of Crime Act 2002* (POC Act) various actions can be taken in relation to the restraint, freezing or forfeiture of property which may have been obtained as a result, or used in the commission, of specified offences, including a 'serious offence'. The bill proposes to amend section 33A of the POC Act to provide that property or wealth is not to be considered 'lawfully acquired' where it has been subject to a security or liability that has wholly or partly been discharged using property that is not lawfully acquired. This would have the effect of broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act.

Compatibility of the measure with the right to a fair trial and fair hearing

1.26 As the POC Act was legislated prior to the establishment of the committee, the scheme has never been required to be subject to a foundational human rights compatibility assessment by the Minister for Justice in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.27 The committee has previously recommended that the Minister for Justice undertake a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and fair hearing in light of the committee's concerns.[12] A full

12 Parliamentary Joint Committee on Human Rights, *Thirty-first Report of the 44th Parliament* (24 November 2015) 44.

human rights assessment of proposed measures which extend or amend existing legislation requires an assessment of how such measures interact with the existing legislation. The committee is therefore faced with the difficult task of assessing the human rights compatibility of an amendment to the POC Act without the benefit of a foundational human rights assessment of the POC Act from the Minister for Justice.

1.28 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings. Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)), and a guarantee against retrospective criminal laws (article 15(1)).

1.29 The POC Act enables a person's property to be frozen, restrained or forfeited either where a person has been convicted or where there are reasonable grounds to suspect a person has committed a serious offence. As set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil or administrative under domestic law, its content may nevertheless be considered 'criminal' under international human rights law. The committee's reports have previously raised concerns that parts of the POC Act may involve the determination of a criminal charge.[13]

1.30 Given that assets may be frozen, restrained or forfeited without a finding of criminal guilt beyond reasonable doubt, the POC Act limits the right to be presumed innocent, which is guaranteed by article 14(2) of the ICCPR. The forfeiture of property of a person who has already been sentenced for an offence may also raise concerns regarding the imposition of double punishment, contrary to article 14(7) of the ICCPR.

1.31 As the proposed measure would have the effect of broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act, this measure also engages the right to a fair trial and fair hearing.

1.32 The statement of compatibility states the objective of the measure to be 'to ensure that criminals are not able to maintain ownership over property or wealth that is obtained, either directly or indirectly, using proceeds of crime'.[14] However, it does not identify the right to a fair trial and fair hearing as engaged and limited so provides no justification for this limitation. The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility

13 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 189-191; and *Thirty-first Report of the 44th Parliament* (24 November 2015) 37-44.

14 EM, SOC 13.

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.

1.33 In assessing the proportionality of the measure against the right to a fair trial and fair hearing, it is also relevant as to whether the POC Act itself sets out sufficient safeguards to protect this right. As noted above, the committee has previously raised concerns regarding the sufficiency of such safeguards.

Committee comment

1.34 **The measure engages and limits the right to a fair trial and fair hearing.**

1.35 **The committee notes that the preceding legal analysis raises questions as to whether broadening the class of assets that may be subject to being frozen, restrained or forfeited under the POC Act is a proportionate limit on the right to a fair trial and fair hearing.**

1.36 **The committee therefore seeks the advice of the minister as to:**

- **whether the limitation is a reasonable and proportionate measure for the achievement of its objective (including the sufficiency of safeguards contained in the POC Act); and**
- **whether an assessment of the POC Act could be undertaken to determine its compatibility with the right to a fair trial and fair hearing in light of the committee's concerns.**

Migration Amendment (Visa Revalidation and Other Measures) Bill 2016

Purpose	Seeks to empower the Minister for Immigration and Border Protection to require that certain visa holders complete a revalidation check; provides that certain events that cause a visa that is held and not in effect to cease; and enables the use of contactless technology in the immigration clearance system
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 19 October 2016
Rights	Non-refoulement; effective remedy and liberty; equality and non-discrimination; privacy (see **Appendix 2**)

Power to require revalidation check relating to a prescribed visa

1.37 The measures in Schedule 1 of the bill propose to introduce a new revalidation check framework. As part of this framework, proposed section 96B would provide the minister with the discretionary power to make a decision as to whether a person who holds a visa prescribed for the purposes of new subsections 96B(1) or 96E(1) is required to complete a revalidation check for that visa. A 'revalidation check' is described at proposed subsection 96A(1) as 'a check as to whether there is any adverse information relating to a person who holds a visa'. The scope, timing or nature of a revalidation check is otherwise not provided by the bill. If a revalidation check is not completed, or is not passed, the affected person's visa will cease.

1.38 If the minister thinks it is in the public interest to do so, the minister is also empowered by proposed section 96E to make a determination, by legislative instrument, for a specified class of persons who are required to complete a revalidation check. This power is a personal non-compellable power and this instrument is not subject to disallowance.

1.39 Proposed subsection 96A(2) provides that a person will pass a revalidation check if the minister is satisfied there is no 'adverse information relating to the person'. What constitutes 'adverse information' is not defined in the bill, and is intended to include 'any adverse information *relating* to the person who holds the visa', rather than simply information that is directly about that person.[1]

1.40 The minister therefore has the power to prescribe any type of visa as being subject to proposed sections 96B and 96E. The bill places no limit on the breadth of this power. The explanatory memorandum states that the measures in Schedule 1 of

1 Explanatory memorandum (EM) 11.

the bill are designed to initially apply to Chinese nationals who will be granted a new 'longer validity Visitor visa'.[2] However, the proposed measure is not constrained to this class of visa or to any particular group of people.

Compatibility of the measure with multiple rights

1.41 The proposed provisions provide a broad power for the minister to prescribe any type of visa as being one that may be subject to a revalidation check. A failure to complete or pass a revalidation check could lead to the cessation and possible cancellation of the person's visa. As the power to prescribe the type of visa is unlimited, it appears that it could enable the minister to prescribe any type of visa, including a protection visa, spousal or other family visa or permanent visa as subject to the revalidation check. This measure therefore has the potential to engage a number of human rights, including Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family. Some of these rights will be addressed in the following discussion.

1.42 Australia's non-refoulement obligations prevent Australia from returning any person to a country where there is a real risk that this person would face persecution, torture or other serious forms of harm.[3] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.43 As noted above, it is possible that proposed sections 96B or 96E could apply to a visa holder or class of visa holders who hold a protection visa. If this were to apply to protection visas, this could lead to a protection visa holder failing the revalidation check and having their visa cancelled. If this were to occur, such individuals could, as a matter of Australian domestic law, be subject to refoulement to their country of origin. Australia's non-refoulement obligations are therefore engaged by this measure.

1.44 The proposed amendments to the *Migration Act 1958* (Migration Act) in Schedules 1 and 2 of the bill are administrative measures that would not be reviewable by the Administrative Appeals Tribunal (AAT) under Part 5 of the Migration Act.[4] Part 5 of the Migration Act limits the review powers of the Migration and Refugee Division of the AAT to certain decisions relating to the grant and

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2 EM 5.

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 3(1); International Covenant on Civil and Political Rights (ICCPR), articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. The non-refoulement obligations under the CAT and the ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by article 33 of the Convention relating to the Status of Refugees.

4 Section 338 of the *Migration Act 1958* defines a 'Part 5 - reviewable decision'. See also section 336M for a general overview of reviewable decisions under the Act.

cancellation of some visas. The measure also engages the right to an effective remedy in relation to the obligation of non-refoulement.[5]

1.45 In addition, to the extent that the proposed amendments may cause the minister to require the revalidation of a visa and, as a result, the visa could cease to be in effect, the visa holder or class of visa holders could be subject to visa cancellation, and possible detention pending their deportation, which engages the right to liberty.[6]

1.46 Furthermore, subjecting a person who holds a spousal visa or a permanent resident's visa to a revalidation check would engage the right to protection of the family, as if the visa were to be cancelled this could affect the rights of close family members not to be separated.

1.47 While it is permissible for proportionate limitations to be placed on these rights, the statement of compatibility does not address the breadth of the power to prescribe any type of visa as one that could be subject to a revalidation check and so does not discuss any possible engagement of a number of human rights. Nor does the objective set out in the explanatory memorandum explain the breadth of the proposed measure.

Committee comment

1.48 **The statement of compatibility has not identified a number of human rights that may be engaged by this measure given the breadth of the power to prescribe any type of visa as one that could be subject to a revalidation check. Noting the concerns raised in the preceding legal analysis, the committee seeks the advice of the Minister for Immigration and Border Protection as to:**

- **why there is no limit on the face of the bill as to the type of visas that may be prescribed as being subject to the possibility of a revalidation check; and**
- **whether, in light of the broad power to prescribe any kind of visa, the measure is compatible with Australia's non-refoulement obligations, the right to an effective remedy, the right to liberty and the right to protection of the family.**

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5 See the committee's previous comments in relation to these rights: Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 198; *Second Report of the 44th Parliament* (11 February 2014), paragraphs [1.89] to [1.99]; and *Fourth Report of the 44th Parliament* (18 March 2014) paragraphs [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

6 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 202-204; and *Nineteenth Report of the 44th Parliament* (3 March 2015) 17-20.

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

1.49 As discussed at paragraphs [1.39] and [1.40] above, the minister is empowered by proposed sections 96B and 96E to require any visa holder to complete a revalidation check. The explanatory memorandum states that the measures in Schedule 1 of the bill are designed to manage risks to the Australian community that may arise in the context of a 'longer validity Visitor visa' which will initially be made available to Chinese nationals.[7] However, contrary to the stated intended application of the provisions, there is nothing on the face of the bill that limits the minister's powers to apply the revalidation check to this longer class of visitor visa for Chinese nationals. It is therefore possible that the minister could exercise this power in such a way that would have a disproportionate effect on people on the basis of their nationality, religion, race or sex, which engages and may limit the right to equality and non-discrimination.

1.50 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.[8]

1.51 It is difficult to assess the compatibility of the power with the right to equality and non-discrimination without certainty as to the visas that will be subject to the possibility of a revalidation check. The statement of compatibility states that the right to equality and non-discrimination is engaged by the proposed amendments, but that any differential treatment will be based on objective criteria.[9] It identifies the objective of the revalidation check as to:

> …allow Australia to appropriately manage and facilitate the travel and movement of visa holders through the provision of up to date advice on potential risks and the application of appropriate measures to reduce the possibility of exposure to risk.[10]

1.52 It states that the revalidation check might occur following an assessment of an increased risk to the Australian community resulting from a health, security or other incident in a particular location.[11]

1.53 It is noted that managing risks to the Australian community through immigration channels may be capable of being a legitimate objective for human

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7 EM, statement of compatibility (SOC) 48-49.

8 Pursuant to articles 2, 16 and 26 of the ICCPR. The rights to equality and non-discrimination are also protected by articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

9 EM, SOC 50.

10 EM, SOC 51.

11 EM, SOC 51.

rights purposes. However, the measure in its current form may not be proportionate to achieving this objective. In respect of proposed section 96B, the statement of compatibility provides that:

> It is not the policy intention to require a visa holder to undertake or pass a revalidation check on the basis of any of the prohibited grounds set out in Articles 2 and 26 [right to equality], and departmental policy guidance will be provided to ensure this policy intention is implemented under any delegated power of the new section 96B.[12]

1.54 In respect of proposed section 96E, the statement of compatibility states that any exercise of the minister's power to determine specified classes of persons who are required to complete a revalidation check will be 'based on an assessment of risk considering information and any statistical data'.[13] The statement of compatibility states that, to the extent that the right to equality and non-discrimination is engaged, this is engaged indirectly as it is intended that initially only Chinese nationals will be able to access the 10-year visa on a trial basis, and, consequentially, will be the only group required by the minister to undertake the revalidation check.[14]

1.55 It is noted that while the statement of compatibility states that it is intended that these powers will only be used based on objective assessments of risk, there is nothing in the bill that would restrict the use of the power in this way. Further, administrative safeguards, such as the departmental policy guidance mentioned in the statement of compatibility are less reliable than the protection statutory processes offer. Therefore, it is uncertain whether the bill, as currently drafted, will guarantee the right to equality and non-discrimination.

Committee comment

1.56 **The committee notes that the preceding legal analysis identifies that proposed sections 96B and 96E engage and may limit the right to equality and non-discrimination, and raises questions as to its compatibility with this right.**

1.57 **The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether safeguards could be included in the legislation, such as:**

- **the minister's power to require a revalidation check be limited to long-term visitor visas;**
- **the basis upon which a revalidation check may be required be made clear in the legislation, rather than being a matter of ministerial discretion; and**

12 EM, SOC 50.

13 EM, SOC 51.

14 EM, SOC 51.

- **a requirement that the minister's power to require a person or classes of persons to complete a revalidation check is based on an objective assessment of an increased risk to the Australian community.**

Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

Purpose	Seeks to amend the *Migration Act 1958* and the Migration Regulations 1994 to prevent 'unauthorised maritime arrivals' and 'transitory persons' who were at least 18 years of age and were taken to a regional processing country after 19 July 2013 from making a valid application for an Australian visa
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 8 November 2016
Rights	Protection of the family; family reunion; children; equality and non-discrimination (see **Appendix 2**)

Permanent lifetime visa ban for classes of asylum seekers

1.58 The bill would amend the *Migration Act 1958* (Migration Act) to prevent asylum seekers who were at least 18 years of age, and were taken to a regional processing country,[1] after 19 July 2013 from making a valid application for an Australian visa (referred to as the 'regional processing cohort').[2] Such asylum seekers would accordingly face a permanent lifetime ban from obtaining a visa to enter or remain in Australia.

1.59 The minister will have a personal, discretionary, non-compellable power to determine, if the minister thinks that it is in the public interest, that the proposed statutory bar to making a valid visa application does not apply to an individual or class of persons in respect of visas specified in the determination.[3]

1 Regional processing countries include Republic of Nauru (Nauru) or Papua New Guinea (PNG) where off-shore immigration detention centres operate.

2 See proposed section 5(1) of the *Migration Act 1958* (Migration Act) which defines members of the 'regional processing cohort' as 'unauthorised maritime arrivals' (UMAs) and 'transitory persons' who were taken to a regional processing country after 19 July 2013. UMA is defined in section 5AA(a) of the Migration Act and includes asylum seekers who arrived in the migration zone by boat. A 'transitory person' is defined in section 5(1) of the Migration Act and includes a person who attempted to enter Australia by boat but may have been taken directly to a regional processing country without first having been taken to Australia under Part 3 of the *Maritime Powers Act 2013*.

3 See proposed sections 46A(2)(2AB)-(2AC), 46B(2)(2AA)-(2AB) and proposed section 46A(8) of the Migration Act.

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

1.60 The proposed lifetime visa ban would apply to the majority of individuals currently at regional processing centres (Republic of Nauru (Nauru) and Papua New Guinea (PNG)), those individuals who were previously held at those centres, and also to individuals who seek asylum by boat and are sent to regional processing centres in the future.[4] The proposal to permanently ban a group of people who have committed no crime and are entitled as a matter of international law to seek asylum in Australia,[5] regardless of their mode of arrival, from making a valid Australian visa application is a severe and exceptional step. The proposed ban would apply to visas necessary for tourism, business or professional visits, or visiting family. Under existing law a person who has had their Australian visa cancelled on character grounds may be permanently excluded from Australia.[6] However, there is no other class of persons that may be prevented in this manner from making any valid application to enter or remain in Australia.

1.61 The bill engages the right to equality and non-discrimination by its differential treatment of 'cohorts' or groups of people in materially similar situations, that is, people making an application for a visa to enter or remain in Australia. The statement of compatibility acknowledges in very general terms that the proposed ban could amount to differential treatment on the basis of 'other status' under article 26 of the International Covenant on Civil and Political Rights (ICCPR) (the right to equality and non-discrimination).

1.62 The proposed ban directly distinguishes the grant of visas between people who fall within the 'regional processing cohort' and individuals who do not, which may amount to direct discrimination on the basis of 'other status'. In this regard, Article 31 of the Convention Relating to the Status of Refugees and its Protocol (Refugee Convention) prohibits states from imposing a penalty on asylum seekers who enter its territory illegally.[7] As such, the ban would appear to apply a penalty on those who seek asylum and are part of the 'regional processing cohort'. The right to seek asylum, irrespective of the mode of transit, is protected under international law.

4 See explanatory memorandum (EM) 21; 24.

5 See Universal Declaration of Human Rights article 14.

6 See, Migration Act sections 501 and 501E; Migration Regulations 1994, schedule 5.

7 Article 31(1) provides 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

1.63 The ban may also have a disproportionate negative effect on individuals from particular national origins; nationalities; or on the basis of race, which gives rise to concerns regarding indirect discrimination on these grounds.

1.64 'Discrimination' under the ICCPR encompasses measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[8] 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 protected attribute.[9]

1.65 The government's demographic data regarding the nationalities of individuals at regional processing centres shows that the vast majority come from Iran. The PNG processing centre (which only accommodates males) is largely composed of asylum seekers from Iran, Afghanistan, Iraq and Pakistan. The Nauru processing centre (which accommodates males, females and children) is largely composed of asylum seekers from Iran, Sri Lanka, Pakistan, Bangladesh, and with people who have no country of nationality.[10]

1.66 Such statistical data strongly indicates that the proposed ban will have a disproportionate negative effect on the basis of national origin, nationality or race, and one which endures for the lifetime of the affected persons. Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.[11]

1.67 Differential treatment (including the differential effect of a measure that is neutral on its face)[12] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

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8 The prohibited grounds of discrimination or 'protected attributes' include 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.

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

10 See, Elibritt Karlsen, *Australia's offshore processing of asylum seekers in Nauru and PNG: A Quick Guide to statistics and resources* (30 June 2016) http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Offshore#_Nationalities_of_asylum (last accessed 14 November 2016).

11 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).

12 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

1.68 The issue of indirect discrimination on the basis of race; nationality or national origin is not specifically addressed in the statement of compatibility. However, as noted above, the statement of compatibility does address whether the differential treatment of those who fall within the 'regional processing cohort', and individuals who do not, constitutes unlawful discrimination. In this regard, the statement of compatibility argues that the differential treatment (that is, the visa ban):

> …is for a legitimate purpose and based on relevant objective criteria and that is reasonable and proportionate in the circumstances. This measure is a proportionate response to prevent a cohort of non-citizens who have previously sought to circumvent Australia's managed migration program by entering or attempting to enter Australia as a UMA from applying for a visa to enter Australia. This measure is also aimed at further discouraging persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encouraging them to pursue regular migration pathways instead.[13]

1.69 The statement of compatibility does not state that banning this cohort of people from making a valid visa application to enter Australia is based on any reason why these particular people should not be allowed to visit Australia in future. There is no suggestion that they present any danger to Australia or that a future visit would have any adverse affect on Australia. There appears to be no evidence for such a suggestion, and, in any event, there are other powers under the Migration Act that would allow visa applications to be declined if the circumstances justified it in a particular case.

1.70 Instead, as stated, an objective of the lifetime visa ban appears to be the imposition of a penalty on this cohort of people, with an intended deterrent effect on others embarking on 'hazardous boat journeys' in future. The bill therefore applies what is likely to be considered an unlawful penalty for seeking asylum, in contravention of article 31 of the Refugee Convention.[14] To penalise those who seek to enter Australia illegally for the purpose of seeking asylum cannot be a legitimate objective under international law.

1.71 Insofar as the objective of the bill is to 'further discourag[e] persons from attempting hazardous boat journeys with the assistance of people smugglers in the future and encourage[e] them to pursue regular migration pathways instead',[15] the statement of compatibility provides no evidence as to whether the measure would be effective in pursuing this objective. The statement of compatibility does not

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13 EM 24.

14 See A Zimmerman (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011), article 31.

15 EM, statement of compatibility 24.

engage with the reasons why persons in this cohort attempt to enter Australia by boat and without obtaining a visa, whether this cohort of people have access to 'regular migration pathways' nor what proportion of this cohort have ultimately been found to be refugees entitled to protection. Each of these reasons is important to understanding whether the lifetime visa ban is likely to be effective in achieving the stated objective, and whether it risks deterring those who are entitled to seek Australia's protection.

1.72 The statement of compatibility also provides no evidence or reasoning to support its assertion that the proposed ban is proportionate. As noted above, a visa ban on classes of asylum seekers is a severe measure and will mean that even if a person is found to be a refugee and resettled in another country Australian law will prevent them from making a visa application across all visa categories. The ban is lifelong, and the class of persons subject to the ban is open-ended as the measure extends to persons taken to a 'regional processing country' in future. The only limitation on the operation of the ban is a ministerial power to lift the ban. However, this is a personal and non-compellable discretion, based only on what the minister thinks is in the public interest. The legislation thereby makes no provision, for example, for compassionate cases, or business or professional visits, both of which are situations in which the visa ban may have serious consequences for an affected person.

1.73 Accordingly, on the information available, the proposed ban does not appear to be compatible with the right to equality and non-discrimination.

Committee comment

1.74 **The proposed lifetime visa ban engages the right to equality and non-discrimination.**

1.75 **This visa ban would appear to have a disproportionate negative effect on individuals from particular national origins or nationalities. This human rights issue was not specifically addressed in the statement of compatibility.**

1.76 **The committee notes that the preceding legal analysis raises questions as to whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination on the basis of national origins, nationality or race) amounts to unlawful discrimination.**

1.77 **The committee further notes that the proposed ban distinguishes the grant of visas between people who fall within the 'regional processing country cohort' and individuals who do not and the preceding legal analysis raises questions as to whether this may amount to direct discrimination on the basis of 'other status'.**

1.78 **Accordingly, in relation to the compatibility of the measure with the right to equality and non-discrimination, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:**

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the measure is reasonable and proportionate for the achievement of that objective, including how it is based on reasonable and objective criteria; whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently and whether affected groups are particularly vulnerable.**

Right to protection of the family and rights of the child

1.79 An important element of the right to protection of the family under article 17 of the ICCPR is to ensure family members are not involuntarily separated from one another.

1.80 Relatedly, under article 10 of the Convention on the Rights of the Child (CRC), Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. Under the CRC Australia is also required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[16]

1.81 The proposed visa ban engages and limits the right to protection of the family and rights of the child as it would foreseeably operate to separate families. In this respect, there are a range of circumstances under the proposed visa ban which may lead to the separation of family members. An individual subject to the visa ban will be prevented from joining family members in Australia (including where these family members have been granted a visa to come to or remain in Australia or are Australian citizens). This would include the situation where an individual subject to the visa ban has, for example, married an Australian citizen, yet is unable to apply for a visa on this basis.

1.82 While the proposed lifetime visa ban does not apply to children under 18 years of age at the time they were taken to a regional processing centre, the measure may still clearly impact upon children by separating children (who are not subject to the visa ban) from parents (who are subject to the visa ban). It would prevent an individual subject to a visa ban from being with a child who is an Australian citizen or child who is otherwise entitled to reside in Australia.

1.83 The statement of compatibility acknowledges that the right to protection of the family and rights of the child are engaged by the measure and that it 'may result in separation, or the continued separation, of a family unit'.[17] Elsewhere in the

16 Article 3(1).

17 EM 23.

statement of compatibility the objective of the measure is identified as discouraging hazardous boat journeys and encouraging the use of regular migration programs.[18]

1.84 The statement of compatibility also provides some information regarding the role of the minister's discretionary powers in the context of the scheme in relation to the right to protection of the family:

> …the proposed legislative amendments will include flexibility for the Minister for Immigration and Border Protection personally to 'lift' the bar [visa ban] where the Minister thinks it is in the public interest to do so. This consideration could occur in circumstances involving Australia's human rights obligations towards families and children, allowing a valid application for a visa on a case by case basis and in consideration of the individual circumstances of the case, including the best interests of affected children. In addition, such matters can be considered when deciding to exercise the waiver to allow a Special Purpose Visa to be granted by operation of law, or to allow an application for certain subclasses of visa to be deemed to have been made.[19]

1.85 However, the statement of compatibility does not specifically address whether the measure is a permissible limit on the right to protection of the family or rights of the child.

1.86 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. This conforms with the committee's *Guidance Note 1* and the guidance information available from the Attorney-General's Department with respect to the preparation of statements of compatibility.

1.87 The exercise of the discretionary power by the minister, where the minister 'thinks' it is in the 'public interest', could potentially relieve some of the harshness of the visa ban in individual cases.[20] However, on its own, this discretionary safeguard is unlikely to be sufficient to ensure that the measure is a proportionate limit on the right to protection of the family in the context of a blanket visa ban.[21] In this respect, it is noted that the default position (without discretionary intervention by the minister) would be for families to remain separated.

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18 EM 24.

19 EM 23.

20 See proposed section 46A(2).

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

Committee comment

1.88 **The proposed lifetime visa ban engages and limits the right to protection of the family and rights of the child. The statement of compatibility has not sufficiently justified these limitations for the purposes of international human rights law.**

1.89 **The committee notes that the preceding legal analysis raises questions as to whether the measure is rationally connected to and a proportionate means of achieving its stated objective, so as to be compatible with the right to protection of the family and rights of the child.**

1.90 **Accordingly, in relation to the limitations on the right to protection of the family and rights of the child, the committee requests the further advice of the Minister for Immigration and Border Protection as to whether:**

- **there is a rational connection between the limitation and the stated objective (that, is evidence that the measure will be effective); and**
- **the limitation is a reasonable and proportionate measure for the achievement of that objective (including whether there are other less rights restrictive ways to achieve the stated objective; whether the visa ban could be more circumscribed; whether the measure provides sufficient flexibility to treat different cases differently; whether there are any additional safeguards; and whether affected groups are particularly vulnerable).**

Privacy Amendment (Re-identification Offence) Bill 2016

Purpose	Seeks to amend the *Privacy Act 1988* to introduce provisions which prohibit conduct related to the re-identification of de-identified personal information published or released by Commonwealth entities
Portfolio	Attorney-General
Introduced	Senate, 12 October 2016
Rights	Fair trial; presumption of innocence; prohibition on retrospective criminal laws (see **Appendix 2**)

Retrospective effect of the proposed offences

1.91 The Privacy Amendment (Re-identification Offence) Bill 2016 (the bill) would amend the *Privacy Act 1988* (Privacy Act) to prohibit conduct related to the re-identification of de-identified personal information that has been published or released by Commonwealth entities, acting as a deterrent against attempts to re-identify de-identified personal information in published government datasets.

1.92 The bill would apply to entities, including small businesses, and individuals.[1]

1.93 Proposed sections 16D, 16E and 16F of the bill all apply to acts that were committed on or after 29 September 2016,[2] this being the date following the Attorney-General's media release that stated the government's intention to introduce a criminal offence of re-identifying de-identified government data.[3] This differs from the usual practice that legislation creating criminal offences operates prospectively from or after Royal Assent is given to the legislation.

Compatibility of the measure with the prohibition on retrospective criminal laws

1.94 Article 15 of the International Covenant on Civil and Political Rights (ICCPR) prohibits retrospective criminal laws. It requires that no one can be found guilty of a crime that was not a crime at the time it was committed. This is an absolute right, which means that it can never be permissibly limited.

1.95 As proposed sections 16D and 16E of the bill would make the proposed offence provisions operate retrospectively, the absolute prohibition on retrospective criminal law is engaged.[4]

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1 Pursuant to Schedule 1, item 5, paragraph 16CA(1)(a).

2 At Schedule 1, item 5, paragraphs 16D(1)(c), 16E(1)(c) and (e) and 16F(1)(c).

3 Explanatory memorandum (EM), statement of compatibility (SOC) 9.

4 Proposed section 16F proscribes conduct to which a civil penalty applies, but this does not engage the prohibition on retrospective criminal law.

1.96 The statement of compatibility states that retrospective application of these provisions is reasonable, necessary and proportionate.[5] However, as an absolute right that cannot be limited, there can be no justifiable limitation on the prohibition on retrospective criminal laws so as to accord with human rights law.

Committee comment

1.97 **The committee notes that the preceding legal analysis identifies that the proposed offence provisions in sections 16D and 16E engage the prohibition of retrospective criminal laws.**

1.98 **The committee observes that the prohibition on retrospective criminal laws is absolute and can never be subject to permissible limitations.**

1.99 **The committee requests advice from the Attorney-General as to whether consideration has been given to amending paragraphs 16D(1)(c) and 16E(1)(c) such that the offences in these sections operate prospectively, that is, from or after the date of Royal Assent.**

Offences relating to interference with personal information

1.100 The bill seeks to introduce both civil and criminal penalty provisions. Proposed sections 16D and 16E provide that an offence will be committed or an entity will be liable to a civil penalty where:

- de-identified personal information is intentionally re-identified;[6] and
- re-identified personal information is intentionally disclosed, regardless of whether or not the act that resulted in the information being de-identified was done so intentionally.[7]

1.101 These sections also set out exceptions to the application of the provisions. In addition, in consultation with the Australian Information Commissioner, the Attorney-General may decide to exempt an entity from the application of the provisions.[8]

5 EM, SOC 9.

6 See Schedule 1, item 5, proposed section 16D.

7 See Schedule 1, item 5, proposed section 16E.

8 See Schedule 1, item 5, proposed section 16G.

Compatibility of the measure with the right to the presumption of innocence

1.102 The right to a fair trial in article 14 of the ICCPR includes the right to be presumed innocent. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of an offence beyond reasonable doubt.[9]

1.103 Proposed sections 16D and 16E include exceptions to the application of the offence provisions. Reliance on any of these exceptions requires entities, including individuals, to prove that their behaviour was consistent with the relevant defence. In effect, this means shifting the evidential burden of proof from the prosecution to the defendant, which engages the presumption of innocence.

1.104 The objective of these measures, as identified in the statement of compatibility, is to appropriately respond to the deliberate re-identification and disclosure of re-identified personal information.[10] This stated objective, which involves the protection of an individual's personal information published or released by Commonwealth agencies, may be regarded as a legitimate objective for the purposes of international human rights law.

1.105 There is limited discussion in the statement of compatibility as to why the measures are a proportionate limitation on the presumption of innocence, which goes to the question of whether the approach is compatible with international human rights law. In this regard, the statement of compatibility states that, for each of the defences set out in sections 16D and 16E, each limb of the defence would not be difficult for an entity to prove.[11] The statement of compatibility also provides that a prosecution will not be pursued where it is clear to authorities that the entity (including individuals) would be in a position to rely on one of the defences in the relevant section.[12]

1.106 It is relevant that although the offences in sections 16D and 16E contain a reversal of the burden of proof, the burden is evidentiary, not legal. Section 16D requires the defendant to adduce evidence that the *re-identification* of personal information was done in accordance with an Australian law or court/tribunal order where the entity is a responsible agency; for the purposes of meeting an obligation under a contract where the entity is a contracted service provider for a Commonwealth contract to provide services to a responsible agency; in accordance with an agreement to perform functions or activities on behalf of a responsible agency; or in accordance with a determination in force under section 16G. Pursuant

9 See Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [30].

10 EM, SOC 6.

11 EM, SOC 8.

12 EM, SOC 8.

to section 16E, these defences (and accompanying evidentiary burdens) also apply to entities in the context of the *disclosure* of re-identified personal information.

1.107 In these circumstances, placing evidentiary burdens on the defendant appears to be consistent with the right to the presumption of innocence under international human rights law as the prosecution retains the burden of proving the defendant's guilt beyond reasonable doubt. On this basis, it is likely that the limitation on the right to the presumption of innocence is proportionate.

Committee comment

1.108 **The committee notes that the proposed reverse burden offences engage and limit the right to the presumption of innocence.**

1.109 **Given the nature of the matters to be proven by the defendant pursuant to the proposed sections, and that the sections impose an evidentiary burden only, the committee concludes that the measures are likely to be a proportionate limitation on the presumption of innocence.**

Sex Discrimination Amendment (Exemptions) Regulation 2016 [F2016L01445]

Purpose	Amends the Sex Discrimination Regulations 1984 to extend for a further 12-month period the prescription of two Western Australian Acts under the *Sex Discrimination Act 1984*, with the effect that an exemption would be provided for conduct taken in direct compliance with these Acts that would otherwise constitute unlawful discrimination on the grounds of sexual orientation, gender identity or intersex status
Portfolio	Attorney-General
Authorising legislation	*Sex Discrimination Act 1984*
Last day to disallow	1 December 2016
Right	Equality and non-discrimination (see **Appendix 2**)

Background

1.110 The *Sex Discrimination Act 1984* was amended in 2013 by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (SDA Amendment Act) to provide new protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status, and provide protections against discrimination for same-sex de facto couples.

1.111 The committee previously considered the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 in its *Sixth report of 2013* and noted that the inclusion of these additional grounds of prohibited discrimination would advance the right to equality and non-discrimination and would better reflect the standards under international human rights law.[1]

1.112 The SDA Amendment Act included an exemption for conduct that would otherwise constitute discrimination on the basis of these additional grounds provided that that conduct is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.

1.113 Section 5 of the Sex Discrimination Regulations 1984 provided that all Commonwealth, state and territory laws as in force at 1 August 2013 were initially prescribed until 31 July 2014 to allow time for jurisdictions to review their laws and assess compliance with the new protections against discrimination. A review of Commonwealth laws found that this legislation was able to operate in accordance

1 See Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 58-64.

with these new protections, and consequently no Commonwealth laws have since been prescribed past this initial prescription period.[2]

1.114 The Sex Discrimination Amendment (Exemptions) Regulation 2014 subsequently extended the sunset date applying to the prescription of state and territory laws for a further 12-month period to 31 July 2015. The Sex Discrimination Amendment (Exemptions) Regulation 2015 (2015 regulation) then extended this for a further 12-month period until 31 July 2016.

Extension of prescription period

1.115 The Sex Discrimination Amendment (Exemptions) Regulation 2016 (the regulation) extends the prescription of two Western Australian (WA) Acts (the *Human Reproductive Technology Act 1991* (WA), and *Surrogacy Act 2008* (WA)) for a further 12-month period until 31 July 2017.

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

1.116 As the regulation further extends the period in which actions that would otherwise constitute unlawful discrimination on the grounds of sexual orientation, gender identity or intersex status under the prescribed legislation would be exempted from these protections, the measure engages and limits the right to equality and non-discrimination.

1.117 The statement of compatibility for the regulation acknowledges that the regulation engages and limits the right to equality and non-discrimination but states that:

> The limitation is based on reasonable and objective criteria as it only extends two prescribed laws in force at 1 August 2013, which ensures any laws passed after that date must comply with the existing protections from discrimination on the grounds of sexual orientation, gender identity and intersex status. The limitation is proportionate as it is for a short time period, and no more restrictive than required. A period of less than 12 months may not be sufficient to allow Western Australia time to amend its laws. The Government does not propose any further extensions of this exemption after 31 July 2017.[3]

1.118 The regulation appears to identify the objective of allowing the states and territories adequate time in which to review their legislation and assess compliance with the new protections, and amend relevant laws accordingly.

1.119 However, questions arise as to whether this measure is rationally connected and/or proportionate to this stated objective. It is now three years since the SDA Amendment Act was introduced. It is unclear from the statement of compatibility

2 See explanatory statement (ES) 1.

3 ES, statement of compatibility (SOC) 5.

why this period has been insufficient to implement amendments to all relevant state and territory legislation. The initial 12-month exemption period ended on 31 July 2014, and was then extended on two previous occasions for a further 12-month period, until 31 July 2016. Indeed the explanatory statement for the most recent 2015 regulation stated that '[t]he Government does not propose any further extensions of this exemption after 31 July 2016'.[4]

1.120 The statement of compatibility does not set out reasons as to why a further period of 12 months is necessary for WA to implement the requisite changes to the two remaining WA Acts, given the time that has already passed without the changes having been made. It states that 'the limitation is proportionate as it is for a short time period'.[5] However, at the end of this extended prescription period on 31 July 2017, the two WA Acts will have been exempted for a total of four years since the measures came into effect. This means that individuals may continue to be subject to discrimination under the two Acts without any legal recourse. Continuing to subject individuals to discriminatory laws for any length of time is a serious issue from the perspective of the right to equality and non-discrimination. Accordingly, it is not clear that the measure is a proportionate means of achieving its apparent objective of giving WA sufficient time to amend the two Acts or that a further 12 month extension represents the least rights restrictive approach.

Committee comment

1.121 **The committee notes that the exemption from protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status engages and limits the right to equality and non-discrimination.**

1.122 **The committee observes that the regulation pursues the apparent objective of allowing the states and territories adequate time in which to review their legislation and assess compliance with the new protections, and amend relevant laws accordingly.**

1.123 **The committee further observes that the preceding legal analysis raises questions as to whether the measure is effective in achieving and/or a proportionate means of achieving its apparent objective.**

1.124 **The committee therefore seeks the advice of the Attorney-General as to whether the further 12-month prescription period for the *Human Reproductive Technology Act 1991* (WA) and *Surrogacy Act 2008* (WA) is effective in achieving and/or proportionate to its apparent objective, and in particular, why the previous three-year period has been insufficient to implement the necessary amendments to these laws to ensure compliance with the protections against discrimination on the basis of a person's sexual orientation, gender identity and intersex status.**

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4 See Sex Discrimination Amendment (Exemptions) Regulation 2015 [F2015L01151], ES 1.

5 ES, SOC 5.

Advice only

1.125 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.

Appropriation Bill (No. 1) 2016-2017
Appropriation Bill (No. 2) 2016-2017

Purpose	Seek to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of government (No. 1) and for services that are not the ordinary annual services of the government (No. 2)
Portfolio	Finance
Introduced	House of Representatives, 31 August 2016
Rights	Multiple rights (see **Appendix 2**)

Background

1.126 The committee has previously considered the human rights implications of appropriations bills in a number of reports,[1] and they have been the subject of correspondence with the Department of Finance.[2]

Potential engagement and limitation of human rights by appropriations Acts

1.127 Proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

1.128 In concluding its previous analysis of Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015 (the 2014-2015 bills), the committee noted:

1 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 65; *Seventh Report of 2013* (5 June 2013) 21; *Third Report of the 44th Parliament* (March 2014) 3; *Eighth Report of the 44th Parliament* (June 2014) 5, 31; *Twentieth Report of the 44th Parliament* (18 March 2015) 5; *Twenty-third Report of the 44th Parliament* (18 June 2015) 13; *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2.

2 Parliamentary Joint Committee on Human Rights, *Seventh Report of 2013* (5 June 2013) 21; and *Eighth Report of the 44th Parliament* (18 June 2014) 32.

3 See Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013); *Seventh Report of 2013* (5 June 2013); *Third Report of the 44th Parliament* (4 March 2014); and *Eighth Report of the 44th Parliament* (24 June 2014).

> …the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.[4]

Compatibility of the bills with multiple rights

1.129 Like the 2014-2015 bills and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.[5] The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.[6] They also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[7] No further assessment of the human rights compatibility of the bills is provided.

1.130 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. These include specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available;[8] and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. This means that any reduction in allocated government funding for measures which realise socio-economic rights, such as specific health and education services, may be considered as retrogressive in respect of the attainment of ESC rights and, accordingly, must be justified for the purposes of international human rights law.

1.131 The cited view of the High Court that appropriations Acts do not create rights or duties as a matter of Australian law does not address the fact that appropriations may nevertheless engage human rights for the purposes of international law, as specific appropriations reducing expenditure may be regarded as retrogressive, or as limiting rights. The appropriation of funds facilitates the taking of actions which may affect both the progressive realisation of, and the failure to fulfil, Australia's

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4 Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) 17.

5 Explanatory statement (ES), statement of compatibility (SOC) 4.

6 ES, SOC 4.

7 ES, SOC 4.

8 See UN Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring*, at http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf.

obligations under the treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.132 The committee acknowledges that such bills present particular difficulties for human rights assessment because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios. A human rights assessment of appropriations bills at the level of individual measures may therefore not be practical or possible for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.133 Despite this, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility. For example, consideration could be directed to their impact on progressive realisation obligations and on vulnerable minorities or specific groups, such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities. Indeed, there is some precedent in the Australian context for assessments of this nature in relation to appropriations bills by government, which could inform the development of an appropriate template for the assessment of appropriations bills for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[9] There is also a range of international resources to assist in the assessment of budgets for human rights compatibility.[10]

Committee comment

1.134 **The committee notes that the statements of compatibility for the bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, it notes that the preceding legal analysis indicates that the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.**

1.135 **Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility,**

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9 For example, from 1983 to 2013 a Women's Budget Statement was prepared by the Australian Government which set out the impact of budget measures on women and also gender equality.

10 See, for example, Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (Unifem 2006) http://www.unicef.org/spanish/socialpolicy/files/Budgeting_for_Womens_Rights.pdf; UN Practitioners' Portal on Human Rights Approaches to Programming, *Budgeting Human Rights* http://hrbaportal.org/archives/tools/budgeting-human-rights; Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke, Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014).

drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; and**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights.**

Criminal Code Amendment (War Crimes) Bill 2016

Purpose	Seeks to amend the *Criminal Code Act 1995* to provide that certain war crimes offences applicable in non-international armed conflict do not apply to members of organised armed groups; reflect the requirements of the international law principle of proportionality in relation to attacks on military objectives in non-international armed conflict; and makes a minor technical amendment
Portfolio	Attorney-General
Introduced	House of Representatives, 12 October 2016
Right	Life (see **Appendix 2**)

Permissible targeting of members of organised armed groups in non-international armed conflicts

1.136 The Criminal Code Amendment (War Crimes) Bill 2016 (the bill) seeks to amend war crimes contained in division 268 of the *Criminal Code Act 1995* (the Criminal Code). In particular, the bill seeks to amend the war crimes of murder, mutilation and cruel treatment to provide that the offences will not apply in respect of acts against persons who are members of an 'organised armed group' in a non-international armed conflict. Currently, the offences do not apply in respect of people 'taking an active part in hostilities'.[1] The effect of this exception is that those 'taking an active part in hostilities' can be permissibly targeted (and killed or injured) as those undertaking such targeting will not be subject to a criminal sanction. The proposed amendments would add an additional class of persons who can be permissibly targeted (and killed or injured): members of an 'organised armed group'. The concept of 'organised armed group' and 'non-international armed conflict' are described in the statement of compatibility as follows:

> A non-international armed conflict is an armed conflict which involves one or more non-State organised armed groups. Hostilities in such a conflict may occur between government forces and organised armed groups, or between such groups only, depending on the circumstances.
>
> The existence of an 'organised armed group' in a non-international armed conflict will be determined by reference to the facts in existence at the time. The key indicia are at least a minimal degree of organisation, some kind of command structure or hierarchy, and the existence of a collective purpose that is related to the broader hostilities and involves the use of force. It is also necessary that the group be 'armed' and utilising force to

1 See *Criminal Code Act 1995* sections 268.70-72.

> achieve its purposes, and that the group have sufficient connection to the non-international armed conflict. An organised armed group may exist within a larger entity; only those elements that engage in hostilities qualify as an organised armed group.[2]

Compatibility of the measure with the right to life

1.137 The right to life includes the prohibition on arbitrary killing and requires that force be used as a matter of last resort. The use of force by state authorities resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances (see Appendix 2). The measures engage and may limit the right to life because, as explained above, the effect of the proposed amendments would add an additional class of persons who can be permissibly targeted, and therefore killed or injured. This is because the person undertaking such targeting would no longer be subject to criminal sanctions in relation to this additional class.

1.138 The statement of compatibility recognises that the right to life may be engaged by the amendments, but states:

> …in situations of armed conflict the scope and content of rights under international human rights law may be affected as a result of the application of international humanitarian law. The specific interrelationship between international human rights law and international humanitarian law is not settled as a matter of international law. The protection of international human rights law does not cease in situations of armed conflict. Human rights obligations will continue to apply in situations of armed conflict, although they may be displaced to the extent necessitated by international humanitarian law. This will depend on the particular circumstances and obligations involved.
>
> Thus, in situations of armed conflict, the prohibition against the arbitrary deprivation of life contained in article 6 of the ICCPR will be displaced to the extent necessitated by international humanitarian law.[3]

1.139 International humanitarian law (IHL) identifies a minimum standard of conduct in situations of armed conflict. IHL does not impose many of the positive human rights obligations guaranteed by international human rights law. For example, the positive duty to investigate, as an aspect of the right to life under international human rights law, applies to all deaths where the state is involved.[4] IHL is more

2 Explanatory memorandum (EM), statement of compatibility (SOC) 3.

3 EM, SOC 4-5.

4 See, for example, *Pearson v United Kingdom* [2011] ECHR 2319 (13 December 2011); Philip Alston, *Report on Extrajudicial, Summary or Arbitrary Executions* (2006) E/CN.4/2006/53 [36].

circumscribed and requires only that governments investigate alleged or suspected war crimes.[5]

1.140 While the full extent to which international human rights law applies in the context of armed conflict is not settled as a matter of international law, human rights obligations do apply to an army acting in an overseas operation where they are exercising jurisdiction or 'effective control'.[6] This is accepted in the statement of compatibility.[7] When IHL does not provide a specific rule, or the meaning of this rule is unclear, human rights law is an appropriate source for guidance as to the content of the law in a situation of armed conflict.[8] In a situation of armed conflict, the prohibition on arbitrary killing continues to apply, but the question of whether a killing is arbitrary is generally determined by applying the rules of IHL.[9]

1.141 In the context of non-international armed conflicts, the rules of IHL are less clear, especially with respect to combatants. The terms 'civilian', 'armed forces' and 'organised armed group' are used in the treaties that govern non-international armed conflicts without being expressly defined.[10]

1.142 The explanatory memorandum states that the amendments 'reflect the distinction that exists at international law between civilians and members of an organised armed group.'[11] However, the amendments made by the bill do not apply specific obligations in the Geneva Conventions and Additional Protocols (that set out the core obligations of IHL). The terms of the Geneva Conventions and Additional

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5 The Geneva Conventions contain obligations to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons (articles 49 and 50 of Geneva Convention I; articles 50-51 of Geneva Convention II; articles 129 and 130 of Geneva Convention III; articles 146 and 147 of Geneva Convention IV).

6 See, *Al-Saadoon & Ors Secretary of State for Defence* [2015] EWHC; *Smith v The Ministry of Defence* [2013] UKSC 41 (19 June 2013); *Al-Jedda v United Kingdom* [2011] ECHR 1092 (7 July 2011); *Al-Skeini & Ors v United Kingdom* [2011] ECHR 1093 (7 July 2011).

7 EM, SOC 4.

8 See Philip Alston, S*tudy on targeted killings* (2010) A/HRC/14/24/Add.6, 10; *Legality of the Threat or Use of Nuclear Weapons* (1996) (Advisory Opinion) ICJ rep. 226, [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) (Advisory Opinion) I.C.J. Rep. [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) I.C.J. Rep., [216].

9 See also Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament* (13 May 2015) 141 (in respect of Counter-Terrorism Legislation Amendment Bill (No. 1) 2014).

10 International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 27.

11 EM, SOC 8.

Protocols themselves appear to contemplate that direct attacks on civilians are only permitted where the civilians 'directly participate in hostilities'.[12]

1.143 Rather, the amendments made by the bill appear to be drawn from commentary relating to customary IHL, in particular from the International Committee of the Red Cross (ICRC).[13] While the ICRC commentaries may provide soft law guidance in relation to the application of IHL they do not provide a complete answer to human rights concerns.[14]

1.144 Introducing an additional category of persons who may be targeted in a non-international armed conflict raises human right concerns because it allows targeting of people who may not 'directly participate in hostilities'. A person whose role within the organised armed group is not related to providing assistance connected to the hostilities, or whose role in or membership of the organised armed group may have changed or even ceased, would appear to be a permissible target under the amendments. In this respect, the former Special Rapporteur on extrajudicial, summary or arbitrary executions made the following observations in his *Study on Targeted Killings*:

> …the ICRC's Guidance raises concern from a human rights perspective because of the "continuous combat function" (CCF) category of armed group members who may be targeted anywhere, at any time. In its general approach to DPH [direct participation in hostilities], the ICRC is correct to focus on function (the kind of act) rather than status (combatant vs. unprivileged belligerent), but the creation of CCF category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time."
>
> Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function. If States are to accept this category, the onus will be on them to show that the evidentiary basis is strong. In addition, States must adhere to the careful distinction the ICRC draws between continuous combatants who may always be subject to direct attack and civilians who (i) engage in sporadic or episodic direct participation (and may only be attacked during their participation), or (ii) have a general war support function ("recruiters,

12 Additional Protocol I, article 51(3); article 50(1) (defining civilian); articles 13(3) and 51(3); Geneva Conventions III and IV, article 3; Additional Protocol II, articles 4 and 13(3).

13 See minister's second reading speech 2-3, referring to ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

14 See Emily Crawford and Alison Pert, *International Humanitarian Law* (2015) 40-41.

> trainers, financiers and propagandists") or form the political wing of an organized armed group (neither of which is a basis for attack).[15]

1.145 As the intent of the bill is to establish a specific status determination for members of organised armed groups to be targeted in non-international armed conflicts, the concerns raised by the former Special Rapporteur are particularly relevant. Where customary norms of IHL applicable to non-international armed conflicts may permit the targeting of members of organised armed groups, there should be clarity about whether conduct could subject persons who are otherwise not directly engaging in hostilities to being killed. In cases where the killing of a person is not in accordance with IHL, the obligations under the right to life, such as the duty to investigate, will also be engaged.

Committee comment

1.146 **The proposed amendment to the definition of the war crimes of murder, mutilation and cruel treatment engages and may limit the right to life.**

1.147 **The effect of this amendment would be to permit the targeting (including death or injury) of members of an 'organised armed group' without the person targeted being subject to criminal sanctions.**

1.148 **The committee notes that the preceding legal analysis identifies potential human rights concerns with respect to the right to life and targeting of members of organised armed groups in non-international armed conflicts.**

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

15 Philip Alston, *Study on targeted killings* (2010) A/HRC/14/24/Add.6, 19-20; see also ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 31-36.

Bills not raising human rights concerns

1.150 Of the bills introduced into the Parliament between 7 and 10 November 2016, the following did not raise human rights concerns:[1]

- Australian Organ and Tissue Donation and Transplantation Authority Amendment (New Governance Arrangements) Bill 2016;
- Civil Nuclear Transfers to India Bill 2016;
- Export Finance and Insurance Corporation Amendment (Support for Commonwealth Entities) Bill 2016;
- Interactive Gambling Amendment Bill 2016;
- Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Bill 2016;
- Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016;
- Superannuation (Objective) Bill 2016;
- Seafarers and Other Legislation Amendment Bill 2016;
- Seafarers Safety and Compensation Levies Bill 2016;
- Seafarers Safety and Compensation Levies Collection Bill 2016;
- Telecommunications and Other Legislation Amendment Bill 2016; and
- Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016.

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