Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

Committee information

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

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

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

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

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

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

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

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

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Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 8 and 31 May 2018 (consideration of 2 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 15 March and 23 April 2018 (consideration of 6 legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

1.3 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.

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 registered in the relevant period, as listed on the Federal Register of Legislation. See, https://www.legislation.gov.au/.

Response required

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

Defence (Inquiry) Regulations 2018 [F2018L00316]

Purpose	Prescribes matters providing for, and in relation to, inquiries concerning the Defence Force. This includes two flexible inquiry formats: Commission of Inquiry and Inquiry Officer Inquiry. These formats consolidate and replace the five forms of inquiry allowed under the previous *Defence Force (Inquiry) Regulations 1985*
Portfolio	Defence
Authorising legislation	*Defence Act 1903*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 March 2018; tabled Senate 21 March 2018)
Rights	Privacy; fair trial; not to incriminate oneself; presumption of innocence (see **Appendix 2**)
Status	Seeking additional information

Coercive evidence-gathering powers

1.5 Sections 30 and 32 of the regulations provide that a person who fails or refuses to attend as a witness to give evidence before a commission of inquiry (COI),[1] or fails or refuses to answer questions before a COI, commits an offence punishable by 20 penalty units.[2] Similarly, a person commits an offence punishable by 20 penalty units if a person fails to comply with a notice to produce documents or things relevant to a COI.[3] Similar offence provisions are introduced for members of the Defence Force who fail or refuse to comply with a notice to attend as a witness to

1 Commissions of Inquiry are a consolidation of the four higher-level inquiry formats under the former Defence (Inquiry) Regulations 1985 – General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry and Chief of the Defence Force (CDF) Commissions of Inquiry: see Explanatory Statement (ES) p.8. COIs are used for higher level matters that are particularly complex and sensitive: see ES p.1.

2 Persons can be required to attend to give evidence following a written notice from the president of the commission of inquiry, if the president reasonably believes that a person has information that is relevant to the commission's inquiry: section 19 of the regulations.

3 Pursuant to a notice issued under section 18 of the regulations.

give evidence, who fail or refuse to produce a document or thing, or who refuse to answer questions, in relation to an inquiry officer (IO) inquiry.[4]

1.6 Subsections 38(1) and 67(1) respectively provide that an individual appearing as a witness before a COI or IO is not excused from answering a question on the ground that the answer to the question might tend to incriminate the individual.[5]

1.7 However, an individual is not required to answer a question if the answer might tend to incriminate the individual in respect of an offence with which the individual has been charged, where the relevant charge has not been finally dealt with by a court or otherwise disposed of.[6] Additionally, section 124(2C) of the *Defence Act 1903* (Defence Act) provides that a statement or disclosure made by a witness in the course of giving evidence before an inquiry is not admissible in evidence against the witness other than in proceedings relating to the giving of false testimony.[7] Further, civil proceedings cannot lie against the person for loss, damage or injury of any kind suffered by another person as a result of producing a document or thing, disclosing information, or giving information or making a submission in the course of an inquiry.[8]

Compatibility of the measure with the right not to incriminate oneself

1.8 Specific guarantees of the right to fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), include the right not to incriminate oneself (article 14(3)(g)). Subsections 38(1) and 67(1) of the regulations engage and limit this right by requiring that a person answer questions notwithstanding that to do so might tend to incriminate that person.

1.9 The right not to incriminate oneself may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.10 The statement of compatibility acknowledges that the measure engages and limits the right not to incriminate oneself. It states that:

> The purpose of statutory inquiries under the Regulations is to facilitate command decision-making concerning the Defence Force. Ascertaining the

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4 Sections 53, 61 and 62 of the regulations. 'Inquiry officer' inquiries are used to inquire into more routine matters. See ES p.1.

5 It is noted that this applies to oral testimony only, and the privilege against self-incrimination applies to the provision of documents: see sections 124(2A) and (2C) of the *Defence Act 1903.* See also pp.29 of the ES.

6 Sections 38(2) and 67(2) of the regulations.

7 Section 124(2C) of the *Defence Act 1903* (Defence Act)*;* see the note to sections 38 and 67 of the regulations.

8 Sections 40 and 69 of the regulations.

> true causes of significant events involving Defence Force members is frequently more important than possible prosecution of, or civil suit against, individuals. Compelling witnesses to provide information about an event, even though it could implicate them in wrongdoing, while also protecting the information from subsequent use in criminal or civil proceedings, is an important mechanism to obtain information.[9]

1.11 Ascertaining the true causes of significant events involving Defence Force members, and facilitating command decision-making, are likely to be legitimate objectives for the purposes of international human rights law. Compelling witness to attend hearings and to provide information, irrespective of whether to do so could implicate them in wrongdoing, appears to be rationally connected to that objective.

1.12 However, questions arise as to the proportionality of the measures. The statement of compatibility states that the abrogation of the privilege against self-incrimination 'is accompanied by significant protections against the use of information obtained in subsequent criminal, disciplinary and civil tribunals'.[10] In this respect, a 'use' immunity is provided by subsection 124(2C) of the Defence Act, such that where a person has been required to give incriminating evidence, the statement or disclosure cannot be used directly against the person in any civil or criminal proceedings, or in any proceedings before a service tribunal.

1.13 However, no 'derivative use' immunity is provided either by the regulations or the Defence Act. This means that information or evidence obtained indirectly as a result of the person's incriminating evidence may be used in criminal proceedings against the person. While not specifically addressed in the statement of compatibility, the explanatory statement acknowledges that there is no 'derivative use' immunity available.[11]

1.14 However, the statement of compatibility discusses in general terms why the limitation on the privilege against self-incrimination is proportionate:

> The requirement that hearings of Commissions of Inquiry be held in private, and the prohibitions against the use and disclosure of certain information and documents that apply in both types of inquiries (including the application of the exemption under section 38 of the Freedom of Information Act 1982), constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination. For example, where an individual gives oral testimony containing incriminating

9 Statement of compatibility (SOC), p. 4.

10 SOC, p.4.

11 ES p.29, p.47.

evidence, subsequent use or publication of that testimony can be prohibited.[12]

1.15 These safeguards are important and relevant in determining the proportionality of the measure. However, it remains unclear why it would not be appropriate also to include a 'derivative use' immunity. In this respect, it is acknowledged that a 'derivative use' immunity will not be appropriate in all cases (for example, because it would undermine the purpose of the measure or be unworkable). Further, the availability or lack of availability of a 'derivative use' immunity needs to be considered in the regulatory context of the relevant measures. The extent of interference with the privilege against self-incrimination that may be permissible as a matter of international human rights law may, for example, be greater in contexts where there are difficulties regulating specific conduct, persons subject to the powers are not particularly vulnerable, or the powers are otherwise circumscribed with respect to the scope of information which may be sought. That is, there are a range of matters which influence whether the limitation is proportionate. Further information from the minister as to the rationale for not including a 'derivative use' immunity would therefore assist in determining whether the measures are the least rights restrictive way of achieving their objectives.

Committee comment

1.16 The preceding analysis indicates that the coercive evidence-gathering powers conferred by the regulation may engage and limit the right not to incriminate oneself.

1.17 The committee therefore seeks the advice of the minister as to whether the measures are a proportionate means of achieving the stated objective (including any relevant safeguards that exist in relation to defence force personnel). This includes information as to whether a 'derivative use' immunity is reasonably available as a less rights restrictive alternative to ensure information or evidence indirectly obtained from a person compelled to answer questions cannot be used in evidence against that person.

Compatibility of the measure with the right to privacy

1.18 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

1.19 By imposing a penalty for failing to appear as a witness, or failing or refusing to answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure may engage and limit the right to privacy.

12 SOC, p. 5: this same point is made in the ES at pp. 29 and 47-48.

This is because a person may be required to disclose personal information in the course of any inquiry.

1.20 While the right to privacy may be subject to permissible limitations in a range of circumstances, the statement of compatibility does not acknowledge that the coercive evidence gathering powers may engage and limit the right to privacy. Assuming the purpose of limiting the right to privacy in this context is the same as that discussed above at [1.10] and [1.11], this would appear to be a legitimate objective and appears to be rationally connected to this objective. However, further information, including information as to the extent to which a person may be required to disclose personal information as part of the coercive evidence gathering process, would assist in determining the compatibility of the measures with this right. In this respect, it is noted that the use and disclosure provisions of the regulations, discussed further below, would be relevant in determining the proportionality of the limitation on the right to privacy.

Committee comment

1.21 The preceding analysis indicates the right to privacy may be engaged and limited by the coercive evidence gathering powers.

1.22 The committee seeks the advice of the minister as to whether the limitation is a proportionate limitation on the right to privacy (including the extent to which a person may be required to disclose personal information as part of the coercive evidence gathering process, and any applicable safeguards).

Authorisations to use, disclose and copy information and documents

1.23 Section 25 provides that the president of the COI may direct that information collected in oral evidence or documents given during evidence may be prohibited from disclosure where the president is satisfied that it is necessary to do so in the interests of: the defence, security or international relations of the Commonwealth; fairness to a person who may be affected by the inquiry; or the effective conduct of the inquiry.[13] It is an offence for a person to disclose information where it has been prohibited by a direction of the president.[14]

1.24 However, section 26 provides that a Commonwealth employee or member of the Defence Force may use, disclose and copy information and documents contained in COI records and reports in the performance of the person's duties. Section 27 additionally provides that the minister may authorise a Commonwealth employee or a member of the Defence Force to use information and documents in COI records and reports for a specified purpose, and disclose or copy inquiry

13 Section 25 of the regulations.

14 Section 36 of the regulations.

documents, records and reports.[15] Section 28 provides that the minister may use, disclose and copy information and documents contained in COI records and reports. Each of these provisions apply despite a direction given by the president prohibiting disclosure of information under section 25.[16]

1.25 Equivalent use and disclosure provisions are provided in relation to IO inquiries,[17] however, there is no corresponding power of inquiry officers to give directions prohibiting disclosure of information.

Compatibility of the measure with the right to privacy

1.26 As set out above, the right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

1.27 Information and documents contained in COI and IO records and reports may contain personal and sensitive information. By permitting the use, disclosure and copying of information and documents contained in COI and IO records and reports, the measures engage and limit the right to privacy. The statement of compatibility does not acknowledge that the provisions authorising the use, disclosure and copying of information and documents engage the right to privacy.

1.28 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must pursue a legitimate objective, be rationally connected and proportionate to achieving that objective.

1.29 In particular, regarding the proportionality of the measure, there are concerns in relation to the breadth of the use and disclosure provisions, and whether they are sufficiently circumscribed. For each of the provisions, it is unclear what the extent of disclosure is. For example, providing certain conditions are met, the regulations would appear to extend to permitting public disclosure. Similarly, in relation to sections 26, 27, 58 and 59 of the regulations, the authorisation to disclose information in the course of their duties extends to an 'employee of the Commonwealth' or a 'member of the Defence Force'. This may capture a broad number of people at varying levels of rank within the public service and Defence Force. In relation to sections 27 and 59 of the regulations, it is not clear whether

15 Persons who are permitted to disclose information or documents pursuant to sections 26 and 27 will not commit an offence: see section 37(2) and (3) of the regulations.

16 Section 26(2), section 27(3) and section 28 of the regulations.

17 Sections 58 (use, disclosure and copying of certain information and documents as an employee of the Commonwealth or member of the Defence Force), 59 (minister may authorise use, disclosure and copying of certain information) and 60 (minister may use, disclose and copy certain information and documents) of the regulations.

there are any limitations to the types of 'specified purposes' for which the minister may authorise use and disclosure of information. In relation to section 28 and 60, there does not appear to be any limit on the extent to which the minister may use, disclose or copy information and documents contained in COI records and reports. Further information from the minister as to these matters would assist in determining the compatibility of these measures with the right to privacy.

1.30 In relation to section 26 of the regulations, it is noted that the explanatory statement explains that use, disclosure and copying occur 'in the performance of the person's duties', which provides a significant safeguard against improper use, disclosure and copying of information contained in COI records and COI reports. It also states that if persons were to disclose a COI record or COI report outside of their duties, that person may be subject to internal administrative or disciplinary action, and the conduct may also constitute an offence under section 37, as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, unauthorised public disclosure of a COI record or COI report may result in internal administrative or disciplinary action.[18] The explanatory statement further states that the Chief of Defence Force Directive 08/2014 further enhances the safeguards in relation to sections 26 and 58, as it restricts the types of disclosures that validly fall within the scope of a person's official duties. It would be of assistance if a copy of this directive could be provided in order to assess the human rights compatibility of the measures.

1.31 More generally, the information provided in the explanatory statement is not sufficient as it does not provide an assessment of whether the limitation on the right to privacy is permissible. As set out in the committee's *Guidance Note 1*, the committee's expectation is that statements of compatibility read as stand-alone documents, as the committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill with Australia's international human rights obligations.

Committee comment

1.32 The preceding analysis raises questions as to whether the use and disclosure provisions in the regulations are compatible with the right to privacy. The statement of compatibility does not contain an assessment of whether the measures are compatible with this right.

1.33 The committee therefore seeks the advice of the minister as to:

- **whether the measures pursue a legitimate objective for the purposes of international human rights law;**
- **whether the measures are rationally connected to (that is, effective to achieve) that objective;**

18 ES, p.21.

- **whether the measures are proportionate to achieve the stated objective, having regard to the matters addressed in [1.29] to [1.31] above; and**
- **whether a copy of Chief of Defence Force Directive 08/2014 as it relates to the use and disclosure provisions could be provided to the committee.**

Reversal of the evidential burden of proof

1.34 The regulations create a number of offences in relation to the use and disclosure of information in relation to a COI. A number of these offences provide exceptions (offence-specific defences) in certain circumstances. For each of these defences, the defendant bears an evidential burden.[19] Similar offence-specific defences for which the defendant bears the evidential burden apply in the context of the offence provisions in relation to an IO Inquiry.[20]

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

1.35 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Provisions that reverse the burden of proof and require a defendant to raise evidence to disprove one or more elements of an offence engage and limit this right

1.36 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

1.37 The statement of compatibility does not identify that the reverse burden offences in the regulations engage and limit the presumption of innocence. Further, while information is provided in the explanatory statement as to the rationale for reversing the evidential burden of proof,[21] this information does not provide an assessment of whether the limitation on the right to the presumption of innocence is permissible.

Committee comment

1.38 The committee draws the attention of the minister to the committee's *Guidance Note 2* which sets out the key human rights compatibility issues in relation to reverse burden offences.

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19 Sections 29(2), 30(2), 32(3), 36(2) and (3) and 37(2) and (3) of the regulations.

20 Sections 61(2) and (4), 62(2) and 66(2) and (4) of the regulations.

21 See, for example, ES p.23,25,43 and 46.

1.39 The committee requests the advice of the minister as to:

- **whether the reverse burden offences are aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offences are effective to achieve (that is, rationally connected to) that objective; and**
- **whether reverse burden offences are reasonable and proportionate to achieve that objective.**

Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 [F2018L00262]

Purpose	Repeals the Temporary Work (Skilled)(Subclass 457) visa and introduces new Temporary Skill Shortage (Subclass 482) visa; implements complementary measures for the Employer Nomination Scheme (Subclass 186) visa and the Regional Sponsored Migration Scheme (Subclass 187) visa
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled Senate 19 March 2018) Notice of motion to disallow must be given by 26 June 2018[1]
Rights	Freedom of association (see **Appendix 2**)
Status	Seeking additional information

Criteria for nomination – associated persons

1.40 Section 2.72 of the regulations sets out the criteria which apply to persons sponsoring or nominating a proposed occupation for persons holding or applying for a Subclass 482 (Temporary Skills Shortage) Visa (TSS visa).[2] Section 2.72(4) requires that, to approve a nomination, the minister must be satisfied that either:

> (a) there is no adverse information known to Immigration about the person or a person associated with the person; or
>
> (b) it is reasonable to disregard any adverse information known to Immigration about the person or a person associated with the person.

1 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

2 Section 2.72 also applies to holders of the Subclass 457 (Temporary Work (Skilled) Visa) visa. That visa is repealed by the regulation, however, the reference is included in section 2.72 because, although the visa has been repealed, holders of 457 visas will require a new nomination if they change employer: Explanatory statement to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (regulations), p.28.

1.41 It is also one of the criteria for obtaining a TSS visa that there is no adverse information known to Immigration about the person who nominated the nominated occupation[3] or a person associated with that person.[4]

1.42 Section 5.19(4) of the regulations introduces the same requirement for persons nominating skilled workers under the Subclass 186 and Subclass 187 visas.[5]

1.43 'Adverse information' is defined in section 1.13A of the regulations to mean information that the person:

> (a) has contravened a law of the Commonwealth, a State or a Territory; or
>
> (b) is under investigation, subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law; or
>
> (c) has been the subject of administrative action (including being issued with a warning) for a possible contravention of such a law by a Department or regulatory authority that administers or enforces the law; or
>
> (d) has become insolvent (within the meaning of section 95A of the Corporations Act 2001); or
>
> (e) has given, or caused to be given, to the Minister, an officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular.

1.44 Section 1.13B provides that persons are 'associated with' each other if:

> (a) they:
>
> (i) are or were spouses or de facto partners; or
>
> (ii) are or were members of the same immediate, blended or extended family; or
>
> (iii) have or had a family-like relationship; or
>
> (iv) belong or belonged to the same social group, unincorporated association or other body of persons; or
>
> (v) have or had common friends or acquaintances; or
>
> (b) one is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of:

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3 'Nominated occupation' refers to the proposed occupation of the applicant for the visa: see clause 482.111 in Schedule 2 of the regulations.

4 See clause 482.216, clause 482.316 of Schedule 2 of the regulations.

5 These visas allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business. Subclass 186 visa is available nationally, while the Subclass 187 visa is for skilled workers who want to work in regional Australia: see Statement of Compatibility (SOC) to the regulations, p. 8.

(i) the other; or

(ii) any corporation or other body in which the other is or was involved (including as an officer, employee or member); or

(c) a third person is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of both of them; or

(d) they are or were related bodies corporate (within the meaning of the Corporations Act 2001); or

(e) one is or was able to exercise influence or control over the other; or

(f) a third person is or was able to exercise influence or control over both of them.

Compatibility of the measure with the right to freedom of association

1.45 The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[6] This right supports many other rights, such as freedom of expression, religion, assembly and political rights. Without freedom of association, the effectiveness and value of these rights would be significantly diminished.

1.46 Introducing a requirement that the minister may refuse nomination where there is adverse information about a person associated with the person nominating engages and limits the right to freedom of association, as it has the potential for the measure to restrict a person's ability to freely associate. The statement of compatibility does not acknowledge that the right to freedom of association is engaged by the measure.

1.47 Limitations on the right to freedom of association are only permissible where they are 'prescribed by law' and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.[7] This requires an assessment of whether the measure pursues one of these legitimate objectives, is rationally connected to that objective and is a proportionate means of achieving the objective.

1.48 No information is provided in the statement of compatibility as to the objective of the measure. However, the explanatory statement provides the following information as to why it is necessary to have a broad definition of 'associated with' in the regulations:

The definition has been drafted in terms which encompass the wide range of associations among family, friends and associates which can be used to

6 Article 22 of the International Covenant on Civil and Political Rights

7 Article 22(2).

> continue unacceptable or unlawful business practices via different corporate entities.
>
> The breadth of these provisions is necessary to maintain the integrity of Australia's sponsored worker programs. There are two safeguards against inappropriate reliance on the provisions. The Minister always has a discretion to disregard adverse information and associations if it is reasonable to do so. That discretion would be exercised to disregard information which did not have serious bearing on the suitability of the business to sponsor overseas workers. Further, if the decision relates to a business operating in Australia, all relevant decisions – refusal to approve a person as a sponsor, refusal to approve a nomination, and refusal to grant a visa to the nominated employee – are subject to independent merits review by the Administrative Appeals Tribunal. The Government considers that these provisions strike an appropriate balance between the need to uphold the integrity of the sponsored worker program and the need to ensure consistent and fair decision making.[8]

1.49 A measure is likely to be rationally connected if it can be shown that the measure is likely to be effective in achieving that objective. In this case, it is unclear whether merely being associated with a person who may have engaged in a range of specified conduct ('adverse information') has specific relevance to a person's suitability as a sponsor or nominator. In addition, it is noted that the definition of 'associated with' is very broad, extending to persons who 'belong or belonged to the same social group, unincorporated association or other body of persons'. Taking into account the potential breadth of its application, there are concerns that the definition of 'associated with' may not be sufficiently circumscribed such that the measure may not be a proportionate way to achieve that objective. In this respect, it is noted that there is ministerial discretion to disregard any adverse information about the person or a person associated with the person.[9] It is unclear that the ministerial discretion to disregard the adverse information of the associated person, in and of itself, offers sufficient protection such that the measure may be regarded as proportionate to its objective.

Committee comment

1.50 The preceding analysis indicates that the measure engages the right to freedom of association.

1.51 The committee seeks the advice of the minister as to the compatibility of the measure with this right, including:

8 Explanatory statement, pp.19-20.

9 See section 2.72(4) and 5.19(4) of the regulation.

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the measure is rationally connected (that is, effective to achieve) that objective; and**
- **whether the measure is a proportionate means of achieving its objective (including whether the definition of 'associated with' is sufficiently circumscribed).**

National Redress Scheme for Institutional Child Sexual Abuse Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018

Purpose	Seeks to establish a national redress scheme for survivors of institutional child sexual abuse
Portfolio	Social Services
Introduced	House of Representatives, 10 May 2018
Rights	Equality and non-discrimination, privacy, effective remedy, fair hearing (see **Appendix 2**)
Status	Seeking additional information

Background

1.52 The committee has previously considered the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the 2017 Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the 2017 Consequential Amendments Bill) in its *Report 13 of 2017* and *Report 2 of 2018.*[1] Those bills sought to establish a Commonwealth redress scheme for survivors of institutional child sexual abuse absent a referral power from a state to establish a national redress scheme.

1.53 Following referral of powers by states,[2] the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (the 2018 Bill) and the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 (the 2018 Consequential Amendments Bill) seek to establish a national redress scheme (the scheme) for survivors of institutional child sexual abuse.

1 See, Parliamentary Joint Committee on Human Rights, *Report 13 of 2017* (5 December 2017) pp. 2-16; Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73-96.

2 The statement of compatibility refers to the assistance of New South Wales, Victoria and the Australian Capital Territory: see Statement of Compatibility (SOC) p. 113. See the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (NSW) which passed both houses in New South Wales on 16 May 2018, and the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Victoria) passed both houses in Victoria on 7 June 2018.

Previous analysis of the proposed Commonwealth Redress Scheme

1.54 In *Report 2 of 2018,* the committee noted that the minister had foreshadowed the introduction of the 2018 Bill, and that the minister had also indicated that a number of the human rights issues raised by the committee in relation to the Commonwealth Bill would be considered when developing the 2018 Bill.[3]

1.55 The statement of compatibility to the 2018 Bill extensively draws upon and refers to the committee's previous analysis of the 2017 Bill where relevant, which was useful to the committee in undertaking its analysis.

1.56 A number of aspects of the 2017 Bill are replicated in the 2018 Bill. Where there is overlap and no substantive change to the provision, the committee's previous human rights analysis of the measures in the 2017 Bill applies equally to the 2018 Bill. In particular:

- *Eligibility to receive redress under the scheme for non-citizens and non-permanent residents*: The human rights analysis of the 2017 Bill noted that the restriction on non-citizens' and non-permanent residents' eligibility for redress engaged and limited the right to equality and non-discrimination on the basis of nationality or national origin.[4] Following correspondence from the minister, the committee concluded that while the measure pursues a legitimate objective, there were concerns that the breadth of the restriction on the eligibility of all non-citizens and non-permanent residents may not be proportionate.[5] However, the committee further stated that setting out further classes of persons who may be eligible in the proposed redress scheme rules, including those who would otherwise be excluded due to not being citizens or permanent residents, may be capable of addressing these concerns.[6] This same eligibility criterion is also present in the 2018 Bill.[7]
- *Power to determine entitlement, eligibility and ineligibility by rules:* The previous human rights analysis stated that the proposed power in the 2017 Bill to prescribe eligibility and ineligibility by way of rules (the proposed redress scheme rules) raised concerns as to compatibility with the right to an

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 73, 79, 83, 93.

4 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 74.

5 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78.

6 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 78.

7 See proposed section 13(1)(e) of the 2018 Bill; see statement of compatibility (SOC) pp. 117-118.

effective remedy.[8] This was because, in the absence of sufficient safeguards, the broad scope of the power to determine eligibility or ineligibility could be exercised in such a way as to be incompatible with this right.[9] The committee noted, however, that the proposed discretion of the scheme operator to determine eligibility of survivors if they are otherwise ineligible may be capable of addressing some of these concerns.[10] The power to determine eligibility and ineligibility by way of rules is also present in the 2018 Bill, as well as a broad power to determine entitlement to redress by way of rules.[11] To that extent the concerns expressed in the previous human rights analysis apply equally here.[12] However, there are also additional issues relating to entitlement, eligibility and ineligibility under the scheme that are discussed in further detail below.

- *Power to determine by rules whether an institution is responsible for abuse:* The 2017 Bill contained a provision that allowed for rules to be made prescribing circumstances in which a participating institution is not responsible for sexual or non-sexual abuse.[13] The committee noted the broad scope of this power may give rise to human rights concerns in relation to its operation. This was because its scope was such that it could be used in ways that may risk being incompatible with the right to an effective remedy.[14] The 2018 Bill also includes a provision that allows for rules to be made to prescribe whether an institution is responsible, primarily responsible or equally responsible for abuse.[15] The concern as to the potential operation of this rule-making power in a manner incompatible with the right to an effective remedy also applies to the 2018 Bill. As with the 2017 Bill, if the bill is passed, the committee will consider the human rights implications of any redress scheme rules once they are received.
- *Bar on future civil liability of participating institutions and associates:* The 2017 Bill provided that where an eligible person receives an offer of redress and chooses to accept the offer, the person releases and forever discharges

8 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 79-83.

9 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 80.

10 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 83.

11 Proposed section 12(3) and (4) of the 2018 Bill.

12 See proposed section 13(2) and (3) of the 2018 Bill.

13 See proposed section 21(7) of the Commonwealth Bill.

14 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 83-85.

15 Proposed section 15(4(f),(5) and (6) of the 2018 Bill.

all institutions participating in the scheme from civil liability for abuse, and the eligible person cannot bring or continue any claim against those institutions in relation to that abuse.[16] The committee considered that this bar on future civil liability of participating institutions may engage and limit the right to an effective remedy.[17] However, the committee noted that the proposed rules governing the provision of legal services under the redress scheme may operate as a sufficient safeguard so as to support the human rights compatibility of the measure.[18] The 2018 Bill also requires survivors who accept redress to forever release from civil liability all institutions providing them with redress, and additionally extends this release to 'officials of those responsible institutions and associates (other than an official who is an abuser of the person)'.[19] The 2018 Bill also provides further detail as to the effect of accepting the release on civil liability.[20] The concern as to compatibility of the bar on future civil liability with the right to an effective remedy also applies to the 2018 Bill. The committee will consider the compatibility of the proposed rules governing the provision of legal services, and whether they offer adequate safeguards, when they are received.[21]

- *Absence of external merits review and removal of judicial review:* The 2017 Bill provided for a system of internal review of determinations made under the scheme.[22] The 2017 Consequential Amendments Bill also exempted decisions made under the scheme from judicial review under the

16 Proposed sections 39 and 40 of the Commonwealth Bill.

17 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 85-88.

18 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 88.

19 Proposed section 42(2)(c) of the 2018 Bill; see also sections 39, 42 and 43 of the 2018 Bill; see also SOC pp.122-123. The SOC explains (at p.123) the rationale for expanding the release to 'associates' as follows: ' organisations comprising multiple institutions are likely to opt-in to the Scheme as one, forming a 'participating group' (institutions are then known as 'associates' of one another). In order to form a participating group, institutions must be sufficiently connected and appoint a representative for the group. That representative will then be jointly and severally liable with each associate for funding contributions. Attaching the release to all associates of responsible participating institution(s) for sexual abuse and related non-sexual abuse within the scope of the Scheme is therefore reflective of their joint financial liability, and is a necessary component of ensuring that institutions will opt-in to the Scheme together, therefore ensuring maximum coverage for survivors'.

20 Proposed section 43 of the 2018 Bill.

21 The committee also notes that it is preferable for details of proposed rules to be available for consideration in conjunction with the related bill prior to its passage. See also Committee Comment at [1.59] below.

22 Proposed Part 4-3 of the Commonwealth Bill.

Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).[23] The committee considered that these measures raised concerns as to compatibility of the review scheme with the right to a fair hearing.[24] However, having regard to the information provided by the minister and the particular context in which the review scheme operated, the committee considered that the internal review mechanism may be capable of ensuring that survivors have adequate opportunities to have their rights and obligations determined in a manner compatible with the right to a fair hearing. The committee recommended that the operation of the internal review mechanism be monitored to ensure that survivors have sufficient opportunities to have their rights and obligations determined by an independent and impartial tribunal.[25] The 2018 Bill also establishes an internal review mechanism,[26] and the 2018 Consequential Amendments Bill excludes the scheme from judicial review under the ADJR Act.[27] Therefore, the conclusions relating to the right to a fair hearing in the 2017 Bill apply equally to the 2018 Bill. In relation to review of the internal review mechanism, it is noted that the statement of compatibility to the 2018 Bill further advises that:

> The Government intends to monitor the Scheme's internal review mechanism, including through broader reviews of the Scheme's implementation. General information relevant to internal review may also be detailed in the Scheme's annual report to the Minister (for presentation to the Parliament) and also has the capacity to be scrutinised through the Scheme's governance arrangements.[28]

1.57 The matters discussed in the remainder of this human rights analysis relate to matters in the 2018 Bill and National Redress Consequential Amendments Bill that raise additional or new issues to the 2017 Bill that require further advice from the minister.

Committee Comment

1.58 The committee notes that the analysis in the statement of compatibility to the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and the

23 Schedule 3 of the Commonwealth Consequential Amendments Bill.

24 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 93-96.

25 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 96.

26 Part 4-1 of the 2018 Bill.

27 Schedule 3 to the National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018.

28 SOC, p. 127.

National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018 draw extensively upon the committee's human rights analysis of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Commonwealth Bill). The committee welcomes this approach and thanks the minister for preparing the statement of compatibility in this manner.

1.59 The committee requests the minister provide the committee with a copy of the proposed redress scheme rules. Alternatively, the committee requests a detailed overview of the proposed rules, having regard to the matters discussed above.

1.60 The committee refers to and reiterates its previous consideration of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 in its *Report 13 of 2017* and *Report 2 of 2018* as outlined at paragraph [1.56] of the preceding analysis, and draws the human rights implications of those measures as they apply to the 2018 Bill to the attention of the Parliament.

Information sharing provisions

Disclosure power of the scheme operator

1.61 The 2017 Bill set out the circumstances in which the scheme operator may disclose protected information in the public interest.[29] Following the further information provided by the minister, the committee noted that the power to make public interest disclosures under the 2017 Bill would only be used where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, or similar, for specific purposes such as assistance in relation to a reported missing person or a homeless person. The committee considered that disclosure in such circumstances may be sufficiently circumscribed such that the measure would be a proportionate limitation on the right to privacy. The committee recommended that the operator's disclosure power be monitored by government to ensure that any limitation on the right to privacy be no more extensive than what is strictly necessary.[30]

1.62 The committee also noted that the minister had indicated he would consider including a positive requirement that the scheme operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed to reflect a national redress scheme, and would also

29 See proposed section 77 of the Commonwealth Bill.

30 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 93.

consider including a positive requirement for rules to regulate the operator's disclosure power.[31]

1.63 The 2018 Bill also provides that the National Redress Scheme Operator (operator)[32] may disclose protected information[33] in the public interest if certain circumstances are satisfied.[34] As with the 2017 Bill, this measure engages and limits the right to privacy.[35] The provision in the 2018 Bill is substantively identical to the provision in the 2017 Bill, and to that extent the committee's comments on the 2017 Bill apply equally.

1.64 However, it is noted that the statement of compatibility provides the following information:

> The Committee also noted that the (former) Minister has indicated he will consider including a positive requirement that the Operator must have regard to the impact the disclosure may have on a person to whom the information relates in any future legislation developed for a National Redress Scheme. This has now been reflected in the Bill.[36]

1.65 However, there is no requirement in section 95 of the 2018 Bill (which relates to public interest disclosure) that requires the operator to have regard to the impact the disclosure may have on a person to whom the information relates. It is noted that this safeguard is instead included for other disclosure powers of the scheme operator and in respect of disclosure by persons engaged by participating

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31 Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) pp. 92-93.

32 National Redress Scheme Operator is defined in section 6 to mean the person who is the Secretary of the Department in the person's capacity as operator of the scheme. 'Department' is not defined in the bill and pursuant to section 19A of the *Acts Interpretation Act 1901* means the Department that is administered by the Minister or Ministers administering that provision in relation to the relevant matter, and that deals with that matter.

33 'Protected Information' is defined in section 92(2) of the 2018 Bill as '(a) information about a person or an institution that: (i) was provided to, or obtained by, an officer of the scheme for the purposes of the scheme; and (ii) is or was held in the records of the Department or the Human Services Department; or (b) information to the effect that there is no information about a person or an institution held in the records of a Department referred to in subparagraph (a)(ii)'.

34 Proposed section 95 of the 2018 Bill.

35 For the relevant principles relating to the right to privacy, see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) p. 89.

36 SOC, p. 125.

institutions in the 2018 Bill.[37] Therefore, further information is required in order to clarify the statement in the statement of compatibility.

Disclosure by employees and officials of government institutions

1.66 Proposed section 97 provides an additional authorisation for employees or officers of government institutions to whom protected information is disclosed to obtain, record, disclose or use the information for certain permitted purposes including the enforcement of criminal law; the safety or wellbeing of children; investigatory, disciplinary or employment processes related to the safety or wellbeing of children; or for a purpose prescribed by the rules. As this provision involves the disclosure of protected information (including personal information), this provision also engages and limits the right to privacy.

1.67 Limitations on the right to privacy are permissible where the measure pursues a legitimate objective, and is rationally connected and proportionate to that objective. The statement of compatibility does not address this specific new provision and its compatibility with the right to privacy. It is noted that, like the scheme operator's public interest disclosure power, this provision does not require the employee or officer of the institution to consider the impact the disclosure may have on the person. This raises concerns as to whether, with respect to the proportionality of the measure, the measure is the least rights restrictive approach.

1.68 It is also noted that the provision allows for rules to introduce new purposes for which employees or officers of government institutions may disclose information. This also raises concerns as to proportionality. This is because international human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[38] Without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Further information from the minister would therefore assist in determining whether this additional disclosure power is a proportionate limitation on the right to privacy.

Committee comment

1.69 The committee seeks clarification from the minister, having regard to the statement on page 125 of the statement of compatibility, as to whether the public interest disclosure power in section 95 of the 2018 Bill could be amended so as to

37 See proposed section 96(3) of the 2018 bill (operator disclosing for law enforcement or child safety or wellbeing), and proposed section 98(3) (person engaged by participating institution disclosing etc. for a specified purpose).

38 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

include a positive requirement that the scheme operator must have regard to the impact the disclosure may have on a person to whom the information relates.

1.70 In relation to the additional disclosure authorisations for employees or officers of government institutions in section 97, the committee seeks the advice of the minister as to the compatibility of this provision with the right to privacy, in particular:

- **whether the measure pursues a legitimate objective;**
- **whether the measure is rationally connected to that objective;**
- **whether the measure is proportionate to the legitimate objective (including whether the provision is the least rights restrictive approach, and clarification as to the scope of the power to declare new permitted purposes by the rules); and**
- **whether section 97 could be amended to include a positive requirement that the operator must have regard to the impact the disclosure may have on a person to whom the information relates.**

Entitlement to receive redress under the national redress scheme: special rules for persons with serious criminal convictions

1.71 Proposed section 63 of the 2018 Bill introduces a special assessment procedure for persons with 'serious criminal convictions', which applies where the person is sentenced to imprisonment for 5 years or longer for an offence against a law of the Commonwealth, a State, a Territory or a foreign country.[39] Proposed section 63(2) provides that a person is not entitled to redress under the scheme unless there is a determination by the scheme operator that the person is not prevented from being entitled to redress. Proposed section 63(5) provides:

> (5) The Operator may determine that the person is not prevented from being entitled to redress under the scheme if the Operator is satisfied that providing redress to the person under the scheme would not:
>
> (a) bring the scheme into disrepute; or
>
> (b) adversely affect public confidence in, or support for, the scheme.

39 The minister foreshadowed in his response to the Commonwealth Bill that the 2018 Bill would limit the eligibility of persons with certain criminal convictions to obtain redress: see Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) 80-83. The committee noted that there are human rights concerns in relation to the proposed exclusion of persons with certain criminal convictions from being eligible for the scheme: page 83.

1.72 As soon as practicable after becoming aware of the person's sentence, the scheme operator is required to consider whether to make a determination and give a written notice to the relevant 'specified advisor'[40] from the Commonwealth or participating State or Territory, requesting that the specified advisor provide advice about whether a determination should be made and setting a timeframe within which to provide that advice.[41]

1.73 Proposed section 65(6) additionally provides that, when making a determination, the Operator must take into account:

(a) any advice given by a specified advisor in the period referred to in the notice; and

(b) the nature of the offence; and

(c) the length of the sentence of imprisonment; and

(d) the length of time since the person committed the offence; and

(e) any rehabilitation of the person; and

(f) any other matter that the Operator considers is relevant.

1.74 Proposed section 65(7) provides that, when taking into account the matters referred to above, the operator must give greater weight to any advice that is given by a specified advisor from the jurisdiction in which the abuse occurred, in the period referred to in the notice, than to any other matter.

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

1.75 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) 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

40 'Specified advisor' is defined in section 64(3)(b) as the following: (i) if the abuse of the persons occurred inside a participating state or a participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; (ii) if the abuse of the person occurred outside a participating state or participating territory – the Commonwealth Attorney-General; (iii) if the offence was against a law of a participating state or participating territory – the Attorney-General of the state or territory, or another person nominated by that Attorney-General in writing; if the offence was against a law covered by subparagraph (iii) – the Commonwealth Attorney-General.

41 The written notice must also include sufficient information to enable the specified advisor to provide that advice. The period in which the specified advisor may provide the advice must be at least 28 days starting on the date of the notice: see proposed section 63(4) of the 2018 Bill.

protection of the law.[42] Articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further describe the content of this right and the specific elements that state parties are required to take into account to ensure the elimination of discrimination on the basis of race, colour, descent, national or ethnic origin.

Racial discrimination

1.76 'Racial discrimination' is defined in article 1(1) of ICERD to mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Thus, racial discrimination can be direct (that is, have a discriminatory purpose) or indirect (that is, have a discriminatory effect on the enjoyment of rights).[43] Accordingly, treatment which disproportionately affects members of a particular racial group will amount to differential treatment based on race for the purpose of international human rights law.

1.77 As acknowledged in the statement of compatibility, Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and are sentenced to custody at a higher rate than non-Indigenous defendants.[44] The measure may therefore indirectly discriminate on the basis of race due to the disproportionate negative impact of the measure on Aboriginal and Torres Strait Islander peoples.[45]

Criminal record

1.78 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination in Article 26 of the ICCPR. However, relevantly, the European Court of Human Rights has interpreted the prohibition on discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[46] While this jurisprudence is not binding on Australia, the

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

43 Committee on the Elimination of Racial Discrimination, *General Recommendation 14* (1993); See also *Althammer v Austria*, HRC 998/01, [10.2]

44 SOC, p.118.

45 SOC, p.118.

46 See *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

case law from the Court is useful in considering Australia's obligations under similar provisions in the ICCPR.[47] Limiting the entitlement to redress for persons with a criminal record accordingly may also engage and limit the right to equality and non-discrimination on this basis.

Limitations on the right to equality and non-discrimination

1.79 Differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds such that it is rationally connected to, and proportionate in pursuit of, a legitimate objective. The statement of compatibility states that the restriction on eligibility of persons with serious criminal convictions is permissible on the following basis:

> …restricting eligibility on the basis of criminal history is necessary to achieve the legitimate aim of the Scheme aligning with community expectations around who should receive redress payments from Government, with flexibility to make relevant persons entitled to redress on a case-by-case basis, where appropriate to do so. There is a risk the public would not support a Scheme that paid redress to perpetrators of serious crimes. In particular, victims of those crimes may strongly object to redress payments being made to people who have committed crimes against them.
>
> Furthermore, the restriction on survivors with serious criminal convictions was developed in consultation with State and Territory Attorneys-General, who were almost unanimous that reasonable limitations on applications is necessary to uphold public faith and confidence in the Scheme, and a necessary part of the framework for states to opt-in to the Scheme (ensuring nationwide access to redress).[48]

1.80 The overall objectives of the redress scheme are to 'recognise and alleviate the impact of past institutional child sexual abuse and related abuse' and 'to provide justice for survivors of that abuse'.[49] These are undoubtedly legitimate objectives for the purposes of international human rights law. However, the objective of limiting entitlements to persons with serious criminal convictions is narrower and is stated to be to align this scheme with 'community expectations'. To be a legitimate objective, the objective must be one that is pressing and substantial and not one that simply

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47 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers preventing discrimination in employment on the basis of a criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958*,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

48 SOC, pp. 118-119.

49 Proposed section 3 of the 2018 Bill.

seeks an outcome that is desirable or convenient. Further, tolerance and broadmindedness are the hallmarks of a democratic society, and so restrictions on rights of persons purely based on what might offend public opinion is not generally considered a legitimate objective.[50] On this basis, the stated objective of 'aligning the scheme with community expectations' does not appear to be a legitimate objective for the purposes of international human rights law.

1.81 It is also not clear how limiting the entitlement to redress of persons with serious criminal convictions is rationally connected to the objectives of the redress scheme. Indeed, noting the overall purpose of the scheme to 'recognise and alleviate the impact of past institutional child sexual abuse' and provide justice for survivors, limiting the entitlement of certain persons based on their subsequent conduct appears to undermine this objective. This is particularly the case in circumstances where the *Final Report* of the Royal Commission noted the impact of child sexual abuse on a survivor may manifest itself in 'interconnected and complex ways', including the development of 'addictions after using alcohol or other drugs to manage the psychological trauma of abuse, which in turn affected their physical and mental health, sometimes leading to criminal behaviour and relationship difficulties.'[51] A number of survivors who appeared before the Royal Commission had described how the impact of child sexual abuse had contributed to criminal behaviour as adolescents and adults.[52]

1.82 There are also concerns as to whether the measure is proportionate. Important factors in determining whether a measure is a proportionate limitation on human rights include whether there is sufficient flexibility to treat individual cases differently and whether there are less rights restrictive approaches reasonably available. Proposed section 63 contains a number of provisions that allow a person's individual circumstances to be taken into account and to provide persons, who may have a serious criminal conviction, to be entitled to redress where the operator so determines. This is an important safeguard and allows for matters such as a person's rehabilitation to be taken into account.

1.83 However, the starting point for persons who have serious criminal convictions is that they are *not* entitled to redress *unless* a determination is made by

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50 See *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005) [69]-[71]; *Dickson v United Kingdom,* European Court of Human Rights App No. 44362/04 (Grand Chamber, 4 December 2007) [68] and [72].

51 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 11. See also, James RP Ogloff, Margaret C Cutajar, Emily Mann and Paul Mullen, 'Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study'(2012) *Trends & Issues in Crime and Criminal Justice No.440*.

52 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Impacts,* Volume 3 (2017) 143-145. See also Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1* (2014), pp. 116-117.

the scheme operator.[53] Even where a scheme operator is satisfied that providing redress to the person would not bring the scheme into disrepute or adversely affect public confidence in or support for the scheme, the 2018 Bill provides only that the operator *may* determine the person is not prevented from being entitled.[54] Further, a person's individual circumstances (namely, the nature of the offence, the length of the sentence of imprisonment, the length of time since the commission of the offence, and any rehabilitation) are given lesser weight than advice of the specified advisor.[55] In this respect, there would appear to be other, less rights restrictive approaches available, including: making it a requirement that a person with a serious criminal conviction *is* entitled to redress *unless* a determination is made that the person receiving redress would bring the scheme into disrepute, or providing that the operator *must* determine a person with a serious criminal conviction is entitled to redress if satisfied that providing redress under the scheme would not bring the scheme into disrepute, or providing that an individual's personal circumstances be given equal weight to the submissions of the specified advisors. Further information from the minister as to these matters would assist in determining whether the disproportionate effect of the measure on Aboriginal and Torres Strait Islander peoples and those with a criminal record would be compatible with the right to equality and non-discrimination.

1.84 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[56] It is not clear from the information provided whether determinations by the scheme operator under section 63(5) are capable of being reviewed either internally or externally.[57] Further information from the minister as to whether (and, if so, by what mechanism) a determination by the scheme operator under section 63(5) may be reviewed would therefore be of assistance to determine whether the measure is a proportionate limitation on the right to equality and non-discrimination.

Committee comment

1.85 The preceding analysis indicates that the special assessment procedure for applicants with serious criminal convictions raises concerns as to the compatibility of the measure with the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait

53 Proposed sections 63(2) and 63(5) of the 2018 Bill.

54 Proposed section 63(5) of the 2018 Bill.

55 Proposed section 63(6) and 63(7) of the 2018 Bill.

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

57 The review provisions of the 2018 Bill appear to apply to determinations made under proposed section 2: see proposed section 73.

Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

1.86 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under proposed section 63 are able to be reviewed).**

Compatibility of the measure with the right to an effective remedy

1.87 Article 2(3) of the ICCPR requires states parties to ensure that persons whose human rights under the ICCPR have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

1.88 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights obligations, including the right of every child to protection by society and the state,[58] and the right of every child to protection from all forms of physical and mental violence, injury or abuse (including sexual exploitation and abuse).[59] Insofar as persons with serious criminal convictions may be precluded from accessing redress, restrictions on the entitlement of survivors with serious criminal convictions engages the right to an effective remedy.

1.89 The statement of compatibility does not specifically address the entitlement of survivors with serious criminal convictions from the perspective of the right to an effective remedy. For the same reasons as those discussed above in relation to the right to equality and non-discrimination, there are concerns that restricting the

58 Article 24 of the International Covenant on Civil and Political Rights: see SOC, p. 122.

59 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, p. 117.

entitlement to redress of survivors with serious criminal convictions is not compatible with the right to an effective remedy. This is particularly so as the UN Human Rights Committee has stated that while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must comply with the fundamental obligation to provide a remedy that is effective.[60]

Committee comment

1.90 The preceding analysis indicates that restrictions on the entitlement to redress for survivors with serious criminal convictions engage the right to an effective remedy. The statement of compatibility does not address the compatibility of the measure with this right.

1.91 The committee seeks the advice of the minister as to the compatibility of the special assessment process for persons with serious criminal convictions with the right to an effective remedy.

Access to redress under the national redress scheme for persons in gaol

1.92 Proposed section 20(1)(d) of the 2018 Bill provides a person cannot make an application for redress under the scheme if the person is in gaol.[61] Proposed sections 20(2) and (3) provide that the restriction on applying for persons in gaol does not apply if the operator determines in accordance with requirements prescribed by the rules that there are 'exceptional circumstances justifying the application being made'.

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

1.93 Persons who are in prison continue to enjoy all of the rights and freedoms guaranteed under international human rights law except for those that are demonstrably necessitated by the fact of incarceration (such as the right to liberty).[62] The matters discussed above in relation to the limitation on persons with serious criminal convictions apply equally to persons who are incarcerated. That is, the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal

60 See UN Human Rights Committee, *General Comment No.29: States of Emergency (Article 4)* (2001) [14].

61 'In gaol' in the 2018 Bill is defined by reference to section 23(5) of the *Social Security Act 1991* which provides that a person is in gaol if (a) the person is being lawfully detained (in prison or elsewhere) while under sentence for conviction of an offence and not on release on parole or licence; or (b) the person is undergoing a period of custody pending trial or sentencing for an offence.

62 *Hirst v the United Kingdom (No. 2)*, European Court of Human Rights App No. 74025/01, (Grand Chamber, 6 October 2005); *Basic Principles for the Treatment of Prisoners,* General Assembly Resolution 45/111 (14 December 1990) Principle 5.

justice system means that precluding persons who are incarcerated from making an application is likely to disproportionately negatively affect Aboriginal and Torres Strait Islander survivors of sexual abuse, raising concerns as to the compatibility of the measure with the right to equality and non-discrimination. By precluding persons who are incarcerated from applying for redress, the measure may also discriminate on the basis of criminal record. The UN Committee on Economic and Social and Cultural Rights has specifically noted that the denial of a person's legal capacity because she or he is in prison may constitute discrimination on the basis of 'other status'.[63] The measure also engages the right to an effective remedy by limiting the ability of persons who are incarcerated to access redress under the scheme.

1.94 It is noted that the statement of compatibility emphasises that persons will be able to make an application for redress if they are not in gaol at some point during the 10 years of the redress scheme.[64] Proposed section 20 therefore does not remove a person's entitlement or eligibility for redress but rather precludes that person from making an application during their period of incarceration, and to this extent for most incarcerated survivors otherwise entitled and eligible for redress the measure would be a practical limitation on the right to equality and non-discrimination and the right to an effective remedy during their period of incarceration.

1.95 The statement of compatibility does not specifically address this aspect of the 2018 Bill in light of the right to equality and non-discrimination and the right to an effective remedy. However, the statement of compatibility does provide some information as to why the restriction is necessary and permissible:

> This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors, which may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. As the Scheme will run for 10 years, survivors who are incarcerated for a short period of time will be able to apply when they are no longer incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality.

63 UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) [27].

64 SOC, p.119.

> Additionally, survivors who are incarcerated for longer periods of time (i.e. five or more years) may not be entitled to redress as a result of their custodial sentence (detailed above) in the first instance.[65]

1.96 It is acknowledged that there may be practical issues associated with delivering appropriate support services to incarcerated survivors. However, while the statement of compatibility identifies some of the challenges associated with providing redress to incarcerated survivors, the statement of compatibility does not otherwise identify how the restriction pursues a legitimate objective for the purposes of international human rights law. In this respect, as noted earlier, in order to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.97 There may also be concerns as to proportionality. In particular, while proposed section 20 allows the operator to override the restriction on incarcerated persons applying, this may only occur in 'exceptional circumstances'. The statement of compatibility provides examples of what constitutes an exceptional circumstance for overriding this provision, including 'because they will be in gaol during the last two years of the Scheme, or they are terminally ill'.[66] However, this is not apparent from the bill itself which refers only to requirements prescribed by the rules.[67] Further information as to what would constitute 'exceptional circumstances', including the proposed content of the rules, and whether a determination under proposed section 20 is subject to review, would be of assistance in determining whether the measure is compatible with human rights.

Committee comment

1.98 The preceding analysis indicates that precluding incarcerated persons from applying for redress may engage the right to equality and non-discrimination. This is because the measure may disproportionately negatively affect Aboriginal and Torres Strait Islander peoples and so may constitute indirect discrimination on the basis of race. It may also constitute discrimination on the basis of a person's criminal record.

1.99 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**

65 SOC, pp. 119-120.

66 SOC, p. 119.

67 Proposed section 20(2) and (3) of the 2018 Bill.

- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, and whether determinations by the scheme operator under proposed section 20 are able to be reviewed).**

1.100 The preceding analysis also raises questions as to the compatibility of the measure with the right to an effective remedy. The committee therefore seeks the advice of the minister as to the compatibility of the measure with the right to an effective remedy.

Entitlement to receive redress under the national redress scheme: persons subject to a security notice

1.101 The 2018 Bill also introduces special rules excluding entitlement to redress for persons subject to security notices from the Home Affairs minister.[68] Proposed section 64 provides that a person is not entitled to redress under the scheme while a security notice is in force in relation to the person. Proposed section 65(1) provides that the Home Affairs Minister may give the minister a written notice (a security notice) if:

> (a) the Foreign Affairs Minister gives the Home Affairs Minister a notice under subsection 66(1) in relation to the person;[69] or
>
> (b) the person's visa is cancelled under section 116 or 128 of the *Migration Act 1958* because of an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security

68 See proposed Part 3-2 of the 2018 Bill.

69 Proposed section 66 allows the foreign minister to give the home affairs minister a written notice if the foreign minister has refused to issue a travel document or cancelled a travel document of a person following a request from a competent authority on the basis the competent authority suspects on reasonable grounds that if an Australian travel document were issued to a person, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country: see also sections 14(1)(a)(i), 14(2) and 22 of the *Australian Passports Act 2005*.

(within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);[70] or

(c) the person's visa is cancelled under section 134B of the *Migration Act 1958* (emergency cancellation on security grounds) and the cancellation has not been revoked because of subsection 134C(3) of that Act; or

d) the person's visa is cancelled under section 501 of the *Migration Act 1958* and there is an assessment by the Australian Security Intelligence Organisation that the person is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

1.102 Before giving a security notice, the Minister for Home Affairs must have regard to the extent (if any) that payments to the person under the scheme have been or may be used for a purpose that might prejudice the security of Australia or a foreign country, if the Minister for Home Affairs is aware of that extent.[71] Security notices must be reviewed annually,[72] and the home affairs minister may revoke a security notice.[73]

1.103 Proposed section 20(b) of the 2018 Bill additionally provides that a person cannot make an application for redress under the scheme if a security notice is in force against the person.

Compatibility of the measure with the right to an effective remedy

1.104 The relevant principles relating to the right to an effective remedy are set out at [1.87]. Restrictions on the entitlement of survivors who are subject to a security notice engage the right to an effective remedy as such persons may be precluded from obtaining redress.

1.105 The statement of compatibility does not address whether this measure is compatible with the right to an effective remedy. However, it provides the following information about why precluding persons subject to security notices is necessary:

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70 'Security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* to mean: (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and (aa) the protection of Australia's territorial and border integrity from serious threats; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

71 Proposed section 65(2) of the 2018 Bill.

72 Proposed section 69 of the 2018 Bill.

73 Proposed section 70 of the 2018 Bill.

> This limitation is necessary to ensure that redress funds are not given to persons who may prejudice Australia's national security interests, or may use funds for purposes against Australia's security interests.[74]

1.106 The explanatory memorandum further explains that:

> These provisions ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups, or that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, would not be entitled to redress under the scheme.[75]

1.107 However, as noted earlier, while limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), states parties must provide a remedy that is effective where there has been a violation of human rights under the ICCPR. Therefore, while national security may generally constitute a legitimate objective to limit human rights, Australia is still obliged to provide an effective remedy. Further information as to how the right to an effective remedy will be protected for persons subject to a security notice would assist in determining compatibility with this right. This would include, for example, information as to any relevant safeguards, such as whether a security notice or a decision to revoke (or not to revoke) a security notice is capable of review.

Committee comment

1.108 The preceding analysis indicates that the restrictions on entitlement to persons subject to security notices engage the right to an effective remedy.

1.109 The committee therefore seeks the advice of the minister as to the compatibility of the restriction with this right.

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

1.110 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

1.111 The concept of 'suit at law' encompasses judicial procedures aimed at determining rights and obligations, equivalent notions in the area of administrative law and also extends to other procedures assessed on a case-by-case basis in light of the nature of the right in question.[76]

1.112 As acknowledged in the statement of compatibility to the 2018 Bill, a determination of a person's entitlement to redress as a result of sexual abuse, and a

74 SOC, pp. 121-122.

75 Explanatory Memorandum, p. 55.

76 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

finding of responsibility on the part of institutions for such abuse, involves the determination of rights and obligations and is likely to constitute a 'suit at law'.[77] In relation to a security notice, removing a person's entitlement to redress while a security notice is in force in relation to the person[78] may similarly engage fair trial and fair hearing rights. For example, it is possible that a security notice may be in force in relation to a person for the entire duration of the scheme, removing an otherwise entitled person's entitlement to redress entirely. The application or continuance of a security notice may therefore similarly involve a determination of the person's rights and obligations.

1.113 If the security notice process were to constitute a 'suit at law', there may be fair trial and fair hearing concerns, as it is unclear whether persons subject to the notice have the benefit of any hearing where, for example, they may be able to make representations to the home affairs minister or the foreign affairs minister as to whether a security notice should be given, or as part of the annual review process, or in determining whether a security notice should be revoked. Further information from the minister would assist in determining the compatibility of the security notice process with this right.

Committee comment

1.114 The preceding analysis raises questions as to whether removing a person's entitlement under the scheme while a security notice is in force engages and limits fair trial and fair hearing rights under Article 14 of the ICCPR.

1.115 The committee seeks the advice of the minister as to the compatibility of the security notice procedures with fair trial and fair hearing rights under Article 14 of the ICCPR.

Entitlement to receive redress under the national redress scheme: child applicants

1.116 For children who will turn 18 years before the scheme sunset day, who make an application for redress, there is a special process for such applicants to be

77 SOC p. 126; See Parliamentary Joint Committee on Human Rights, *Report 2 of 2018* (13 February 2018) [2.179]-[2.189].

78 Proposed section 64 of the 2018 Bill.

prescribed by the redress scheme rules.[79] As a result of these provisions, the 2018 Consequential Amendments Bill seeks to exempt the 2018 Bill from the *Age Discrimination Act 2004*.[80]

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

1.117 The relevant principles relating to the right to equality and non-discrimination are set out at [1.75] above. While 'age' is not listed as a prohibited ground of discrimination in Article 26 of the ICCPR, the UN Human Rights Committee has stated that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination based on the ground of 'other status'.[81] Additionally, the Convention on the Rights of the Child (CRC) requires states parties to respect and ensure rights under the CRC to each child without discrimination.[82] This includes an obligation to ensure that children are protected against all forms of violence and all forms of sexual abuse without discrimination.[83] The relevant principles relating to the right to an effective remedy are set out above at [1.87].

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79 Proposed section 21 of the 2018 Bill. It is noted that proposed section 20(1)(c) provides a person who is a child who will not turn 18 before the scheme sunset day cannot make an application for redress. The effect of this is that children under eight when the scheme commences will not be able to receive redress under the scheme. Proposed section 20(1)(c) engages the right to equality and non-discrimination and the right to an effective remedy. However, the SOC explains at pp. 120-121 that only around 50 of more than 8,000 survivors that attended private sessions were under the age of 8 years. The SOC explains that, as found by the Royal Commission, while it was possible that some individuals would wish to seek redress while they are still a minor, it is not expected that many minors will apply as it would almost always be within the time limitations to commence proceedings through civil litigation, and an individual would be more than likely to receive larger payment either through settlement or civil litigation than they might during the scheme. The SOC also explains alternative avenues that were considered, such as requiring minors to have a nominee arrangement or paying amounts into a trust account, and explains why this approach was not considered to be appropriate. Based on the information provided (particularly the availability of civil litigation for survivors under the age of 8 and the explanation of less rights restrictive approaches that were considered), this aspect of the measure appears to be compatible with the right to an effective remedy and appears to constitute a permissible limitation on the right to equality and non-discrimination.

80 Schedule 5 to the 2018 Consequential Amendments Bill.

81 *Love v Australia* (983/01), UN Human Rights Committee (2003) [8.2].

82 Article 2(1) Convention on the Rights of the Child.

83 Articles 19 and 34 read with Article 2(1) of the CRC. See Committee on the Rights of the Child, *General Comment No.13: The right of the child to freedom from all forms of violence* (2011) [60].

1.118 While the statement of compatibility states that the CRC 'does not explicitly exclude different processes based on age',[84] the different application process for child applicants directly engages the right to equality and non-discrimination. By providing for a special application process for children who will turn 18 before the scheme sunset day, the measure also engages the right to an effective remedy.

1.119 The statement of compatibility provides information as to why the different application process is necessary and permissible:

> The restriction on some children applying for redress, and the special process for how children's applications are treated, is necessary to protect those children's interests. As a requirement of the Scheme is to release responsible participating institutions from any liability for sexual abuse and related non-sexual abuse within the scope of the Scheme (restricting their right to later pursue civil litigation), it is necessary to ensure that the effect of the release is fully understood. Survivors who are children are unlikely to be able to fully comprehend the implications of such a decision, especially when the impact of their abuse may not have been fully realised yet.
>
> Furthermore, a component of the application process is for survivors to articulate the impact that the relevant abuse has had on them. As the impact of child abuse in a person's early years may not be realised until later in the person's life, an application submitted as a child may not contain the relevant detail. Similarly, a child survivor's ability to articulate their experience would likely increase with age. While children who will turn 18 years of age before the Scheme sunset day are able to make an application for redress as a child, it is important that they are able to provide the Operator with updated information once they are an adult, which the special process will allow.
>
> Whilst other avenues to include children, such as requiring them to have a nominee arrangement were considered, numerous stakeholders raised concerns about nominees not making decisions in the best interests of the survivor, or not using redress payments for the benefit of the survivor. Additionally, even if the Scheme were to require that payments go into a trust account, the necessary interaction with the minor's parent or guardian would present complexities. Some minors who have been sexually abused in an institutional setting may have fractured relationships with their parents or guardians, and may remain in out of home care. Due to these relationships, the minor may not trust that their parent or guardian will make choices in their best interest.
>
> The special process described strikes the right balance between safeguarding the interests of children whilst allowing them to have some indication of their likely redress entitlement. This will allow these children

84 SOC, p. 120.

> to pursue a range of different options. Some survivors may wait until they turn 18 in order to access redress, whilst others (supported by their parent/ or guardian/s) may choose to pursue civil litigation.
>
> …
>
> Child survivors and their families, including both those who are unable to access redress under the Scheme and those who have to wait until they are 18 to receive a redress determination, will be able to access the Scheme's community support services, as well as legal support services to receive advice about available options outside of the Scheme.[85]

1.120 The information provided by the minister indicates that the measure has been introduced so as to protect the best interests of the child and has been considered appropriate in light of other, less rights restrictive, options. This is relevant to the compatibility of the measure with the right to equality and the right to an effective remedy.

1.121 However, there are concerns as to whether the broad power to determine the special process for child applicants by way of rules is compatible with these rights. This is because, as discussed earlier, in the absence of sufficient safeguards, the broad scope of the power to determine a person's entitlement to eligibility or ineligibility could be exercised in such a way as to be incompatible with human rights. Further information is required as to the proposed content of the redress scheme rules as it relates to the special process for child applicants so as to determine whether the application process as it applies to children is compatible with the right to an effective remedy and the right to equality and non-discrimination.[86]

Committee comment

1.122 The preceding analysis indicates that the special process for child applicants, to be prescribed in the rules, raises concerns as to compatibility with the right to an effective remedy and the right to equality and non-discrimination.

1.123 The committee seeks further information as to the proposed process for child applicants, including:

- **A copy of the proposed rules prescribing the process for child applicants (or, if no copy is available, a detailed outline of the proposed rules); and**
- **Information as to safeguards in the proposed rules to protect the right to an effective remedy and the right to equality and non-discrimination (including whether the rules will be subject to disallowance or other parliamentary oversight, and whether decisions by the operator pursuant to the rules will be capable of being reviewed).**

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85 SOC, pp. 120-121.

86 This includes information as to the extent to which the rules will be subject to parliamentary oversight, noting section 44(1)(a) of the *Legislation Act 2003*.

Social Security (Assurances of Support) Determination 2018 [F2018L00425]

Social Security (Assurances of Support) Amendment Determination 2018 [F2018L00650]

Purpose	Introduces requirements for parents to give assurances of support for visa entrants
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	F2018L00425: 15 sitting days after tabling (tabled House of Representatives and Senate 8 May 2018) F2018L00650: 15 sitting days after tabling (tabled House of Representatives 24 May 2018)
Right	Protection of the family (see **Appendix 2**)
Status	Seeking additional information

Requirements for persons to give assurances of support

1.124 The determination (as amended by the amended determination)[1] seeks to introduce requirements that must be met for an individual or body (an assurer) to be permitted to give an 'assurance of support' for migrants seeking to enter Australia on certain visa subclasses (assurees).[2] An assurance of support is a legally binding commitment by the assurer to financially support the assuree for the duration of the assurance period,[3] including assuming responsibility for repayment of any

1 The Social Security (Assurances of Support) Determination 2018 [F2018L00425] (the determination) was amended by the Social Security (Assurances of Support) Amendment Determination 2018 [F2018L00650] (the amended determination) on 24 May 2018.

2 Visa subclasses for which it is a mandatory condition of grant of the visa to have an assurance of support include the visa subclass 103 (parent), subclass 143 (contributory parent), subclass 864 (contributory aged parent); subclass 114 (aged dependent relative); subclass 115 (remaining relative). There are also several visa subclasses for which the Minister for Home Affairs may request an assurance of support as a condition of the grant, including subclass 117 (orphan relative); subclass 101 (child); subclass 102 (adoption); subclass 151 (former resident); subclass 202 (global humanitarian visa – community support programme entrants).

3 The length of the assurance period depends on the type of visa. For example, for a contributory parent visa, the period of assurance may be 10 years; for a community support programme entrant, the period is 12 months: explanatory statement to the determination, p. 2.

recoverable social security payments received by the assuree during the assurance period.[4]

1.125 Individuals who give an assurance of support must meet an income requirement in order to be an assurer.[5] Section 15(2) of the amended determination provides that an individual giving an assurance of support as a single assurer meets the income requirement for a financial year if the amount of the individual's assessable income for the year is at least the total of:

(a) the applicable rate of newstart allowance multiplied by the total of:

(i) one (representing the individual giving the assurance of support); and

(ii) the total number of adults receiving assurance under an assurance of support given by the person; and

(b) the amount obtained by adding together, for each child of the person giving assurance under an assurance of support:

(i) the base FTB child rate[6] as at 1 July in the financial year; and

(ii) the applicable supplement amount[7] as at 1 July in the financial year.[8]

1.126 The amended determination provides an example of how this provision is designed to operate:

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4 Section 1061ZZGA(a) of the *Social Security Act 1991*; Statement of compatibility (SOC) to the amended determination, pp. 1,3. Recoverable social security payments for the purpose of assurances of support includes widow allowance, parenting payment, youth allowance, austudy payment, newstart allowance, mature age allowance, sickness allowance, special benefit and partner allowance.

5 Section 14(1) of the determination.

6 'Base FTB child rate' refers to the base Family Tax Benefit rate. The rate has the meaning and is determined by clause 8 of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*. See further the explanation at [1.126] below.

7 'Applicable supplement amount' has the meaning and is determined by clause 38A(2) of Schedule 1 to the *A New Tax System (Family Assistance) Act 1999*. See further the explanation at [1.126].

8 Section 15(2) of the amended determination. The determination before amendment required a higher level of income in order to meet the income requirement, namely the newstart income cut-off amount multiplied by the total of: (i) one (representing the individual giving the assurance of support); and (ii) the total number of adults receiving assurance under the assurance of support given by the person; and (iii) if the individual giving assurance under the assurance of support has a partner – one; and (b) 10% of the newstart income cut-off amount multiplied by: (i) the number of children of the individual giving assurance under the assurance of support; and (ii) the number of children of any adults receiving assurance under the assurance of support.

> If a person with 2 children applies to give an assurance of support for a migrating family of 2 parents and 2 children on 1 July 2017, the minimum required income amount of the person is the total of:
>
> - $45 186 (the applicable newstart allowance of $15 062 multiplied by the total number of adult assurers and adult assurees (3)); and
>
> - the base FTB [(family tax benefit)] child rate and the applicable supplement amount for each of the assurer's children.
>
> The base FTB child rate and the applicable supplement are only added to the income requirement for the assurer's children. They do not apply to the children of the assurees.[9]

1.127 For an individual that gives an assurance of support jointly with another individual or other individuals, the individual assurer meets the income requirement for a financial year if the combined amount of assessable income of the assurers for the year is at least the total of the following amounts:

> (a) the applicable rate of newstart allowance multiplied by the total of:
>
> (i) the total number of individuals giving assurance under the assurance of support; and
>
> (ii) the total number of adults receiving assurance under an assurance of support given by the individual; and
>
> (b) the amount obtained by adding together, for each child of an individual giving assurance under the assurance of support:
>
> (i) the base FTB child rate as at 1 July in the financial year; and
>
> (ii) the applicable supplement amount as at 1 July in the financial year.[10]

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9 Section 15(2) of the amended determination. Before the amendment, the determination required that if a partnered individual with one child applied to give an assurance of support for a migrating family of two parents and two children, the minimum required income amount of the individual would have been the total of: (a) $115 476 (the newstart income cut-off amount of $28 869 multiplied by the total number of individuals giving assurance, persons receiving an assurance, and the partner of the individual giving assurance (4)); and (b) $8 661 (10% of the newstart income cut-off amount of $28 869 multiplied by the total number of children of both the individual giving assurance, and the persons receiving assurance (3)).

10 Section 16(2) of the amended determination. The determination before amendment required a higher level of income in order to meet the income requirement, namely (a) the newstart income cut-off amount multiplied by the total of: (i) the total number of individuals giving assurance under the assurance of support; and (ii) the total number of adults receiving assurance under an assurance of support given by the individual; and (iii) the total number of partners of the individuals that are jointly giving assurance under the assurance of support; and (b) 10% of the newstart income cut-off amount multiplied by (i) the number of children of the individuals giving assurance under the assurance of support; and (ii) the number of children of any adults receiving assurance under the assurance of support.

1.128 The amended determination provides an example of how this provision is designed to operate:

> If a joint assurer (who has a partner and 2 children) gives an assurance of support with the partner for a migrating family of 2 parents and 2 children on 1 July 2017, the combined minimum required income of both assurers is the total of:
>
> - $60 248 (the applicable newstart allowance of $15 062 multiplied by the total number of adult assurers and adult assurees (4)); and
>
> - the base FTB child rate and the applicable supplement amount for each of the assurers' children.
>
> The base FTB child rate and the applicable supplement are only added to the income requirement for the assurers' children. They do not apply to the children of the assurees.[11]

Compatibility of the measure with the right to protection of the family

1.129 The right to respect for the family is protected by articles 17 and 23 of the International Covenant on Civil and Political and Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection. An important element of protection of the family is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together will engage this right.

1.130 Additionally, under article 3(1) of the Convention on the Rights of the Child (CRC), Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[12] Under article 10 of the CRC, Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner.

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11 Section 16(2) of the amended determination. Before the amendment, the determination required that for two joint assurers (who each have a partner and two children) give an assurance of support for a migrating family of two parents and three children, the combined minimum required income amount of both assurers is the total of: (a) $173 214 (the newstart income cut-off amount of $28 869 multiplied by the total number individuals giving assurance, persons receiving an assurance, and the partners of the individuals giving assurance (6)); and (b) $20 208 (10% of the newstart income cut-off amount of $28 869 multiplied by the total number of children of both the individuals giving the assurance, and the persons receiving assurance (7)).

12 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

1.131 A measure which limits the ability of certain family members to join others in a country is a limitation on the right to protection of the family.[13] By requiring individuals (relevantly, including family members) to meet certain income requirements in order to sponsor family members to come to Australia, the measure creates a financial barrier for family members to join others in a country and therefore may limit the right to protection of the family.

1.132 Limitations on the right to protection of the family will be permissible where the limitation is in pursuit of a legitimate objective, and is rationally connected and proportionate to the pursuit of that objective.

1.133 The statement of compatibility to the determination and the amended determination do not acknowledge that this right is engaged by the measure. However the statement of compatibility describes the objective of the determination as 'protecting social security outlays by the Commonwealth while allowing the migration of people who might not otherwise be permitted to come to Australia'.[14] While this may be capable of constituting a legitimate objective, further information is required to determine whether the objective is legitimate in the context of this specific measure. In this context, the committee's usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provides a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law.

1.134 Additionally, as noted above, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. As to proportionality, while it is noted that the income requirement for assurers is significantly lower in the amended determination than the original determination,[15] the income requirement in the amended determination is nonetheless substantial. Further information is required to determine whether the measure is rationally connected and proportionate to the stated objective of the measure.

Committee comment

1.135 The preceding analysis indicates the requirements for persons to give assurances of support for visa entrants may engage and limit the right to protection of the family.

1.136 The committee therefore seeks the advice of the minister as to:

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13 See, for example, *Sen v the Netherlands* (Application no. 31465/96) (2001) ECHR; *Tuquabo-Tekle And Others v The Netherlands (Application no. 60665/00)* (2006) ECHR [41]; *Maslov v Austria (Application no. 1638/03)* (2008) ECHR [61]-[67].

14 SOC to the amended determination, p.1.

15 See above at [1.125] to [1.128] and accompanying footnotes.

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **whether the measure is rationally connected to (that is, effective to achieve) that objective; and**
- **whether the measure is a proportionate means of achieving its objective.**

Various Parks Management Plans[1]

Purpose	Provides management plans for particular parks
Portfolio	Environment and Energy
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Last day to disallow	15 sitting days after tabling (tabled Senate 21 March 2018, House 26 March 2018). Subject to a motion to disallow by Senator Pratt on 21 March 2018.
Rights	Freedom of expression (see **Appendix 2**)
Status	Seeking additional information

Regulation of commercial media within the parks

1.137 Each of the park management plans include rules for commercial media to operate in the parks. The plans provide that news-of-the day reporting may be undertaken on terms determined by the Director and subject to the Director being notified. Commercial media activities other than news-of-the-day reporting are subject to further conditions including a permit being issued.[2]

Compatibility of the measure with the right to freedom of expression

1.138 The right to freedom of expression includes the communication of information or ideas through the media. Providing that news-of-the day reporting is to be on the terms determined by the Director engages and may limit the right to freedom of expression. The requirement that other commercial media activities are subject to further conditions including the issuing of a permit also engages and limits this right.

1 Coral Sea Marine Park Management Plan 2018 [F2018L00327]; Temperate East Marine Parks Network Management Plan 2018 [F2018L00321]; North-West Marine Parks Network Management Plan 2018 [F2018L00322]; North Marine Parks Network Management Plan 2018 [F2018L00324]; South-West Marine Parks Network Management Plan 2018 [F2018L00326].

2 North Marine Parks Network Management Plan 2018 [F2018L00324] p. 51, [4.2.6]; Temperate East Marine Parks Network Management Plan 2018 [F2018L00321] p. 51 [4.2.5]; North-West Marine Parks Network Management Plan 2018 [F2018L00322] p. 54 [4.2.6]; South-West Marine Parks Network Management Plan 2018 [F2018L00326] p. 50 [4.2.4]; Coral Sea Marine Park Management Plan 2018 [F2018L00327] p. 43, [4.2.5].

1.139 While the right to freedom of expression may be subject to permissible limitations in a number of circumstances,[3] the statements of compatibility provided no assessment of this right. Accordingly, it is unclear from the information provided the extent of any limitation on the right to freedom of expression and whether that limitation is permissible.

Committee comment

1.140 The right to freedom of expression is engaged and may be limited by the park management plans. This was not addressed in the statements of compatibility.

1.141 The committee therefore seeks the advice of the minister as to the compatibility of the measure with the right to freedom of expression including information as to:

- **the extent of the limitation the measure imposes on the right to freedom of expression (such as, information about the terms determined by the Director in relation to news-of-the day reporting and the process for the issue of a permit or permission for other reporting);**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including the existence of any safeguards).**

3 Limitations must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to that objective. Additionally, the right may only be limited for certain prescribed purposes, that is, where it is necessary to respect the rights of others, or to protect national security, public safety, public order, public health or morals.

Advice only

1.142 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) 2018-2019

Appropriation Bill (No. 2) 2018-2019

Appropriation (Parliamentary Departments) Bill (No. 1) 2018-2019

Appropriation Bill (No. 5) 2017-2018

Appropriation Bill (No. 6) 2017-2018

Purpose	Seeks to appropriate money from the Consolidated Revenue for services
Portfolio	Finance
Introduced	House of Representatives, 8 May 2018
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Background

1.143 The committee has considered the human rights implications of appropriations bills in a number of previous reports,[1] and the bills have been the subject of correspondence with the Department of Finance.[2] During the 44th Parliament, the Minister for Finance invited the committee to meet with departmental officials about this issue.[3]

1 See, Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) p. 65; *Seventh report of 2013* (5 June 2013) p. 21; *Third report of the 44th Parliament* (4 March 2014) p. 3; *Eighth report of the 44th Parliament* (24 June 2014) p. 5 and p. 31; *Twentieth report of the 44th Parliament* (18 March 2015) p. 5; *Twenty-third report of the 44th Parliament* (18 June 2015) p. 13;*Thirty-fourth report of the 44th Parliament* (23 February 2016) p. 2; *Report 2 of 2017* (21 March 2017) p.44; *Report 5 of 2017* (14 June 2017) p. 42; *Report 3 of 2018* (27 March 2018) p. 97.

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

3 See, for example, Parliamentary Joint Committee on Human Rights, *Eighth Report of the 44th Parliament* (June 2014) pp. 5-7, 33.

Potential engagement and limitation of human rights by appropriations Acts

1.144 As stated in the analysis of previous appropriations bills, 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).[4]

1.145 The committee has previously noted that:

> …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.[5]

Compatibility of the bills with multiple rights

1.146 As with 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'.[6] 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.[7] The statements of compatibility also state that '[d]etailed information on the relevant appropriations…is contained in the portfolio [Budget] statements'.[8] No further assessment of the human rights compatibility of the bills is provided.

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4 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), *Report 5 of 2017* (14 June 2017) p. 42.

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

6 Appropriation Bill (No. 1) 2018-2019: explanatory memorandum (EM), statement of compatibility (SOC), p. 3; Appropriation Bill (No. 2) 2018-2019: EM, SOC, p. 4; Appropriation (Parliamentary Departments) Bill (No. 1) 2018-2019: EM, SOC, p. 4; Appropriation Bill (No. 5) 2018-2019: EM, SOC, p. 4; Appropriation Bill (No. 6) 2018-2019: EM, SOC, p. 4.

7 Bill No. 1, EM, SOC, p. 3; Bill No. 2, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4; Bill No. 5, EM, SOC, p. 4; Bill No. 6 2018-2019: EM, SOC, p. 4.

8 Bill No. 1, EM, SOC, p. 3; Bill No. 2, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4; Bill No. 5, EM, SOC, p. 4; Bill No. 6 2018-2019: EM, SOC, p. 4.

1.147 A full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.[9] 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;[10] 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.

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

1.149 As previously stated, while such bills present particular difficulties for human rights assessments because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.[11]

Committee comment

1.150 The committee notes that, as with previous appropriations bills, the statements of compatibility for the current bills provide no assessment of their

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9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 30-33.

10 See, UN Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring*, http://www.ohchr.org/Documents/Publications/Chapter20-48pp.pdf; Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

11 There are a range of international resources to assist in the preparation of human rights compatibility assessments of budgets: See, for example, Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (Unifem, 2006) *https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.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).

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, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.

1.151 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, 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;**
- **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; and**
- **whether the allocations are compatible with the rights of vulnerable groups (such as children; women; Aboriginal and Torres Strait Islander Peoples; persons with disabilities; and ethnic minorities).**

1.152 The committee would welcome the opportunity to engage further with the department on these and related matters concerning statements of compatibility for appropriations bills.

1.153 The committee recommends that departmental officials meet with the committee secretariat on behalf of the committee to develop workable approaches to statements of compatibility for appropriations bills and seeks the advice of the minister as to this course of action.

Bills not raising human rights concerns

1.154 Of the bills introduced into the Parliament between 8 and 31 May 2018, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Aged Care (Single Quality Framework) Reform Bill 2018;
- Air Services Amendment Bill 2018 (No. 2);
- Australian Research Council Amendment Bill 2018;
- Corporations (Fees) Amendment (ASIC Fees) Bill 2018;
- Corporations (Review Fees) Amendment Bill 2018;
- Criminal Code and Other Legislation Amendment (Removing Commonwealth Restrictions on Cannabis) Bill 2018;
- Defence Amendment (Sovereign Naval Shipbuilding) Bill 2018;
- Export Legislation Amendment (Live-stock) Bill 2018;
- Fair Work Amendment (Making Australia More Equal) Bill 2018;
- Health Insurance (Approved Pathology Specimen Collection Centres) Tax Amendment Bill 2018;
- Health Legislation Amendment (Improved Medicare Compliance and Other Measures) Bill 2018;
- Live Sheep Long Haul Export Prohibition Bill 2018;
- National Consumer Credit Protection (Fees) Amendment (ASIC Fees) Bill 2018;
- Social Services Legislation Amendment (Maintaining Income Thresholds) Bill 2018;
- Space Activities Amendment (Launches and Returns) Bill 2018;
- Superannuation Auditor Registration Imposition Amendment (ASIC Fees) Bill 2018;
- Superannuation Industry (Supervision) Amendment (ASIC Fees) Bill 2018;
- Treasury Laws Amendment (Accelerated Depreciation for Small Business Entities) Bill 2018;
- Treasury Laws Amendment (APRA Governance) Bill 2018;
- Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018;
- Treasury Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2018;
- Treasury Laws Amendment (Personal Income Tax Plan) Bill 2018;

- Treasury Laws Amendment (Tax Integrity and Other Measures No. 2) Bill 2018;
- Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018;
- Veterans' Affairs Legislation Amendment (Veteran-centric Reforms No. 2) Bill 2018; and
- Water Amendment Bill 2018.

Chapter 2

Concluded matters

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

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

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678]

Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules 2007 (No. 1) to allow the AUSTRAC CEO to exempt reporting entities from particular provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* where a requesting officer of an eligible agency reasonably believes that providing a designated service to a customer would assist the investigation of a serious offence
Portfolio	Attorney-General
Authorising legislation	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Right	Fair trial and fair hearing (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the instrument in its *Report 3 of 2018*, and requested a response from the Attorney-General by 11 April 2018.[1]

2.4 A response from the Minister for Law Enforcement and Cyber Security was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 2-5.

Exemptions for reporting entities from compliance with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

2.5 The instrument allows the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to exempt reporting entities from certain obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).

2.6 Section 75.2 of the instrument provides that, if a requesting officer[2] of an eligible agency[3] reasonably believes that providing a designated service to a customer would assist the investigation of a serious offence,[4] the officer may request the AUSTRAC CEO to exempt specified reporting entities from certain obligations under the AML/CTF Act.[5]

2.7 Under the AML/CTF Act, 'designated services' include (among other things) dealings with accounts by financial institutions, the administration of trusts, the supply of goods by way of lease or hire-purchase, and the guarantee of loans.[6] A reporting entity is any person that provides a designated service.[7]

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2 'Requesting officer' is defined under subsection 75.10(2) of the instrument, and means the head of an eligible agency, or a member of an eligible agency who is a Senior Executive Service (SES) employee or equivalent, or who holds the rank of superintendent or higher.

3 'Eligible agency' is defined under subsection 75.10(1) of the instrument, and means the Australian Crime Commission, the Australian Federal Policy, the Immigration Department, the NSW Crime Commission or the police force or service of a State or the Northern Territory.

4 'Serious offence' is defined under subsection 75.10(3) of the instrument, and means an offence against a Commonwealth, State or Territory law, punishable on indictment by imprisonment for 2 or more years, or an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would constitute a serious offence.

5 Section 75.3 provides that the exemption in section 75.2 applies to the following provisions of the AML/CTF Act: section 29 (identity verification for certain pre-commencement customers); section 32 (carrying out the applicable customer identification procedure before the commencement of the provision of a designated service); section 34 (carrying out the applicable customer identification procedure after the commencement of the provision of a designated service); section 35 (verification of identity of customers); section 36 (ongoing customer due diligence); section 82 (compliance with Part A of an anti-money laundering and counter-terrorism financing program); section 136 (false or misleading information); section 137 (producing false or misleading documents); section 138 (false documents); section 139 (providing a designated service using a false customer name or customer anonymity); and section 142 (conducting transactions so as to avoid reporting requirements relating to threshold transactions).

6 AML/CTF Act section 6.

7 AML/CTF Act section 5, definition of 'reporting entity'.

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

2.8 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). Additional guarantees in the determination of a criminal charge include the right to be presumed innocent and the right not to incriminate oneself.[8] The right also encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[9]

2.9 The initial human rights analysis stated that an exemption granted by the AUSTRAC CEO may engage the right to a fair trial in this respect. This was because it was unclear whether exempting reporting entities from compliance with obligations under the AML/CTF Act could permit those entities (on behalf of a law enforcement officer) to encourage or incite an individual to commit a criminal offence, or to provide incriminating information that might later be relied upon in criminal proceedings. That is, it was unclear whether the exemption could allow conduct which rises to the level of entrapment for the purposes of international human rights law which would constitute a limitation on the right to a fair trial.[10]

2.10 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

2.11 The statement of compatibility for the instrument does not identify that the right to a fair trial may be engaged and limited and does not explain whether an exemption granted by the AUSTRAC CEO could be used to incite or encourage the commission of an offence.[11] Accordingly, the statement of compatibility does not provide a substantive assessment of whether any limitation on the right to a fair hearing and a fair trial would be permissible.

2.12 However, in relation to the objective of the measure, the explanatory statement nevertheless states:

> AUSTRAC is aware of instances when law enforcement enquiries with reporting entities about the activities of certain customers have adversely affected the progress of related law enforcement investigations.

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8 International Covenant on Civil and Political Rights (ICCPR) article 14(2)-14(7).

9 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

10 See, *Khudobin v Russia,* ECHR Application No. 59696/00, 26 October 2006; *Baltins v Latvia,* ECHR Application No. 25282/07, 8 January 2013; *Ramanauskas v Lithuania*, ECHR Application No. 74420/01, 5 February 2008, [55].

11 Statement of compatibility (SOC), p. 5.

> The issue for law enforcement arises when reporting entities undertake actions, in line with their obligations under the AML/CTF Act, which have the effect of alerting customers to possible closer scrutiny of their financial transactions. Customers then cease their activities with the reporting entity, thus limiting the ability of law enforcement officers to investigate the financial transactions.
>
> A temporary exemption from certain AML/CTF Act obligations is needed in circumstances where actions taken by reporting entities, in line with these AML/CTF obligations, could undermine invstigations by law enforcment into certain customers of the reporting entities.[12]

2.13 Ensuring the effective investigation of serious offences is likely to constitute a legitimate objective for the purposes of international human rights law.

2.14 However, it was unclear from the information provided whether the measure is rationally connected and proportionate to this objective. For example, in relation to whether the measure is rationally connected, it was unclear how compliance with the specific obligations listed in section 75.3 would operate to undermine an investigation.

2.15 In relation to the proportionality of the measure, it was unclear whether there are adequate and effective safeguards to ensure that reporting entities (on behalf of law enforcement officials or otherwise) are not able to incite or encourage the commission of an offence, or to ensure that evidence obtained by enticement is not relied upon in criminal or civil proceedings.

2.16 Accordingly, the committee requested advice as to whether the measure is compatible with the right to a fair trial and fair hearing including:

- whether an exemption granted by the AUSTRAC CEO could permit law enforcement officers (acting through reporting entities) to incite or encourage the commission of an offence (including whether there are any safeguards in place);
- if the right to a fair trial and fair hearing may be limited by the measure:
  - how the measure is effective to achieve (that is, rationally connected to) its stated objectives; and
  - whether any limitation is a reasonable and proportionate means of achieving the stated objective (including whether there are adequate and effective safeguards in place, such as, to ensure that law enforcement officers are not able to incite or encourage the commission of an offence, or to rely on evidence that has been improperly obtained in criminal proceedings).

12 Explanatory statement (ES), p. 1.

Minister's response

2.17 The minister's response explains the scope of obligations imposed on reporting entities under the AML/CTF Act as including:

- **Identification and verification**. Reporting entities must identify their customers, and verify those customers' identity before providing a designated service.
- **Developing and maintaining an AML/CTF Program**. Reporting entities must have and comply with anti-money laundering and counter-terrorism financing programs (AML/CTF programs), which are designed to identify, mitigate and manage the money laundering or terrorist financing (ML/TF) risks a reporting entity may reasonably face in providing a designated service.
- **Ongoing customer due diligence**. As part of its AML/CTF Program, reporting entities are required to have in place appropriate systems and controls to determine whether additional customer information should be collected and/or verified on an ongoing basis to ensure that the reporting entity holds up-to-date information about its customers. This process is known as 'ongoing customer due diligence' (OCDD). OCDD ensures customers are monitored on an ongoing basis to identify, mitigate and manage any ML/TF risk posed by providing designated services. The decision to apply the OCDD process to a particular customer depends on the customer's level of assessed ML/TF risk.
- **Enhanced customer due diligence**. As part of OCDD, reporting entities are also required to implement a transaction monitoring program and develop an 'enhanced customer due diligence' (ECDD) program. Where a reporting entity determines that the ML/TF or other serious crime risk associated with dealing with a certain customer is high, it is required to implement a range of ECDD measures. These measures may include:
  - **seeking further information from the customer** to clarify or update existing information, obtain further information, or clarify the nature of the customer's ongoing business with the reporting entity;
  - **undertaking more detailed analysis of the customer's information** and beneficial owner information, including, where appropriate, taking reasonable measures to identify the source of wealth and source of funds for the customer and each beneficial owner; and
  - **conducting further analysis and monitoring of the customer's transactions**, including the purpose or nature of specific transactions, and the expected nature and level of transaction behaviour, including future transactions.

2.18 The minister's response further sets out how the application of these obligations may cause challenges in the context of an investigation of a customer for a particular offence:

> An issue arises where, as a result of law enforcement enquiries, a reporting entity forms a suspicion that a customer or their account is involved in or is being used to facilitate ML/TF or other serious crimes. The reporting entity is then obliged to take action in line with its OCDD/ECDD obligations under the AML/CTF Act. These actions may result in the customer being tipped-off to the fact that either they personally or their financial transactions have been flagged as suspicious and are likely under enhanced scrutiny. These customers often decide to cease their activities with the reporting entity, thereby limiting the ability of law enforcement agencies to continue to investigate and follow the financial transactions.
>
> The amendments made by the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4)* (the Amendment Instrument) are intended to address this issue. The Amendment Instrument may provide reporting entities with assurance that they will not be in breach of their obligations under the AML/CTF Act if, after being alerted to the high-risk nature of a customer following law enforcement enquiries and/or at the request of law enforcement agencies, the reporting entities refrain from conducting any additional OCDD/ECDD queries and continue to provide that customer with designated services to avoid 'tipping off' the customer whilst investigation of their financial transactions is ongoing.
>
> The Amendment Instrument also exempts reporting entities from a number of provisions in Part 12—Offences of the AML/CTF Act. The exemption from these provisions addresses a situation where, as a result of law enforcement enquiries, a reporting entity is made aware that a customer is not who they claim to be. If the reporting entity were to continue to provide that person with a designated service, they could potentially be in breach of sections 136 (false or misleading information), 137 (producing false or misleading documents), 138 (false documents), 139 (providing a designated service using a false customer name or customer anonymity).
>
> Reporting entities are also exempted from section 142 of the AML/CTF Act (conducting transactions so as to avoid reporting requirements relating to threshold transactions). This is necessary to ensure that they do not commit an offence when conducting transactions that they have reason to believe, following law enforcement enquiries, are likely to have been deliberately structured to avoid giving rise to a threshold transaction that would otherwise need to have been reported under section 43 of the AML/CTF Act.

2.19 In relation to whether the measures could permit law enforcement officers (acting through reporting entities) to incite or encourage the commission of an offence, the minister's response states:

The Committee's report notes that the right to a fair trial, which is guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), also encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence, citing the European Court of Human Rights (ECHR) cases of *Ramanauskas* v. *Lithuania* and *Teixeira de Castro* v. *Portugal* in support.

In *Ramanauskas*, the ECHR held that 'incitement' occurs where law enforcement officers (whether themselves or through persons acting on their instructions) do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence (that is, to provide evidence and institute a prosecution). In other words, the Court considered whether the offence would have been committed without the authorities' involvement.

In *Teixeira de Castro*, the ECHR held that law enforcement officers had not confined themselves to investigating criminal activity in a passive manner because they had instigated the offence, and there was no evidence to suggest that without their intervention the offence would have been committed. The Court distinguished the officers' actions from those of ordinary undercover agents, who may conceal their identities in order to obtain information and evidence about a crime without actively inciting its author to commit it. In reaching its conclusion, the Court emphasised that the authorities did not appear to have had any good reason to suspect Mr Teixeira de Castro of being a drug dealer: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug trafficking until he was approached by the police. The Court also found that there were no objective suspicions that Mr Teixeira de Castro had been involved in any criminal activity, nor was there any evidence to support the argument that he was predisposed to commit offences.

The principles outlined by the ECHR in *Ramanauskas* and *Teixeira de Castro* accord with the approach taken in Australian jurisdictions in similar cases dealing with 'entrapment'. As noted by the High Court in *Ridgeway v R*, while Australia does not generally recognise entrapment as a defence to a criminal charge, the cases that have been decided "favour the view that relief should only be granted if the accused 'otherwise would not have committed or would have been unlikely to commit [the offence]'".

The purpose of the Amendment Instrument is to allow law enforcement agencies to maintain their visibility over criminal wealth and financial flows through suspect accounts that may otherwise be closed by reporting entities due to perceived ML/TF risks, or abandoned by customers that had been alerted to the fact that their transactions were subject to enhanced scrutiny. The Amendment Instrument makes no provision for, and is not

> capable of in any way authorising or affecting, the use of particular investigatory techniques by law enforcement agencies, nor does it provide any means for law enforcement to exert influence over a customer or incite them to commit an offence, that is not otherwise available to them within the existing confines of the law.
>
> The mechanism provided for by the Amendment Instrument may only be exercised where an investigation into a serious offence *has already commenced*, i.e. where law enforcement already have sound reasons to suspect the persons prior involvement in particular unlawful activities. Further, it requires a requesting officer—of the requisite seniority—to provide a written statement to the AUSTRAC CEO confirming that they reasonably believe that the continued provision of a designated service(s) by a reporting entity would assist with the ongoing investigation of that offence. Accordingly, the relevant law enforcement agency must already have formed the relevant suspicion and commenced an investigation in order to make an application; the exemption mechanism cannot be utilised to establish criminal intent that had previously been absent.
>
> It is also important to note that the Amendment Instrument has no coercive or compulsive effect. The exemption mechanism provides reporting entities with the comfort of regulatory relief in the event that they choose to assist and cooperate with a law enforcement investigation into a serious offence. The Amendment Instrument does not allow law enforcement agencies to compel a reporting entity to continue to provide a designated service to a customer; that will continue to be a decision made by each reporting entity in line with its risk-based AML/CTF systems and controls.

2.20 Accordingly, this information demonstrates that the measures will not enable reporting entities to encourage or incite the commission of an offence. The minister's response also outlined a number of further safeguards in relation to the operation of the measure which may assist to ensure its human rights compatibility including:

> The measures are subject to appropriate safeguards, including requirements for applications to:
>
> - be made by a senior official having reasonable grounds to believe that the exemption would assist in the investigation of a serious offence;
> - include a declaration that the information provided in the application is true, accurate, and complete; and
> - be signed off by the AUSTRAC CEO.
>
> The operation of the exemption is also limited to a defined period of six months, starting on the date specified in the notice of the exemption decision, or until the eligible agency notifies both the AUSTRAC CEO and

the exempted reporting entity or entities that the relevant investigation has ceased—whichever occurs first.

2.21 This means that, given the context of the measure and the existence of relevant safeguards, the measures are likely to be compatible with the right to a fair trial and fair hearing.

Committee response

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

2.23 The committee notes that the measure is likely to be compatible with the right to a fair trial and fair hearing.

Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018

Purpose	Seeks to amend the *Crimes Act 1914* to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
Portfolio	Social Services
Introduced	House of Representatives, 15 February 2018
Rights	Privacy; work; equality and non-discrimination (see **Appendix 2**)
Previous reports	3 & 4 of 2018
Status	Concluded examination

Background

2.24 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Social Services by 11 April 2018.[1] The minister's response to the committee's inquiries was received on 19 April 2018 and discussed in *Report 4 of 2018*.[2]

2.25 The bill passed both houses on 10 May 2018 and received Royal Assent on 22 May 2018.

2.26 The committee requested a further response from the minister by 23 May 2018. The response, received on 23 May, is discussed below and is reproduced in full at **Appendix 3**.

Permitting disclosure of spent, quashed and pardoned convictions in certain circumstances

2.27 The measures in the bill seek to create exceptions to Part VIIC of the *Crimes Act 1914* (Crimes Act) with respect to persons who work, or seek to work, with persons with disability in the National Disability Insurance Scheme (NDIS). The effect of these exceptions would be that the spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability under the NDIS may be disclosed to and by, and taken into account by, Commonwealth, State and Territory agencies for the purposes of assessing the person's suitability as a disability worker.

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 6-11.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 38-46.

Compatibility of the measure with the right to privacy and the right to work

2.28 The initial human rights analysis stated that the measures engage the right to privacy and the right to work.[3] The right to privacy is engaged and limited by enabling the disclosure, and the taking into account, of information relating to a person's spent convictions, quashed convictions and convictions for which the person has been pardoned. The measure may also engage and limit the right to work insofar as individuals may be excluded from employment with the NDIS on the basis of their criminal record.

2.29 The statement of compatibility acknowledged that the measure engages and limits the right to privacy and the right to work. However, the statement also argues that these limitations are permissible as they are reasonable to protect people with disability.[4]

2.30 The initial analysis noted that the stated objective of the bill, namely to protect people with a disability from experiencing harm arising from unsafe support or services under the NDIS, was likely to be a legitimate objective for the purposes of international human rights law. Insofar as including information regarding spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker, the initial analysis also stated that the measure appears to be rationally connected to this objective.

2.31 However, the initial analysis also noted that questions arose as to whether the measures in the bill constituted a proportionate limitation on the right to privacy and right to work. In relation to the proportionality of the measure, the statement of compatibility explains:

> The Bill provides access to a worker's detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker screening assessment proportionate to determining the potential risk of harm to people with a disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening access check as a part of the application process.[5]

2.32 While it was acknowledged that there may be circumstances where it would be appropriate to permit disclosure, or taking into account of, a person's criminal history to properly assess whether a person poses an unacceptable risk of harm, the initial analysis noted that questions arose as to whether the breadth of the measure

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3 For further information as to the content of these rights, see Appendix 2. These rights may be subject to permissible limitations which are provided by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

4 Statement of compatibility (SOC), pp. 11-12.

5 SOC, p. 12.

in this bill is greater than necessary to achieve the stated objectives. This is because the measure appears to permit the disclosure, and the taking into account, of a person's entire criminal record, including minor convictions (for example, shoplifting), regardless of whether those criminal convictions bear any relevance to the person's capacity to perform the job or indicate that the person poses an unacceptable risk. This also raised questions as to whether there would be other, less rights restrictive alternatives available, such as only requiring disclosure of serious offences or offences that are relevant to a person's suitability as a disability worker.

2.33 Additionally, based on the information provided, it was unclear why it is necessary to permit the disclosure and the taking into account of spent and quashed convictions, and wrongful convictions for which the person has been pardoned. In the case of a wrongful conviction, for example, the person may be factually and legally innocent of the offence with which they were charged.

2.34 The initial analysis also noted that it was unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limitation on human rights. In this respect, the statement of compatibility recognises that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector'.[6] The statement of compatibility further states:

> The State and Territory-operated worker screening units will be required to have appropriately skilled staff to assess risks to people with disability, to comply with the principles of natural justice, and to comply with a nationally consistent risk assessment and decision-making framework, including considerations of the circumstances surrounding any offence. The Bill provides the means to gain the necessary information to assess such circumstances.
>
> In this way, the Bill…supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised, by excluding workers whose behavioural history indicates they pose a risk from certain services and supports.[7]

2.35 It was acknowledged in the initial analysis that the bill provides some safeguards in relation to the persons who may disclose criminal history information and take that information into account, and the persons to whom that information may be disclosed. However, the safeguards in the bill do not appear to limit the scope of the criminal history information that may be disclosed or taken into account.

2.36 Accordingly, the committee requested the advice of the minister as to whether the measures were proportionate to achieving the stated objectives of the

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6 SOC, p. 11.

7 SOC, p. 12.

bill (including whether the measures are the least rights restrictive way of achieving the objective and the existence of any safeguards).

Minister's first response

2.37 The minister's first response explained the importance of taking into account a person's entire criminal record when undertaking the NDIS worker screening, noting that it is important 'to ensure that the state and territory worker screening units tasked with making an informed assessment of an individual's suitability to work with people with disability can access and consider a complete picture of that person's criminal history'. In this respect, the minister explained the particular vulnerabilities of disabled persons that necessitate a more extensive criminal history check of potential NDIS workers:

> People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances […] surrounding even minor offences.

2.38 The minister's response further explained why a less rights restrictive approach, such as limiting the types of offences that could be disclosed, was not reasonably available:

> Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.
>
> …
>
> While, as the Committee points out, a person whose conviction is quashed may be factually and legally innocent, there are a range of reasons that a conviction may be quashed or pardoned that might not be so black and white. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the worker screening unit, which is why they need access to such information as proposed in the Bill.

2.39 It was acknowledged that undertaking an accurate risk assessment is important and, as noted in the initial analysis, a detailed criminal history check of individuals would assist in ascertaining whether a person poses a risk. However, it was noted that international human rights jurisprudence has raised concerns that

indiscriminate and open-ended disclosure of criminal record data may be incompatible with human rights where there are not adequate safeguards in place.[8] In this respect, the minister's response set out the safeguards that would be in place in order to ensure that the assessment of risk is undertaken in a proportionate manner:

> Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that would indicate potential future risk to people with disability...
>
> State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:
>
> - the nature, gravity and circumstances of the event and how it […] contributes to a pattern of behaviour that may be relevant to disability-related work;
> - the length of time that has passed since the event occurred;
> - the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
> - the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
> - the person's conduct since the event; and
> - all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

2.40 The minister further emphasised that a person's criminal history 'forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit' and that a conviction for a minor offence, spent or quashed conviction would not necessarily prohibit that person from gaining employment with a provider within the NDIS.

2.41 These safeguards are important in determining whether the limitation on the right to privacy and right to work is proportionate. Notwithstanding the fact that the

8 See, for example, *MM v United Kingdom,* App. No 24029/12, European Court of Human Rights (2012); *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35. See also the decision of Bell J in the Victorian Supreme Court in *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013).

exception to the Crimes Act introduced by the bill creates a broad power to disclose, the safeguards in the worker screening process described in the further information provided by the minister appear to be capable of ensuring that persons with spent, pardoned or quashed criminal convictions that bear no relevance to their suitability as an NDIS worker would not be unduly prevented from being employed by the NDIS.

2.42 However, it was not clear from the information provided by the minister whether the safeguards outlined are matters of departmental policy or matters to be set out in legislation or in delegated legislation in the future. Departmental policies and procedures are less stringent than legislation, as policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny or accountability as when the policies are enshrined in legislation.

2.43 The bill additionally provides that, before regulations can prescribe the persons to whom the criminal convictions may be disclosed, the minister must be satisfied, relevantly, that the person or body complies with applicable laws relating to privacy, human rights and records management, complies with principles of natural justice, and has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with a disability.[9] However, further information from the minister would assist in determining whether the safeguards set out in the minister's response are sufficient for the purposes of international human rights law, including whether the safeguards will be prescribed by legislation or legislative instrument.

2.44 Another relevant factor in determining whether safeguards are sufficient includes whether there is a possibility of monitoring and access to review.[10] It was noted, for example, that Working with Children Check decisions are able to be reviewed by applicants through state and territory administrative appeals tribunals.[11] Further information from the minister as to whether (and, if so, by what mechanism) a decision relating to a person's suitability for employment following worker screening will be able to be reviewed would therefore be of assistance to determine whether the limitation on the right to privacy and right to work is proportionate.

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9 Section 85ZZGL of the bill.

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

11 See Victorian Government Department of Justice and Regulation, *Working with Children Check: Failing the Check*, available at http://www.workingwithchildren.vic.gov.au/home/applications/application+assessment/failing+the+check/; NSW Civil and Administrative Tribunal, *Working with Children Checks,* available at http://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_working-with-children/aeod_working-with-children.aspx .

2.45 The committee therefore sought further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- whether the risk assessment framework outlined in the minister's response will be set out in legislation or a legislative instrument; and
- whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.

Minister's second response

2.46 The minister's second response provides the following further information as to whether there are other, less rights restrictive measures available:

> I note the Committee's Report queries whether there are less rights restrictive alternatives available, including whether only 'serious offences or offences that are relevant to a person's suitability as a disability worker' should be taken into account by worker screening units. In my previous letter to the Committee I noted that even less serious offences such as shoplifting are considered directly relevant to an individual's suitability as offences of this nature are directly relevant to an individual's trustworthiness and integrity. I also note the weight given to such lesser offences will be relevant in any state and territory worker screening unit decisions. My previous letter noted this is particularly relevant when individuals employed within the NDIS will have access to the person with disability's personal belongings, finances and medication.
>
> I reiterate that state and territory worker screening units must be provided with sufficient information in order to effectively and diligently perform their functions and discharge their duties. Limiting the criminal history information available to the worker screening unit will diminish the effectiveness of their risk assessments and would fail to give due regard to the rights of persons with disability to be protected from workers who may pose an unacceptable risk of harm. I also reiterate that the fact that an individual may have a criminal conviction for a minor offence, which occurred a long time ago, only forms one part of the analysis and risk assessment undertaken by a state or territory worker screening unit and will not necessarily prevent that worker from gaining employment with an NDIS provider.

2.47 As to whether the risk assessment framework would be set out in legislation or a legislative instrument, the minister's second response explains that the NDIS worker screening regime is a shared responsibility of Commonwealth, state and territory governments. Relevantly, the Commonwealth is responsible for the broad national policy design and the states and territories are responsible for implementation and operational elements of the regime, including introducing legislation establishing the worker screening units responsible for screening NDIS workers. The response explains that the elements of the policy making up the worker screening regime (including the risk assessment framework) are set out in an

Intergovernmental Agreement (IGA) between the Commonwealth and states and territories. The minister's response explains:

> In relation to the risk assessment framework I referred to in my previous letter to the Committee, the framework is a national policy that will be agreed to by all participating jurisdictions. Consistent with the Council of Australian Government's division of responsibility for NDIS worker screening, states and territories will implement the risk assessment framework in their jurisdiction, including, where necessary, by amending existing legislation or introducing new legislation to give effect to the requirements under the IGA.
>
> I note that before a state or territory worker screening unit can be prescribed for the purpose of performing NDIS worker screening checks, under the Bill the Minister needs to be satisfied that the worker screening unit:
>
> - is required or permitted by or under a Commonwealth law, a state law or a territory law to obtain and deal with information about persons who work, or seek to work, with a person with disability; and
> - complies with applicable Commonwealth law, state law or territory law relating to privacy, human rights and records management; and
> - complies with the principles of natural justice; and
> - has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with disability.
>
> Accordingly, before a state or territory worker screening unit can be prescribed for the purpose of NDIS worker screening each jurisdiction must demonstrate it satisfies each of the above criteria, including importantly, the requirement to comply with the principles of natural justice.

2.48 This further information provided by the minister indicates that, if the risk assessment framework described by the minister in his first response is implemented in the manner set out in the minister's second response, it appears to be a sufficient safeguard for the purposes of international human rights law. This is particularly in light of the requirement in the bill that, in order to prescribe the persons to whom the criminal convictions may be disclosed, the minister is required to be satisfied that the worker screening unit has risk assessment frameworks and appropriately skilled staff. However, noting that the specific safeguards are to be operationalised by the states and territories rather than through federal legislation, much will depend on the implementation of the NDIS worker screening scheme in practice. In this respect, it may be useful for there to be ongoing monitoring so as to ensure it is implemented in a manner compatible with human rights.

2.49 The minister's second response also identifies additional oversight of the operation of the scheme that will occur:

> The Committee may wish to note that during the development of the Bill, my Department consulted with the Office of the Australian Information Commissioner. In addition to Ministerial oversight of the worker screening regime through the process of prescribing state or territory worker screening units, there will also be Parliamentary oversight and scrutiny of the worker screening regime through the Bill's requirement to table two written reports of the operation of the worker screening regime. The first report is to be tabled by 31 December 2019, and the second is to be tabled by 31 December 2022.

2.50 As to whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed, the minister's second response explains:

> As the Committee has noted, under the existing working with children checks regime, states and territories do provide review rights for those individuals who are subject to an adverse finding. The Committee may also like to note that under the IGA, state and territory worker screening units will agree to provide certain review and appeal rights to individual workers who may be subject to an adverse decision. This will enable an individual to seek review of decisions of state or territory worker screening units to:
>
> - issue an exclusion (meaning a person cannot work in certain roles in the NDIS);
> - revoke a clearance;
> - apply an interim bar (or temporary exclusion); and
> - suspend a clearance.
>
> In such cases the rules of natural justice and procedural fairness will apply and where there is an intention to make an adverse decision states and territories, consistent with the IGA, will:
>
> - disclose the reason the adverse decision is proposed, except where the NDIS worker screening unit is required under Commonwealth, state or territory law to refuse to disclose the information;
> - allow the individual a reasonable opportunity to be heard; and
> - consider the individual's response before finalising the decision.

2.51 The availability of review of adverse decisions is an important safeguard for the purposes of international human rights law. If the review mechanisms outlined in the IGA are available at a state and territory level this would support a conclusion that the measure appears to be a proportionate limitation on the right to privacy and right to work.

Committee response

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

2.53 Based on the information provided, the safeguards identified by the minister in his responses appear to be capable of addressing the human rights concerns raised in relation to the disclosure of spent, pardoned and quashed convictions when undertaking NDIS worker screening. On this basis, the measure appears to be compatible with the right to privacy and right to work.

2.54 However, noting that the safeguards are to be implemented by the states and territories rather than through federal legislation, the committee recommends that the implementation of the NDIS worker screening scheme be monitored by the Federal government so as to ensure it is implemented in a manner compatible with human rights.

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

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

2.56 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[12] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[13]

2.57 The United Nations Human Rights Committee has not considered whether having a criminal record is a relevant personal attribute for the purposes of the prohibition on discrimination. However, relevantly, the European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include an obligation not to discriminate on the basis of a criminal record.[14] While this jurisprudence is not binding on Australia, the case law from the Court is useful in considering Australia's obligations under similar provisions in the International

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

13 See e.g. *Althammer v Austria,* Human Rights Committee, 8 August 2003, [10.2].

14 See *Thlimmenos v Greece*, ECHR Application No. 34369/97 (6 April 2000).

Covenant on Civil and Political Rights (ICCPR).[15] Providing that certain persons may disclose, and may take into account, information in relation to a person's criminal history information for the purposes of worker screening for the NDIS is likely to engage the right to equality and non-discrimination. This is because persons may be excluded from employment with the NDIS on the basis of their criminal record.

2.58 Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.[16]

2.59 The statement of compatibility did not recognise that the right to equality and non-discrimination is engaged by the measure, and so did not provide a substantive assessment of whether the measure constitutes a permissible limitation on that right. Accordingly, the committee requested the advice of the minister as to the compatibility of the measure with this right.

Minister's first response

2.60 In relation to whether the differential treatment is rationally connected and proportionate to the legitimate objective of the measure, the minister's first response explained:

> The more comprehensive data collected as part of the NDIS Worker Screening Check reflects that there is a higher degree of risk an individual may pose to person[s] with disability in the course of delivering supports and services. Differential treatment of individuals as a result of considering criminal history as a part of a risk-based worker screening would not constitute unlawful discrimination as there is sufficient research and objective evidence that supports the consideration of this information as a basis for determining risk.
>
> A complete criminal history, leads to a more accurate and reliable risk-based worker screening assessment which benefits both people with disability and the worker being screened. A comprehensive assessment is likely to be fairer to workers and reduce the chance of unjustified discrimination.

15 See also the *Australian Human Rights Commission Act 1986* (Cth) which considers discrimination in employment on the basis of a criminal record as part of Australia's obligations under International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958*,* which prohibits discrimination in employment. See Australian Human Rights Commission*, 'On the Record: Discrimination in Employment on the basis of Criminal Record under the AHRC Act'* (2012).

16 *Althammer v Austria* HRC 998/01, [10.2].

> It should be noted that employers do not get access to any criminal history information under the proposed approach to NDIS Worker Screening. Employers will only have access to worker screening outcomes, once the approved Worker Screening Unit has made a determination.
>
> Finally, I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

2.61 From the information provided, it appeared that the differential treatment is based on reasonable and objective criteria. However, for the same reasons discussed above in relation to the right to privacy and right to work, further information relating to the adequacy of the safeguards was required in order for the committee to complete its analysis as to whether the measure is compatible with the right to equality and non-discrimination.

2.62 Accordingly, the committee sought further information from the minister as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- whether the risk assessment framework outlined in the minister's response will be set out in legislation or legislative instrument; and
- whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.

Minister's second response

2.63 The minister's second response refers to his comments relating to the proposed risk assessment framework and whether the decisions will be reviewed, and provides the following additional information in relation to the right to equality and non-discrimination:

> Any differential treatment as envisaged by the Act is reasonable and proportionate. This is because the legitimate objective of the Bill is to protect persons with disability from harm. I also hold this view because of the various criteria that must be satisfied before a worker screening unit can be prescribed under the legislation, including the safeguards which have been deliberately incorporated within the Bill and the broader NDIS worker screening framework. Furthermore, any differential treatment will not constitute unlawful discrimination on the basis that there is sufficient research and objective evidence that supports the relevance of criminal records as a basis for determining an individual's risk to vulnerable people.
>
> I also note the measures in the Bill are consistent with many of the recommendations that emerged from the Royal Commission Working With Children Checks Report. This Report along with the other findings of the Royal Commission serves to highlight the importance of Commonwealth and state and territory governments working together to ensure that our most vulnerable community members are protected from harm. The measures in this Bill will help ensure that persons with disability within the

NDIS are afforded the same level of protection as is currently provided under the Working With Children Checks regime.

The Bill requires that only a prescribed person or body can receive, use or disclose information for the purpose of worker screening.

2.64 For the reasons discussed above in relation to the right to privacy and right to work, it appears the safeguards in the bill would be sufficient for the purposes of international human rights law if implemented in the manner described by the minister. The information provided by the minister also further supports a conclusion that the differential treatment appears to be based on reasonable and objective criteria. On balance, the measure appears to be compatible with the right to equality and non-discrimination.

Committee response

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

2.66 Based on the information provided, on balance the measure appears to be compatible with the right to equality and non-discrimination. However, noting that the safeguards are to be implemented by the states and territories rather than through federal legislation, the committee recommends that the implementation of the NDIS worker screening scheme be monitored so as to ensure it is implemented in a manner compatible with human rights.

Extradition (El Salvador) Regulations 2017 [F2017L01581]

Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017[F2017L01575]

Purpose	The Extradition (El Salvador) Regulations 2017 seek to declare El Salvador as an 'extradition country' for the purposes of the *Extradition Act 1988*; the Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017 seek to remove reference to India from the list of extradition countries and also seek to amend certain definitions in the Extradition (Physical Protection of Nuclear Material) Regulations 1988 and the Extradition Regulations 1988
Portfolio	Attorney-General
Authorising legislation	*Extradition Act 1988*
Last day to disallow	[F2017L01581]: 15 sitting days after tabling (tabled Senate 7 December 2017) [F2017L01575]: 15 sitting days after tabling (tabled Senate 6 December 2017)
Rights	Prohibition against torture, cruel, inhuman and degrading treatment; life; fair hearing and fair trial; liberty; equality and non-discrimination (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.67 The committee first reported on the regulations in its *Report 3 of 2018*, and requested a response from the Attorney-General by 11 April 2018.[1]

2.68 The Attorney-General's response to the committee's inquiries was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.69 The committee has considered human rights issues raised by extradition regulations and the *Extradition Act 1988* (the Extradition Act) on several previous

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 16-29.

occasions.[2] As the Extradition 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 relevant minister in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The committee has previously stated that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.[3]

Extending the definition of 'extradition country' to include El Salvador

2.70 The Extradition Act provides the legislative basis for extradition in Australia. The Extradition Act allows Australia to receive extradition requests from countries that are declared by regulation to be an 'extradition country'[4] and for powers under that Act to be exercised in relation to such a request.

2.71 The Extradition (El Salvador) Regulations 2017 (the El Salvador regulations) seek to declare El Salvador as an 'extradition country' for the purposes of the Extradition Act. Previously, the extradition relationship between Australia and El Salvador was governed by the *Treaty between the United Kingdom of Great Britain and Ireland and El Salvador for the Mutual Surrender of Fugitive Criminals 1883*, which Australia inherited when it obtained independent status as a constitutional monarchy.

2.72 As the El Salvador regulations expand the operation of the Extradition Act, it is necessary to assess the human rights compatibility of the Extradition Act as a whole when considering these regulations.

2.73 The committee has previously considered that extradition pursuant to the Extradition Act may engage and limit a range of human rights, including the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and

2 See the committee's comments in Parliamentary Joint Committee on Human Rights, *First report of 2013* (6 February 2013) pp. 111-112; see also *Sixth report of 2013* (15 May 2013) p. 149; *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

3 Parliamentary Joint Committee on Human Rights, *Tenth report of 2013* (26 June 2013) p. 56; *Twenty-second report of the 44th Parliament* (13 May 2015) pp. 108-110; *Report 4 of 2017* (9 May 2017) pp. 70-73.

4 'Extradition country' is defined in section 5 of the Extradition Act to mean, relevantly '(a) any country (other than New Zealand) that is declared by the regulations to be an extradition country'.

- right to equality and non-discrimination.[5]

2.74 The statement of compatibility acknowledges that these rights are engaged by the El Salvador regulations.[6]

Compatibility of the measure with the prohibition against torture, cruel, inhuman and degrading treatment

2.75 Australia has obligations under article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) not to extradite a person to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Australia's obligations under article 7 of the International Covenant on Civil and Political Rights (ICCPR) are broader in scope and not only prohibit torture but also prohibit 'cruel, inhuman or degrading treatment or punishment'. The United Nations (UN) Human Rights Committee has held that article 7 prohibits extradition of a person to a place where that person may be in danger of torture or cruel, inhuman or degrading treatment or punishment if extradited.[7]

2.76 The statement of compatibility states that the El Salvador regulations are consistent with a person's rights in respect of the prohibition against torture, cruel, inhuman and degrading treatment.[8] In this respect, the initial human rights analysis noted that section 22(3) of the Extradition Act prohibits the Attorney-General from determining that a person should be surrendered where there are substantial grounds for believing the person would be in danger of being tortured. This is an important safeguard for the purposes of international human rights law. However, there is no equivalent legal requirement in relation to the extradition of persons who may be in danger of cruel, inhuman or degrading treatment or punishment if returned. While there is a general discretion for the Attorney-General not to surrender a person, as stated in previous human rights assessments by the committee, ministerial discretion not to remove a person, rather than a legislative

5 It is noted that it is difficult to assess the compatibility of the Extradition Act for human rights in the absence of a foundational human rights compatibility assessment. Therefore, the rights listed are not intended to be comprehensive and there may be other human rights engaged and limited by the Extradition Act.

6 Statement of Compatibility (SOC) p. 4.

7 UN Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment of Punishment)* (1992) [9]; UN Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [12]. See, also, Committee against Torture, *General Comment No.4 on the implementation of article 3 of the Convention in the context of article 22* (advance unedited edition, 9 February 2018) [26]; *Babar Ahmad & Ors v United Kingdom*, European Court of Human Rights App No.24027/07 et al, 10 April 2012, [175].

8 SOC, p. 7.

obligation, is not of itself a sufficient safeguard for the purposes of international human rights law.[9]

2.77 The committee sought the advice of the Attorney-General as to the adequacy of the safeguards in the El Salvador regulations and Extradition Act in relation to the extradition of persons who may be in danger of being subject to cruel, inhuman or degrading treatment or punishment upon return to the extradition country.

Attorney-General's response

2.78 The Attorney-General's response provides the following general information about the purpose of the extradition regime and of the importance of balancing extradition and human rights obligations:

> Australia takes its human rights obligations very seriously and is committed to implementing them. Australia also has international obligations under bilateral and multilateral treaties to extradite persons in certain circumstances. Australia's extradition regime is an important part of our ability to combat domestic and transnational crimes, including serious offences such as terrorism, murder, drug trafficking and so forth. Many of these crimes impact upon community safety. Both of these sets of obligations are carefully considered when developing extradition arrangements. Human rights obligations are given a high priority and only limited where it is necessary to do so and proportionate to the objectives of ensuring Australia is not a safe haven for alleged criminals seeking to evade justice and ensuring Australia can pursue alleged criminals offshore.

2.79 As to the adequacy of the safeguards in the El Salvador regulations and the Extradition Act, the minister took issue with the view that discretionary safeguards (as opposed to legislative safeguards) would likely be insufficient for the purposes of international human rights law:

> I reiterate that the Government does not accept the Committee's position that in order for Australia's domestic system to be consistent with our human rights obligations there needs to be express statutory provisions implementing the obligation. The Government is committed to ensuring that Australia's domestic extradition regime under the *Extradition Act 1988* (the Extradition Act) operates in a manner that is consistent with Australia's international law obligations, including international human rights law obligations. Under paragraph 22(3)(f) of the Extradition Act, the Attorney-General has a general discretion not to surrender a person. In exercising this discretion, an assessment of Australia's human rights obligations is undertaken on a case by case basis, which covers the matters

9 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013* (June 2013) p. 58.

> identified by the Committee in its report. For these reasons I consider that the general discretion is an appropriate and adequate safeguard.

2.80 However, the concern does not centre on the absence of an express statutory provision implementing a human rights obligation *per se.*[10] Rather, the committee's inquiries relate to whether there are adequate safeguards included in the law so as to ensure compatibility with Australia's obligations under Article 3 of the CAT and Article 7 of the ICCPR not to extradite, deport, expel or otherwise remove a person from territory under its jurisdiction where there are substantial grounds for believing that there is a real risk of the person being subjected to torture or cruel, inhuman and degrading treatment and punishment. In this respect, it is noted that the UN Human Rights Committee has recently expressed concern that Australia's regulations on extradition do not appear to comply fully with the non-refoulement standard under the ICCPR.[11] In this context, discretionary safeguards alone may be insufficient for the purposes of international human rights law.

2.81 In relation to the adequacy of safeguards in the El Salvador regulations and Extradition Act, the Attorney-General's response states that section 22(3)(b) of the Extradition Act gives effect to Australia's obligations under the CAT insofar as it requires the minister to be satisfied that, on surrender, the person will not be subjected to torture of the kind falling within the scope of Article 1 of the CAT. Similarly, the minister's response explains that even where a person has waived extradition, under paragraph 15B(3)(a) of the Extradition Act, the Attorney-General may only surrender the person if the Attorney-General does not have substantial grounds for believing that the person would be in danger of being subjected to torture, if surrendered. As stated in the initial analysis, this is an important safeguard for the purposes of international human rights law.

2.82 As to the absence of any explicit safeguard prohibiting extradition where persons may be subjected to cruel, inhuman or degrading treatment on surrender, the minister's response explains:

> Subsection 22(3) does not require explicit reference to the matters in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) in order to fulfil Australia's obligations under that Covenant. Under paragraph 22(3)(f) of the Extradition Act, the Attorney-General has a

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10 A number of human rights do impose positive duties on States, including requiring states parties to protect the rights by law: see for example, Article 6(1) (Right to Life). The UN Human Rights Committee has stated, for example, that it is 'implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power': UN Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) [8].

11 UN Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia* (1 December 2017) [33].

> broad, general discretion whether to surrender a person to a foreign country. In accordance with the principle of procedural fairness, a person who is the subject of an extradition request may make submissions on any matter he or she wishes the Attorney-General to take into consideration when making a surrender determination. This can include submissions regarding compatibility of the person's surrender with Australia's obligations under Article 7 of the ICCPR. In addition, in the absence of such representations, if the Attorney-General's Department was aware of any issue or situation which might engage Australia's obligations under Article 7 of the ICCPR, the Department would bring this to the Attorney General's attention. For example, the Department's analysis may consider country information, reports prepared by non-government organisations and information provided through the diplomatic network.
>
> As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

2.83 The general discretion for the minister to determine whether to surrender a person under section 22(3)(f) of the Extradition Act may, in its practical application, capture the circumstance of persons who may be subject to cruel, inhuman or degrading treatment or punishment if extradited. However, the committee must assess the compatibility of the regulations and legislation as drafted, including whether there is scope for them to be implemented in ways that may create a risk that a person is extradited even where there are substantial grounds for believing that there is a real risk of cruel, inhuman and degrading treatment and punishment.[12] In this respect, unconstrained discretion is generally insufficient for human rights purposes to ensure that powers are exercised in a manner that is compatible with human rights. That is, it is possible that the Attorney-General may decline to exercise his or her discretion not to surrender someone even though there is a real risk of the person being subject to cruel, inhuman and degrading treatment and punishment. In particular, the UN Human Rights Committee has emphasised the importance of laws using precise criteria and not conferring unfettered discretion on those charged with

12 See Parliamentary Joint Committee on Human Rights, *Report 10 of 2013* (June 2013) p. 59.

their execution,[13] and that a legislative provision in very general terms does not, of itself, provide a satisfactory legal safeguard against arbitrary application.[14]

2.84 In other words, the fewer legal safeguards that are available, the greater the risk of incompatibility with human rights. This is particularly the case for absolute rights, such as those contained in Article 7 of the ICCPR, which cannot be limited by states parties. Therefore, concerns remain regarding the fact that there is no express requirement in the Extradition Act requiring consideration be given to whether a person to be extradited may be subject to cruel, inhuman or degrading treatment or punishment.

Committee response

2.85 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.86 The committee considers that the general discretion in section 22(3)(f) of the Extradition Act for the minister to determine whether to surrender a person is not likely to be sufficient to ensure compatibility with Australia's obligations in article 7 of the ICCPR not to extradite persons who may be subject to cruel, inhuman or degrading treatment or punishment if extradited.

2.87 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

Compatibility of the measure with the right to life

2.88 The right to life imposes an obligation on Australia to protect people from being killed by others or from identified risks. While the ICCPR does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another country. This prohibits Australia from deporting or extraditing a person to a country where that person may face the death penalty.[15]

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13 See UN Human Rights Committee, *General Comment 27: Freedom of Movement (Article 12)* (1999) [13].

14 *Pinkey v Canada,* UN Human Rights Communication No.27/1977 (1981) [34]. The European Court of Human Rights has also found that an interference with an applicant's human rights was not 'prescribed by law' because it was 'arbitrary and was based on legal provisions which allowed unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability'. The court considered that the law must indicate with sufficient clarity the scope of any discretion and the manner of its exercise: *Hasan and Chaush v Bulgaria,* ECHR App No.30985/96 (26 October 2000) [84]- [86]; *Maestri v Italy*, ECHR App No.39748/98 (17 February 2004) [30]-[31].

15 *Judge v Canada* (929/1998), Human Rights Committee, 13 August 2003, [10.4]; *Kwok v Australia* (1442/05) Human Rights Committee, 23 November 2009, [9.4],[9.7];

The Constitution of El Salvador retains the death penalty only for cases provided by military laws during an international state of war.[16]

2.89 The statement of compatibility states that the Extradition Act is 'consistent with the Australian Government's longstanding opposition to the death penalty', citing section 22(3) of the Extradition Act.[17] That section requires the Attorney-General not to surrender a person to a country where the offence is punishable by a penalty of death, unless the country gives an undertaking that the person will not be tried for the offence; if tried, the death penalty will not be imposed; or, if the death penalty is imposed it will not be carried out. Further, if a person waives extradition in relation to one or more extradition offences, the Attorney-General may only determine that the person be surrendered if the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.[18]

2.90 The statement of compatibility also notes that in practice undertakings relating to the death penalty in extradition cases have always been honoured.[19] It also notes that 'given the public nature of extradition, the Australian Government would most likely be aware of a breach of a death penalty undertaking' as Australia monitors Australian citizens who have been extradited through its consular network. Additionally, it states that it is open to the decision-maker to consider ongoing monitoring as a condition of the extradition and it is open to the person subject to the extradition request to challenge the decision.[20]

2.91 These are important safeguards that are relevant to the determination of whether the Extradition Act is compatible with the right to life. However, as noted in the initial human rights analysis, diplomatic assurances and undertakings may be breached, and section 22 of the Extradition Act does not *require* the Attorney-General to refuse extradition if there are substantial grounds to believe the person would be in danger of being subjected to the death penalty notwithstanding an undertaking. It also does not require any monitoring of the treatment of people extradited to ensure that assurances are being complied with.[21] The UN Human Rights Committee has also noted that diplomatic assurances alone may not be

16 See El Salvador's Depository Notification to the Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (8 April 2014) available https://treaties.un.org/doc/Publication/CN/2014/CN.201.2014-Eng.pdf . See also Article 2(2) of the Second Optional Protocol to the International Covenant on Civil and Political Rights.

17 SOC, p. 7.

18 Extradition Act, section 15B(3)(b).

19 SOC, p. 7.

20 SOC, p. 7.

21 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) p. 154.

sufficient to eliminate the risk in circumstances where there is no mechanism for monitoring their enforcement or no means through which the assurances could be effectively implemented.[22]

2.92 The committee therefore sought the advice of the Attorney-General as to the adequacy of the safeguards in place to protect the right to life of persons who may be subject to the death penalty if extradited.

Attorney-General's response

2.93 In relation to the adequacy of safeguards in place to protect the right to life, the Attorney-General's response states:

> There is no discretion in the Extradition Act that would allow a person to be surrendered in the absence of an undertaking from the requesting country that the death penalty will not be imposed.
>
> The assessment of the risk that a person might be subjected to the death penalty occurs well prior to any request for an undertaking which would satisfy paragraph 22(3)(c). An extradition request raising potential death penalty issues is identified by the Attorney-General's Department at the earliest stages of the extradition process. If the Department held any concerns about the bona fides of a death penalty undertaking, the Department would recommend that the Attorney-General did not accept and progress the request. If a death penalty undertaking is requested, it would be requested and provided by a formal Government to Government communication. The Full Federal Court decision in *McCrea v Minister for Justice and Customs* [2005] FCAFC 180 sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.

2.94 It is acknowledged that diplomatic assurances and undertakings are a standard means by which a requesting state provides the assurances which the requested state considers necessary for its consent to extradition.[23] European Court of Human Rights jurisprudence has stated that such assurances carry a presumption of good faith, and it is appropriate to apply that presumption to a requesting state which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with the requested state.[24]

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22 *Alzery v Sweden* (1416/2005) Human Rights Committee, 10 November 2006, [11.5].

23 *Harkins and Edwards v United Kingdom,* European Court of Human Rights App No.9146/07, 17 January 2012, [85].

24 *Harkins and Edwards v United Kingdom,* European Court of Human Rights App No.9146/07, 17 January 2012, [85].

2.95 The Attorney-General's response further states that the department is not aware of any case in which the terms of a diplomatic undertaking issued to Australia in relation to the death penalty have been breached. It also explains that information regarding whether there had been any breaches of undertakings is reported to parliament annually in the Attorney-General's department annual report.[25] Whether there have been any reported breaches of undertakings is also relevant in determining whether such undertakings constitute a sufficient safeguard.[26]

2.96 However, European Court of Human Rights jurisprudence has also emphasised that the existence of assurances does not absolve states from their obligation to consider the practical application of those assurances.[27] As noted in the initial analysis, the UN Human Rights Committee has stated that diplomatic assurances may not be sufficient to eliminate the risk that the death penalty is imposed where there is no mechanism for monitoring the enforcement of assurances or no means through which the assurances could be effectively implemented.[28] Consistent with this, the UN Human Rights Committee has recently stated that such assurances must be 'credible and effective…against the imposition of the death penalty'.[29]

2.97 In relation to monitoring of extradited Australian citizens, the Attorney-General's response explains:

> The Department of Foreign Affairs and Trade (DFAT) is responsible for the provision of consular assistance to Australians encountering difficulties overseas. Where DFAT has been informed that an Australian citizen has been arrested, detained or imprisoned overseas, DFAT will write to the individual to offer consular assistance. On acceptance of the services offered, DFAT will provide details of local lawyers and interpreters, conduct welfare checks and, when necessary, take steps to ensure the

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25 See, for example, Attorney-General's Department, *Annual Report 2016-2017* (29 September 2017) Appendix 4: Extradition and Mutual Assistance, https://www.ag.gov.au/Publications/AnnualReports/16-17/Pages/Part5-Appendixes/appendix-4.aspx.

26 *Rrapo v Albania,* European Court of Human Rights App No. 5855/10, 25 September 2012, [73].

27 *Babar Ahmad & Ors v United Kingdom*, European Court of Human Rights App No.24027/07 et al, Decision on Admissibility, 6 July 2010, [106].

28 *Alzery v Sweden* (1416/2005) Human Rights Committee, 10 November 2006, [11.5].

29 See UN Human Rights Committee, *Draft General Comment on Article 6, on the right to life* (July 2017) [38]. See also, in the context of diplomatic assurances in relation to Article 3 of the CAT, Committee against Torture, *General Comment No.4 on the implementation of article 3 of the Convention in the context of article 22* (advance unedited edition, 9 February 2018) [20]; *HY v Switzerland* (747/2016) Committee against Torture, 7 September 2017, [10.6]-[10.7]; *Othman (Abu Qatada) v United Kingdom,* European Court of Human Rights App No.8139/09, 17 January 2012.

detainee is treated fairly to the extent possible under the laws of the relevant country, given that consular assistance cannot override local laws.

2.98 The response further explains that Australia does not monitor the status of foreign nationals who have been extradited by Australia, as Australia has no consular right of access to non-nationals. The decision to monitor a foreign national is a matter for that person's country of citizenship. The Attorney-General's response explains that this is because attempts to monitor foreign nationals may be seen as infringing on the foreign country's sovereignty and criminal justice processes. However, with the consent of the person, Australia can inform consular authorities of their country of citizenship of their extradition to a third country.

2.99 Based on the information provided by the Attorney-General and in light of the international jurisprudence, requiring prior undertakings that the death penalty would not be imposed or implemented, and monitoring compliance with such undertakings, is likely to be consistent with Australia's obligations under Article 6(1) of the ICCPR.

2.100 However, if an undertaking is received but the Attorney-General or the department remain concerned that a death penalty undertaking would not be honoured, neither section 22(3) of the Extradition Act nor the El Salvador Regulations expressly prohibit the person from being extradited notwithstanding that risk. This can be contrasted with the circumstance where a person waives extradition pursuant to section 15A,[30] where the Attorney-General may only determine a person be surrendered if satisfied that there is no real risk that the death penalty will be carried out upon the person in relation to any offence.[31] In this respect, the Attorney-General's response explains that if the Attorney-General's Department held real concerns that a death penalty undertaking would not be honoured, it would not recommend that the Attorney-General progress the extradition request and, in the event the department or the Attorney-General became aware of a potential breach this would be raised with the country at the highest diplomatic levels. The minister's response also explains that if, notwithstanding the receipt of an undertaking, the Attorney-General considered that a real risk remained that the person would be subject to the death penalty, the Attorney-General could refuse extradition in the exercise of the general discretion under section 22(3)(f) of the Extradition Act.

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30 Under section 15A of the Extradition Act, if a person is on remand after being arrested under an extradition arrest warrant, the person can elect to waive the extradition process, the effect of which is that not all stages of the extradition process will be completed (such as requirements relating to extradition objections): see Attorney-General's Department, 'Fact Sheet 3 – Waiver of Extradition' available at https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Extradition/Documents/Fact-sheet-waiver-of-extradition.pdf.

31 Extradition Act, Section 15B(3)(b).

2.101 The policy to recommend to the Attorney-General that extradition not proceed if there are concerns a person may be subject to the death penalty notwithstanding receipt of an undertaking is also an important safeguard. However, it is noted that this policy requirement is less stringent than the protection of statutory safeguards. This is because such policies can be removed, revoked or amended at any time and are not required as a matter of law. Further, as noted earlier, it is unlikely that the general discretion provision in section 22(3)(f) would constitute a sufficient safeguard. For this reason, the Extradition Act could be strengthened by legislating a requirement that a person not be extradited if, notwithstanding the receipt of an undertaking, there remains a real risk that the death penalty will be carried out upon the person.

Committee response

2.102 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.103 Based on the information provided by the Attorney-General and in light of the international jurisprudence, the committee considers that requiring prior undertakings that the death penalty would not be imposed or implemented, and monitoring compliance with such undertakings, is likely to be compatible with Australia's obligations under Article 6(1) of the ICCPR in most circumstances.

2.104 However, the committee notes that the safeguards in section 22(3) of the Extradition Act could be strengthened by legislating a requirement that a person not be extradited if, notwithstanding the receipt of an undertaking, there remains a real risk that the death penalty will be carried out upon the person.

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

2.105 The right to a fair trial and fair hearing requires that all persons shall be equal before the courts and everyone has the right to a fair and public hearing in the determination of any criminal charge. Article 14 of the ICCPR in turn sets out a series of minimum guarantees in criminal proceedings, such as the right to be tried without undue delay. While an extradition request of itself does not amount to determination of a criminal charge,[32] European human rights jurisprudence has recognised that fair trial rights may be engaged where a person is extradited in circumstances where there is a real risk of a flagrant denial of justice in the country to which the individual is to be extradited.[33] In other words, the right to a fair hearing and fair trial in the European human rights law context includes an obligation

32 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [6.5].

33 See, *Al Nashiri v Poland,* European Court of Human Rights (24 July 2014), [562]-[569]; *Othman (Abu Qatada) v United Kingdom,* European Court of Human Rights (17 January 2012), [252]-[262]; *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, per Lord Steyn at [41]; *Soering v United Kingdom* European Court of Human Rights (7 July 1989) [113].

not to return a person (*non-refoulement)* to a country where they risk a flagrant denial of justice.

2.106 While it is not binding on Australia, the interpretation of the right to a fair trial and fair hearing under the European Convention of Human Rights is instructive.[34] It is also noted that the position in European human rights law jurisprudence is consistent with the United Nations Model Treaty on Extradition, which includes a mandatory ground of refusing extradition '[i]f the person whose extradition is requested…would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14'.[35] The committee has therefore previously noted its concern that the Extradition Act does not provide for the denial of a fair trial or fair hearing as a ground for an extradition objection.[36]

2.107 The statement of compatibility explains that the Australian Government's position is that article 14 of the ICCPR does not contain non-refoulement obligations (that is, obligations not to return a person to their country of origin).[37] The statement of compatibility does, however, provide information as to safeguards in the Extradition Act which would allow a decision-maker to consider matters going to fair hearing and fair trial rights, including the extradition objection precluding extradition if it would result in double jeopardy,[38] and the general discretion to refuse surrender.[39] The statement of compatibility further notes that it is open to decision-makers to request assurances that persons being extradited would receive a fair trial.

2.108 An additional issue in relation to the right to a fair hearing and fair trial is that, under the Extradition Act, the requesting State is not required to produce any

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34 It is acknowledged that in 2007 the UN Working Group on Arbitrary Detention noted the reluctance of states to extend the application of the prohibition of refoulement to articles 9 and 14. However the Working Group continued by stating that 'to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the International Covenant on Civil and Political Rights, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control': see *Report of the Working Group on Arbitrary Detention to the Human Rights Council,* 9 January 2007, UN Doc. A/HRC/4/40, [44]-[49].

35 Model Treaty on Extradition, adopted by General Assembly resolution 45/116 as amended by General Assembly resolution 52/88, available at: https://www.unodc.org/pdf/model_treaty_extradition.pdf.

36 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 154-155; *Tenth Report of 2013* (June 2013) pp. 60-61.

37 SOC, p. 8.

38 Extradition Act section 7(e).

39 SOC, p. 8.

evidence that there is a case to answer before a person is extradited (this is sometimes referred to as the 'no evidence' model).[40] Further, a person who may be subject to extradition is prohibited from adducing any evidence to contradict the allegation that the person has engaged in conduct constituting an extradition offence (and prohibits a magistrate or Judge from receiving such evidence).[41] The provisions which govern an appeal to a higher court in relation to extradition also prohibit a person from adducing such evidence on appeal and prohibit the court from receiving such evidence on review or appeal.[42]

2.109 The absence of any requirement that there be a case to answer before a person is extradited raises questions as to whether there are sufficient safeguards in place to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial. As the Joint Standing Committee on Treaties noted in its review of Australia's extradition laws in 2001, 'the consequences for a person who is facing extradition to a foreign country where the legal system, language and availability of legal assistance may present great difficulties, mean that extradition cannot be treated merely as an administrative step'.[43] The statement of compatibility to the El Salvador regulations does not address the human rights compatibility of the 'no evidence' approach.

2.110 The committee therefore sought the advice of the Attorney-General as to:

- the adequacy of the safeguards in place to prevent the extradition of persons who may, on surrender, suffer a flagrant denial of justice; and
- whether, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, the El Salvador regulations and the Extradition Act are compatible with the right to a fair trial and fair hearing.

Attorney-General's response

Article 14 of the ICCPR and non-refoulement

2.111 In relation to the adequacy of safeguards in place to prevent the extradition of persons who may suffer a flagrant denial of justice in the extradition country, the Attorney-General's response reiterates the government's view that Article 14 of the

40 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77].

41 Section 19(5), Extradition Act.

42 Section 21A(4), Extradition Act.

43 Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001, [3.77]. The Joint Standing Committee also noted at that time that there were persuasive grounds for Australia to consider increasing its evidentiary requirements from the default 'no evidence' model: [3.80].

ICCPR does not contain non-refoulement obligations. It is acknowledged that the UN Human Rights Committee has not yet ruled on whether Article 14 of the ICCPR engages non-refoulement obligations.[44] However, the European human rights jurisprudence coupled with the UN Model extradition treaty provide insight as to the development of international human rights law in this area, and suggest that the trend is to recognise that the right to a fair trial and fair hearing engage non-refoulement obligations where the person faces a real risk of a flagrant denial of justice if extradited. To this extent, this comparative jurisprudence provides useful guidance as to how the UN Human Rights Committee may consider this issue in the future.

2.112 The Attorney-General's response also reiterates that the mandatory ground of refusal relating to double jeopardy and the general discretionary power in section 22(3)(f) of the Extradition Act are relevant safeguards in relation to the right to a fair trial. The response explains:

> This discretionary power provides a sufficient basis to refuse extradition in circumstances where there are legitimate concerns about the person's access to a fair trial. While Australia's non-refoulement obligations under the ICCPR do not extend to Article 14 of the ICCPR, in relevant matters, the Department would put particular claims that a person may not receive a fair trial in light of their circumstances or any other fair trial issues before the Attorney-General as relevant considerations in exercising his or her general discretion. The relevant considerations may include the extent to which an individual would receive minimum procedural guarantees in a criminal trial in the country to which he or she is being returned. Assessment of these claims may include analysis of the person's claims and any representations or undertakings from the requesting country. The assessment may also consider country information, reports prepared by non-government organisations and information provided through the diplomatic network.

2.113 The department's practice of putting particular claims as to fair trial issues before the minister when she or he is deciding an extradition request is an important safeguard. However, apart from double jeopardy, this is not an express requirement or a mandatory ground of refusal. As noted earlier, a general executive discretion to refuse to surrender a person may not be a sufficient safeguard for the purposes of international human rights law.

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44 The question has been raised in several individual complaints to the UN Human Rights Committee; however, the committee has decided these complaints on other bases without ruling on the question: see, for example, *ARJ v Australia* (692/1996), UN Human Rights Committee, 28 July 1997, [6.15]; *Kwok v Australia* (1442/2005), UN Human Rights Committee, 23 October 2009, [9.8]; *Alzery v Sweden* (1416/2005) Human Rights Committee, 10 November 2006, [11.9].

2.114 The Attorney-General's response further states that expressly including fair trial as a ground for refusal may generate litigation about issues which are essentially attributable to differences between the bases of common law and civil legal systems. The response also states that allowing individuals to challenge extradition on this basis would be incompatible with the international principle of comity.

2.115 In this respect, the High Court of Justice of England and Wales stated in the context of the right to a fair trial under the ECHR, the test of whether there is a 'real risk of a given Respondent suffering a flagrant denial of a fair trial' if extradited required consideration of the following:

> Lord Carswell in *Ullah* reminds us that Member States cannot export the standards and obligations to other States not signatories. On the contrary, Member States have international obligations, in this context most often derived from extradition treaties, in this instance from the MoUs [Memorandum of Understanding].
>
> The burden of raising such an objection to extradition lies on the Requested Person, although if an objection of substance is raised, it is for the Requesting State to counter the objection. The standard of proof is probability. It is a projection of risk: the burden on the RP [Requested Person] is to show, to the standard of probability, that a real risk of the specified kind arises. As the criticism of DJ Evans in *Brown* (paragraph 34) makes clear, the height of the bar is not derived from the standard of proof, or the establishment of "real risk", as opposed to straight probability: the "high test" lies in the degree of denial of fair trial if the risk eventuates.
>
> The rarity of cases where extradition has been rendered unlawful by reference to Article 6 [right to a fair trial] does not, of course, amount to any kind of presumption against such a bar, much less a rule of law. It does serve to emphasise how significant must be the denial of justice in question, before an effective bar is raised.
>
> The speech of Lord Phillips in *RB (Algeria)* (paragraph 133) is a useful guide. The consideration of the risk of denial of justice must go beyond the procedural. Article 6 is a procedural right. The Court should be giving consideration to the outcome of a breach, if it eventuates.[45]

2.116 This reasoning indicates that in jurisdictions where fair trial rights do give rise to non-refoulement obligations, the test of 'flagrant denial of justice' is a stringent one.[46] Therefore, the potential for litigation based on fair trial standards should not, of itself, preclude fair trial guarantees from being expressly considered as grounds of refusal under the Extradition Act. This stringent standard and the requirement that 'Member States cannot export the standards and obligations' under international

45 *Government of Rwanda v Emmanuel Nteziryayo* [2017] EWHC 1912 (Admin) at [91]-[95].

46 See *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [24] (Lord Bingham).

human rights treaties to non-party states[47] also accommodate concerns of international comity. Noting the developments in European human rights jurisprudence in this area and the UN Model Extradition Treaty, the Extradition Act would benefit from a comprehensive review by the relevant minister to assess its provisions against Australia's obligations under international human rights law.

Right to a fair trial and the 'no evidence' model

2.117 As to whether, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, the El Salvador regulations and the Extradition Act are compatible with the right to a fair trial and fair hearing, the Attorney-General's response states:

> Extradition is an administrative legal process whereby a person may be transferred from one country to another to face prosecution or to serve a prison sentence for offences against the law of the other country. The extradition process in Australia does not involve an assessment of guilt or innocence; it is not a criminal trial.
>
> The purpose of an extradition hearing is to determine whether a person should be extradited; it is not to test evidence in the case against them. It is important that a person faces prosecution or serves a sentence in the country in which he or she has been accused or sentenced. The 'no evidence' standard has been Australia's preferred approach since 1988 and all of Australia's modern extradition treaties have been negotiated on this basis.
>
> The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the offence and the applicable penalty, and a statement setting out the conduct alleged against the person in respect of each offence for which extradition is sought, but it does not require evidence to be produced which is sufficient to prove each element of each alleged offence under the laws of the requested country (such as 'prima facie' evidence including witness statements and affidavits). Given it is not the purpose of an extradition hearing to test the evidence, it is appropriate that the person sought to be extradited does not produce evidence about the alleged offence.
>
> The 'no evidence' standard is in line with the international trend toward simplifying the extradition process and is consistent with the United Nations Model Treaty on Extradition. It has allowed Australia to enter into extradition relations with many civil law countries that would otherwise have been unable to conduct extradition with Australia. A return by Australia to a prima facie evidentiary standard would cause considerable

47 *Government of Rwanda v Emmanuel Nteziryayo* [2017] EWHC 1912 (Admin) at [91].

> disruption to our existing extradition relationships, and would be very counterproductive in terms of international law enforcement cooperation.

2.118 It is acknowledged that there are different approaches in different jurisdictions to this issue.[48] While the Attorney-General notes the trend toward simplifying the extradition process, there are some jurisdictions where, having regard to principles of fundamental justice, there is a requirement for some weighing of evidence before deciding whether to extradite a person. Canadian courts, for example, have held the principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition receive a meaningful judicial determination of whether the case for extradition has been established.[49] This requires some minimal weighing of evidence to prevent a person from being deprived of their liberty in circumstances where there is no evidentiary basis to do so.[50] Where the evidence is so defective or appears so unreliable that a judge concludes it would be dangerous or unsafe to convict, the case would be considered insufficient for committal for extradition.[51]

2.119 The Attorney-General's response otherwise does not substantively address the committee's inquiry as to whether the 'no evidence' model is compatible with the right to a fair hearing and fair trial. Accordingly, it is not possible to conclude whether the 'no evidence' approach is compatible with the right to a fair trial and fair hearing.

Committee response

2.120 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.121 Based on the information provided, it is not possible to conclude whether the measures in the Extradition Act discussed in the preceding analysis are compatible with the right to a fair trial and fair hearing.

2.122 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

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48 See generally, Joint Standing Committee on Treaties, Report 40, *Extradition – a review of Australia's law and policy,* August 2001. See also, for example, *United States of America v Ferras; United States of America v Latty* [2006] 2 S.C.R. 77, [42]; *M.M. v United States of America* [2015] 3 S.C.R. 973 [40], [71].

49 *United States of America v Ferras; United States of America v Latty* [2006] 2 S.C.R. 77, [24]-[25].

50 *United States of America v Ferras; United States of America v Latty* [2006] 2 S.C.R. 77, [42].

51 *M.M. v United States of America* [2015] 3 S.C.R. 973 [40], [71]; citing *United States of America v Ferras; United States of America v Latty* [2006] 2 S.C.R. 77, [40], [47]-[49], [54].

Compatibility of the measure with the right to liberty

2.123 The right to liberty is a procedural guarantee requiring that persons not be arbitrarily and unlawfully deprived of liberty. This requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. Imposing a rule that bail must be refused except in special circumstances, as occurs in the Extradition Act,[52] appears to limit this right. This concern is heightened by the potentially lengthy period in which a person may be detained during extradition proceedings.[53] It was noted that this is of particular concern in the context of the El Salvador regulations, which increase the period in which a person must be brought before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days[54] to 60 days.[55]

2.124 As such, the limitation on the right to liberty must be shown to seek to achieve a legitimate objective, have a rational connection to that objective and be proportionate. The statement of compatibility notes that a presumption against bail is appropriate 'given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of the alleged offenders to face justice in the requesting country'.[56] However, as the committee has previously stated, while preventing people who may be a flight risk from avoiding the extradition process may be capable of being a legitimate objective, it is not clear that a blanket prohibition on bail except in special circumstances is a proportionate response.[57]

2.125 In *Griffiths v Australia,* the UN Human Rights Committee found that Australia had breached article 9(1) of the ICCPR on the basis that the complainant's continuing

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52 See sections 15(6), 18(3), 19(9A), 21(2B), 21(6)(f)(iv), 32(3), 35(6)(g)(iv), 49C(3).

53 This is particularly the case in light of the proposed amendments to the Extradition Act in Schedule 3 of the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016. Those amendments would provide that where a person has been released on bail and a temporary surrender warrant for the extradition of the person has been issued, the magistrate, judge or relevant court *must* order that the person be committed to prison to await surrender under the warrant. The committee has previously concluded in relation to this proposed amendment that there was a risk the measure is not a proportionate limitation on the right to liberty, as the measure may not be the least rights restrictive measure in each individual case in circumstances where it obliges a court to commit a person awaiting transfer to prison regardless of their individual risk: see Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p. 98. The bill passed both houses on 10 May 2018.

54 This is the default period provided by section 17(2)(a) of the Extradition Act.

55 Section 6 of the El Salvador Regulations.

56 SOC, p. 9.

57 Parliamentary Joint Committee on Human Rights, *Sixth report of 2013* (15 May 2013) 156-157; *Report 4 of 2017* (9 May 2017) pp. 95-97.

detention pending extradition without adequate individual justification was arbitrary.[58] It reiterated that in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the State party could provide appropriate justification.[59] It also concluded that there may be less rights-restrictive measures to achieve the same ends, such as the imposition of reporting obligations, sureties or other conditions which would take account of individual circumstances.[60]

2.126 The UN Human Rights Committee also found Australia in violation of article 9(4) of the ICCPR in circumstances where the complainant was 'effectively precluded, by virtue of the State party's law and practice, from taking effective proceedings before a court in order to obtain a review of the lawfulness of his continuing detention, as the courts had no power to review whether his detention continued to be lawful after a lapse of time and to order his release on this basis'.[61] The Australian government responded to this ruling by noting (relevantly) that it was open to the complainant to apply for bail, citing the power of the Court under section 21(6) of the Extradition Act to order release on bail if there were 'special circumstances' justifying that release, and also pointed to the availability of the writ of mandamus in the High Court of Australia and judicial review under the *Judiciary Act 1903*.[62] However, the initial human rights analysis stated that it is not clear that the requirement of a court considering whether 'special circumstances' exist would be sufficient consideration of whether a person's detention may be compatible with article 9. It was also not clear how such matters would be able to be raised through judicial review. Therefore, the previous analysis noted that questions arise as to whether the current framework for review of detention in the Extradition Act, as expanded by the El Salvador regulations, provides sufficient opportunity for persons to challenge the lawfulness of their continuing detention for the purposes of international human rights law.

2.127 Further, extradition invariably results in the detention of a person pending extradition and may also involve lengthy detention in a foreign country while awaiting trial. This potentially lengthy detention of persons without first testing the evidence against them raises additional concerns that the 'no evidence' model

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58 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.3].

59 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2]; see also, *C v Australia* (90/1999), UN Human Rights Committee, 28 October 2002, [8.2].

60 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.2].

61 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.5].

62 See 'Griffiths v Australia (1973/2010) – Australian Government response' available at Attorney-General's Department 'Human Rights Communications' website at https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx.

discussed above may give rise to a circumstance where a person may be arbitrarily detained. This matter was not addressed in the statement of compatibility.

2.128 The committee sought the advice of the Attorney-General as to:

- whether a presumption against bail except in special circumstances is a proportionate limitation on the right to liberty;
- whether, having regard to *Griffiths v Australia,* the El Salvador regulations and the Extradition Act provide an opportunity for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR;
- whether detaining persons during the extradition process without first testing the evidence against the person is compatible with the right to liberty; and
- whether section 6 of the El Salvador regulations, which increases the period in which a person must be brought before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days to 60 days, is a proportionate limitation on the right to liberty.

Attorney-General's response

Presumption against bail

2.129 In response to whether a presumption against bail except in special circumstances is a proportionate limitation on the right to liberty, the Attorney-General's response states:

> It is accepted international practice for a person to be held in administrative detention pending extradition proceedings. The remand of the person is not undertaken as a form of punishment and in no way relates to guilt or innocence of any offence. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljkovic v Commonwealth [2006] HCA 40*.
>
> The presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice. Unfortunately, reporting and other bail conditions are not sufficient to prevent individuals who wish to evade extradition from absconding. In extradition cases there is an increased risk of persons absconding before they can be surrendered to the requesting foreign country. If a person who has been remanded on bail absconds during extradition proceedings, it jeopardises Australia's ability to extradite the person which in turn would impede Australia's treaty obligations to return a person to the requesting country. Ultimately, it can also lead to a state of impunity where a person can disappear and continue to evade law enforcement authorities.

> The High Court in *United Mexican States v Cabal [2001] HCA 60* observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community. Bail can be granted where special circumstances exist. The courts have shown their willingness to grant bail when these special circumstances arise.
>
> For these reasons the Government considers the current presumption that bail should only be granted in 'special circumstances' is appropriate, given the significant flight risk posed by people subject to extradition proceedings, and should be maintained. It is a reasonable and proportionate limitation on the right to liberty, necessary to achieve the legitimate objective of securing the return of alleged offenders to face justice, noting that extradition offences are serious offences, including terrorism, murder and transnational organised crimes.

2.130 Where a person poses a flight risk, refusing the grant of bail may be a proportionate limitation on the right to liberty.[63] It is also acknowledged that the extradition offences are usually serious offences. However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there are special circumstances, a person will be detained pending extradition. In this respect, the High Court of Australia has held that to constitute 'special circumstances', the matters relied upon 'need to be extraordinary and not factors applicable to all defendants facing extradition',[64] and the general rule in extradition cases is that defendants are to be held in custody whether or not their detention is necessary.[65] This is therefore a high threshold for a defendant to satisfy.[66]

2.131 As noted in the initial analysis, international human rights law requires adequate individual justification for a person's continued detention pending extradition in order to avoid a characterisation of arbitrariness.[67] To comply with article 9 of the ICCPR, states parties to the ICCPR must show the individual poses such a threat that it cannot be addressed by alternative measures, and that burden

63 See, in the context of the right to release pending trial, the findings of the UN Human Rights Committee that pre-trial detention should remain the exception and bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from jurisdiction: UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

64 *United Mexican States v Cabal* [2001] HCA 60, [61].

65 *United Mexican States v Cabal* [2001] HCA 60, [72].

66 See *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [4.6].

67 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.3].

increases with the length of detention.[68] Concerns remain, therefore, that the presumption against bail and the high threshold for establishing 'special circumstances' creates a risk that persons may be deprived of their liberty in circumstances that may be incompatible with article 9 of the ICCPR.

Access to review the lawfulness of detention pending extradition

2.132 As to whether, having regard to *Griffiths v Australia,* the El Salvador regulations and the Extradition Act provide an opportunity for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR, the Attorney-General's response firstly notes that following amendments to the Extradition Act in 2012, a person may make an application for bail at each stage of the extradition process and the court may grant bail if there are special circumstances. (In contrast, at the time *Griffiths v Australia* was decided, a person could only make bail applications in the early stages of extradition proceedings). The Attorney-General's response also identifies other avenues of review, such as the right of review under section 39B of the *Judiciary Act 1903,* a writ of mandamus in the High Court and a habeas corpus application. The response also reiterates that extradition is an administrative legal process that would not be appropriate for the testing of evidence by Australian courts, and therefore that the 'no evidence' model is also compatible with the right to liberty.

2.133 However, while there are increased opportunities to apply for bail since the *Griffiths v Australia* case was decided, the high threshold of establishing 'special circumstances' remains the same. As a result, it is not clear that further opportunities to apply for bail would necessarily meet the requirement that review of detention, in its effects, be 'real and not merely formal'.[69] Further, the avenues of judicial review identified by the Attorney-General were also available at the time *Griffiths v Australia* was decided.[70] These avenues notwithstanding, the UN Human Rights Committee concluded that the complainant was 'effectively precluded, by virtue of the State party's law and practice, from taking effective proceedings before a court in order to obtain a review of the lawfulness of his continuing detention, as the courts had no power to review whether his detention continued to be lawful after a lapse of time and to order his release on this basis'.[71] Concerns therefore remain that there is a risk that a person detained pending extradition may be deprived of their liberty in circumstances contrary to article 9(4) of the ICCPR.

The 60 day period before a person is brought before a magistrate

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68 UN Human Rights Committee, *General Comment No.35: Article 9 (Liberty and security of person)* (2014).

69 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.5].

70 These avenues were also relied upon by the Australian government in *Griffiths v Australia:* see *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [4.6].

71 *Griffiths v Australia* (193/2010), UN Human Rights Committee, 21 October 2014, [7.5].

2.134 In response to whether section 6 of the El Salvador regulations is a proportionate limitation on the right to liberty, the response states:

> The 60 day period is common to Australia's recent extradition practice, and has been included for a broad range of countries, including for example, the US, Canada, Mexico, Brazil, Croatia and others. This time period takes into account the time required to comply with the requirements of the Extradition Act, namely the complexities of securing the delivery of original documents and translations thereof in the correct form from foreign countries via the diplomatic channel, and the formal acceptance of the request by the Attorney-General. During this 60 day period the person can make an application for bail under section 15 of the Extradition Act, which provides that a person who is arrested under an extradition arrest warrant must be brought as soon as practicable before a magistrate or eligible Federal Circuit Court Judge in the State or Territory in which the person is arrested, and the person may be remanded on bail where there are special circumstances. As noted above, the extradition framework has been designed to be proportionate to the legitimate aim of securing the return of alleged offenders to face justice, noting that extradition offences are serious offences, including terrorism, murder and transnational organised crimes.

2.135 The information from the minister as to the 60 day period is useful in assessing the proportionality of the limitation on the right to liberty. However, for the reasons discussed above, the presumption against bail that applies to persons subject to extradition (including under section 15 of the Extradition Act) creates a risk that such detention may not be compatible with article 9 of the ICCPR.

Committee response

2.136 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.137 The committee considers that the presumption against bail and limited opportunities for persons to review the lawfulness (as a matter of international human rights law) of their detention pending extradition in the El Salvador Regulations and the Extradition Act creates a risk that persons may be deprived of their liberty in circumstances that may be incompatible with article 9 of the ICCPR.

2.138 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

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

2.139 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. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social

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

2.140 As noted in the statement of compatibility, section 7 of the Extradition Act promotes this right to the extent that it sets out grounds on which a person might raise an objection to extradition, including grounds to object where:

- surrender is sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions; or
- the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions.[72]

2.141 While these are important safeguards, it does not cover all of the grounds that are considered 'prohibited grounds' of discrimination in the international human rights conventions to which Australia is a party, including discrimination on the basis of disability, language, opinions (other than political opinions), social origin or marital status. The statement of compatibility notes that the person subject to extradition 'has an opportunity to make representations to the decision-maker regarding all of the protected attributes in article 26 of the ICCPR',[73] however no information is provided in the statement of compatibility as to how such matters would be taken into account. There does not appear to be any legal requirement for a decision-maker to refuse to surrender a person where they may be subject to discrimination on a prohibited ground that is not included in section 7 of the Extradition Act.

2.142 The committee sought the advice of the Attorney-General as to the compatibility of the El Salvador regulations and the Extradition Act with the right to equality and non-discrimination. In particular, the committee sought information as to the safeguards in place to ensure:

- a person is not extradited where their surrender is sought for the purpose of prosecuting or punishing the person on account of her or his personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act; and
- a person is not extradited where they may be prejudiced at her or his trial, or punished, detained or restricted in her or his personal liberty, by reason of a personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act.

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72 SOC, p. 9.

73 SOC, p. 9.

Attorney-General's response

2.143 In relation to these matters, the Attorney-General's response provides the following information:

> The Extradition Act includes grounds for refusing surrender if the person may be prejudiced by reason of his or her race, religion, nationality, political opinions, sex or sexual orientation, or where extradition is sought for the purpose of prosecuting or punishing the person on account of any of these factors. This provides a broad basis to refuse extradition where there may be adverse impacts because the person may be discriminated against. The Attorney-General's broad discretion in paragraph 22(3)(f) of the Extradition Act to refuse surrender provides a sufficient basis to refuse extradition in circumstances where there are other concerns about discrimination against a person.
>
> As the Committee points out in its report, the grounds in Article 26 of the ICCPR that are not contained in the Extradition Act are language, colour, national or social origin, birth (although nationality and race are covered), property, other opinion, or other status. Any concerns relating to these additional grounds are more appropriately considered as part of the Attorney-General's general discretion to refuse to extradite a person. Including further grounds would significantly widen the scope for appeals of extradition decisions. For example, 'other status' has no definite meaning and the inclusion of this ground as an extradition objection under the Extradition Act would make the list of discrimination grounds non-exhaustive. This would likely generate significant litigation.
>
> As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

2.144 In relation to the Attorney-General's statement that the general discretion is an appropriate and adequate safeguard, for the reasons discussed earlier at [2.83], a general legislative safeguard may not be sufficient for the purposes of international human rights law.

2.145 While the Attorney-General's response states that the additional grounds for discrimination listed in the ICCPR would be more appropriately considered as part of the Attorney-General's general discretion, the basis for including some categories and not others in section 7 of the Extradition Act remains unclear. For example, while the Attorney-General notes that 'other status' discrimination has no definite meaning, there are other prohibited grounds of discrimination not listed as grounds for an extradition objection which have a definite meaning under international human rights law, such as national or social origin, property and birth.[74] Further,

74 See , UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) p. 7.

while the ground of 'other status' discrimination is not exhaustive,[75] there are several groups within that category that are recognised and defined as a matter of international human rights law, including age, nationality, and disability.[76] There are also attributes that fall within the 'other status' category under international human rights law but which are explicitly listed as grounds for an extradition objection in the Extradition Act, such as sexual orientation.[77] It is also not clear why the potential for litigation is of itself a justification for including only a partial number of grounds for extradition objections based on discrimination, when a larger number of prohibited grounds are protected under international human rights law.

Committee response

2.146 The committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.147 Based on the information provided, it is not possible to conclude whether failing to include some of the prohibited grounds of discrimination in article 26 of the ICCPR as bases for an extradition objection is compatible with the right to equality and non-discrimination.

2.148 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

Removing India from the list of extradition countries in the Extradition (Commonwealth Countries) Regulations 2010

2.149 Item 1 of the Extradition Legislation Amendment (2017 Measure No. 1) Regulations (Extradition Amendment Regulations) seeks to remove India from the list of extradition countries in Schedule 1 in the Extradition (Commonwealth Countries) Regulations 2010 (the Commonwealth Countries Regulations). This is because extradition requests between Australia and India are now governed under the Extradition (India) Regulations 2010 (the India Regulations) and the Extradition Act, so the reference to India in the Commonwealth Countries Regulations is no longer required.

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75 UN Committee on Economic, Social and Cultural Rights *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) 7.

76 UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) 7-9; UN Committee on Economic, Social and Cultural Rights, *General Comment No.5: Persons with Disabilities* (1994). Australia also has obligations not to discriminate on the basis of disability under Article 5 of the Convention on the Rights of Persons with Disabilities.

77 UN Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (2009) 9.

Compatibility of the measure with multiple rights

2.150 The human rights analysis discussed earlier in relation to the El Salvador regulations applies equally to the Extradition Amendment Regulations. However, it was noted that there are several additional safeguards included in the India regulations that are not present in the El Salvador regulations and which modify the operation of the Extradition Act, including:

- article 4(3)(d) of the bilateral extradition treaty with India implemented domestically through the India Regulations (the India Extradition Treaty) allows a request for extradition to be refused if surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, including because of the person's age or state of health; and
- if Australia receives a request under the India Extradition Treaty, then supporting documentation to establish that the person sought has committed the offence must be provided.[78] This is a departure from the 'no evidence' standard discussed above in relation to the El Salvador regulations.

2.151 However, it was also noted that the Commonwealth Countries Regulations, which will no longer apply to India as a result of the Extradition Amendment Regulations, would have provided greater safeguards to protect human rights, including:

- the standard of evidence required to support an extradition request under the Commonwealth Countries Regulations is that of a 'prima facie' case,[79] which provides a greater level of scrutiny than the 'no evidence' standard under the Extradition Act; and
- a requirement that the person must not be surrendered if the Attorney-General is satisfied that it would be 'unjust, oppressive or too severe a punishment' to surrender the person, such as where the offence is trivial or where the accusation against the person was not made in good faith or in the interests of justice.[80]

2.152 These safeguards in the Commonwealth Countries Regulations are relevant to the determination of whether the human rights engaged and limited by the Extradition Act are proportionate. In particular, the presence of the 'prima facie' evidence test in the Commonwealth Countries Regulations would address some of the concerns discussed earlier concerning the default 'no evidence' standard in the Extradition Act in relation to the right to a fair trial and fair hearing and the right to

78 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, p. [6].

79 See section 8 of the Extradition (Commonwealth Countries) Regulations 2010.

80 See section 9 of the Extradition (Commonwealth Countries) Regulations 2010.

liberty. Similarly, the requirement that a person must not be extradited if it would be 'unjust, oppressive or too severe a punishment' may assist in determining whether the measure is compatible with the right to a fair trial and fair hearing. By removing India from the scope of the Commonwealth Countries Regulations, these safeguards are no longer available.

2.153 The committee sought the advice of the Attorney-General as to the compatibility of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights, having regard to the matters discussed above in relation to the El Salvador Regulations, in particular the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.

2.154 The committee sought the advice of the Attorney-General as to whether removing India from the list of 'extradition countries' in the Extradition (Commonwealth Countries) Regulations 2010 is a proportionate limitation on human rights, having regard to the safeguards in that regulation that are not present in the Extradition Act or the Extradition (India) Regulations 2010.

Attorney-General's response

2.155 In relation to the committee's inquiries set out above, the Attorney-General refers to his comments in relation to the El Salvador regulations and further states:

> Evidence standard
>
> The Committee identified the change from the 'prima facie' standard to the 'no evidence' standard in relation to the material required to support extradition. The 'no evidence' standard was addressed above in relation to the Extradition (El Salvador) Regulations 2017.
>
> Ground for refusal
>
> The Committee identified that the express ground for refusal in the Extradition (Commonwealth Countries) Regulations 2010 regarding 'unjust, oppressive or too severe a punishment' is not expressly contained In the Extradition (India) Regulations 2010. These matters are covered by the general discretion to refuse surrender under paragraph 22(3)(f) of the Extradition Act.
>
> The general discretion also provides a basis to refuse extradition in circumstances where there are concerns about the person's access to a fair trial. These matters are addressed above in relation to the Extradition (El Salvador) Regulations 2017.

> As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

2.156 For the reasons discussed earlier in relation to the El Salvador regulations, it is not possible to conclude whether the 'no evidence' standard in the Extradition Act is compatible with the right to a fair trial and fair hearing. It is also not clear from the information provided whether the requirement pursuant to the India Extradition Treaty that supporting documentation to establish that the person sought has committed the offence must be provided provides a different level of protection for persons being extradited than the 'no evidence' standard in the Extradition Act. However, the different approaches of requiring supporting documentation to establish that the person sought has committed the offence in the India Extradition Treaty and the 'prima facie' case requirement in the Commonwealth Countries Regulations supports the view that there are different approaches to this issue, and that the provisions of the Extradition Act would benefit from a comprehensive review for compatibility with international human rights law.

2.157 In relation to the Attorney-General's response that the general discretion in section 22(3)(f) would cover circumstances where it would be 'unjust, oppressive or too severe a punishment' to extradite a person, for the reasons discussed above, a general legislative discretion may not be a sufficient safeguard for the purposes of international human rights law.

Committee response

2.158 Noting the human rights concerns raised in the preceding analysis, the committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.159 Based on the information provided, it is not possible to conclude whether removing India from the list of extradition countries in Schedule 1 in the Extradition (Commonwealth Countries) Regulations 2010 is compatible with human rights.

2.160 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

Amendments to reflect changes made to the Convention on the Physical Protection of Nuclear Material 1979

2.161 Items 2, 3 and 4 of the Extradition Amendment Regulations also seek to amend the Extradition (Physical Protection of Nuclear Materials) Regulations 1988 (the Nuclear Materials Regulations) and the Extradition Regulations 1988 to reflect amendments made to the Convention on the Physical Protection of Nuclear Material (the Nuclear Material Convention). That convention relevantly requires states parties to provide extradition and mutual assistance to facilitate the enforcement of a series of offences relating to the protection, storage and transportation of nuclear material.

Amendments to that convention were made by the Amendment to the Convention on the Physical Protection of Nuclear Material (the Amended Nuclear Material Convention), which expands the list of offences for which signatories may request a person's extradition. The Amended Nuclear Material Convention also requires signatories not to regard offences committed under that convention as a 'political offence' when considering a request for extradition or mutual assistance.[81] As a consequence, a request for extradition or for mutual legal assistance based on an offence under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) cannot be refused on the ground that it is a political offence.

Compatibility of the measure with multiple rights

2.162 The effect of the amendments introduced relating to the Amended Nuclear Material Convention in the Extradition Amendment Regulations is to expand the operation of the Extradition Act to include a broader range of offences, and to remove offences under the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) from the scope of the 'political offence' extradition objection. As a consequence, the human rights analysis discussed above in relation to the El Salvador regulations applies equally to these amendments.

2.163 As noted in the statement of compatibility, there are some safeguards contained in the Nuclear Material Convention (as amended by the Amended Nuclear Material Convention) that are incorporated into Australian law through the Nuclear Materials Regulations that may assist in determining the proportionality of the limitations on human rights, including:

- article 11B of the Amended Nuclear Material Convention provides that nothing in the convention shall be interpreted as an obligation to extradite where the extraditing state has substantial grounds for believing that the request for extradition for one of the offences under the convention 'has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons'; and
- article 12 of the Nuclear Material Convention provides that any persons in relation to whom proceedings are being carried out in connection with the offences in the convention 'shall be guaranteed fair treatment at all stages of the proceedings'.

81 Under the Extradition Act, there is an extradition objection in relation to an extradition offence if the offence is a 'political offence' in relation to the extradition country: Section 7(a), Extradition Act.

2.164 However, the initial analysis stated that concerns remain in relation to the human rights compatibility of the Extradition Amendment Regulations for the same reasons as those outlined above in relation to the El Salvador Regulations. For example, it was noted that the 'no evidence' standard applies in relation to these amendments. While the statement of compatibility states that the 'prima facie' standard is not required because extradition is not a criminal process,[82] the statement of compatibility does not specifically address the concerns raised above that the 'no evidence' standard may not provide a sufficient safeguard to ensure that extradition of persons occurs in a manner that is compatible with the right to a fair hearing and fair trial or right to liberty.

2.165 The committee sought the advice of the Attorney-General as to the compatibility of items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights having regard to the matters discussed above, in particular the:

- prohibition against torture, cruel, inhuman and degrading treatment;
- right to life;
- right to a fair hearing and fair trial;
- right to liberty; and
- right to equality and non-discrimination.

Attorney-General's response

2.166 The Attorney-General's response states that '[t]hese matters are addressed above in relation to the *Extradition (El Salvador) Regulations 2017*'. The matters discussed above in relation to the El Salvador regulations apply equally in the context of the amendments to the Nuclear Material Regulations.

Committee response

2.167 Noting the human rights concerns raised in the preceding analysis, the committee thanks the Attorney-General for his response and has concluded its examination of this issue.

2.168 Based on the information provided, it is not possible to conclude whether items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations are compatible with human rights.

2.169 The committee reiterates its previous comment that the Extradition Act would benefit from a comprehensive review from the relevant minister to assess its provisions against Australia's obligations under international human rights law.

82 Statement of Compatibility to the Extradition Legislation Amendment (2017 Measure No.1) Regulations, page [5]-[6].

Identity-matching Services Bill 2018

Australian Passports Amendment (Identity-matching Services) Bill 2018

Purpose	This bill seeks to facilitate the exchange of identity information between Commonwealth, state, local and territory governments and certain non-government entities by providing explicit legal authority for the Department of Home Affairs to collect, use and disclose identification information in order to operate identity-matching services
Portfolio	Home Affairs; Foreign Affairs and Trade
Introduced	House of Representatives, 7 February 2018
Right	Privacy (see **Appendix 2**)
Previous report	3 of 2018
Status	Concluded examination

Background

2.170 The committee first reported on these bills in its *Report 3 of 2018*, and requested a response from the Minister for Home Affairs and the Minister for Foreign Affairs by 11 April 2018.[1]

2.171 The Minister for Foreign Affairs' response to the committee's inquiries was received on 11 April 2018 and the Minister for Home Affairs' response was received on 30 April 2018. The responses are discussed below and reproduced in full at **Appendix 3**.

2.172 The committee previously examined the instrument providing legislative authority for the government to fund the National Facial Biometric Matching Capability (the Capability) in its *Report 9 of 2017* and its *Report 11 of 2017*.[2] The Capability facilitates the sharing and matching of facial images as well as biometric information between agencies through a central interoperability hub (the Hub) and the National Driver Licence Facial Recognition Solution (the NDLFRS). In relation to this measure, the committee concluded that there was a risk of incompatibility with the right to privacy through the use of the existing laws as a basis for authorising the collection, use, disclosure and retention of facial images. The committee stated that

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 41-51.

2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 25-27; *Report 11 of 2017* (17 October 2017) pp. 84-91.

setting funding for the Capability without new primary legislation which circumscribes the Capability's operation raises serious concerns as to the adequacy of safeguards to ensure that the measure is a proportionate limitation on the right to privacy.[3]

Facilitating facial and biometric data identity matching

2.173 The Identity-matching Services Bill 2018 (the Identity Matching Bill) provides that the secretary of the Department of Home Affairs may develop, operate and maintain the Hub and the NDLFRS.[4]

2.174 The Hub would facilitate the sharing and matching of facial images as well as biometric information between government agencies by relaying electronic communications.[5]

2.175 The NDLFRS will include a database of identification information from state and territory authorities and will make driver licence facial images available through the identity matching service described below at [2.177].[6]

2.176 The Identity Matching Bill provides an explicit legal basis to authorise the Department of Home Affairs to collect, use and disclose 'identification information' about an individual if it occurs through the Hub or the NDLFRS and is for a range of specified purposes.[7] 'Identification information' is defined to include a person's name (current and former); address (current and former); place and date of birth; current or former sex, gender identity or intersex status; any information contained in a driver's licence, passport or visa and a facial image of the person.[8]

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3 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 91.

4 Identity Matching Bill, section 14.

5 Identity Matching Bill, Explanatory Memorandum (IMB, EM), p. 2.

6 IMB, EM, p. 2.

7 Identity Matching Bill sections 3 and 17, 18; EM, p. 2-3. Under subsection 17(2) 'identification information' may be collected, used or disclosed for the following purposes: (a) providing or developing an identity-matching service for identity and community protection activities, being an activity for: (i) preventing and detecting identity fraud; (ii) preventing, detecting, investigating or prosecuting a federal, state or territory offence or starting or conducting proceedings for proceeds of crime; (iii) investigating or gathering intelligence relevant to national security; (iv) checking the background of a person with access to an asset, facility or person associated with government or protecting a person with a legally assumed identity or under witness protection; (v) promoting community safety, including identifying a person suffering or at risk of suffering physical harm (including missing or deceased persons or those affected by disaster) and a person reasonably believed to be involved in a significant risk to public health or safety; (vi) promoting road safety, including the integrity of driver licensing systems; and (vii) verifying the identity of an individual; (b) developing, operating or maintaining the NDLFRS; or (c) protecting the identities of persons who have legally assumed identities or are under witness protection.

8 Identity Matching Bill, section 5.

2.177 As set out in the explanatory memorandum, the Hub and the NDLFRS will support a range of identity matching services:

- the Face Verification Service (FVS), which enables a facial image and associated biographic details of a person to be compared on a one-to-one basis against an image held on a specific government record for that same individual;
- the Face Identification Service (FIS), which searches or matches facial images on a one-to-many basis to help determine the identity of an unknown person, or detect instances where a person may hold multiple fraudulent identities;
- the One Person One Licence Service (OPOLS), which will allow state and territory agencies to detect instances where a person may hold multiple driver licences across jurisdictions;
- the Facial Recognition Analysis Utility Service (FRAUS), which will allow state and territory agencies to assess the accuracy and quality of their data holdings; and
- the Identity Data Sharing Service (IDSS), which will allow for the sharing of biometric identity information between Commonwealth, state and territory agencies.[9]

2.178 The explanatory memorandum states that all states and territories have agreed to introduce or preserve legislation to support the collection, use and disclosures of facial images and identity information via these identity matching services.[10]

Compatibility of the measures with the right to privacy

2.179 The right to privacy includes respect for informational privacy, including the right to respect for private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life. As noted in the committee's previous reports, the collection, use and disclosure of identity information (including photographs) through the Hub and the NDLFRS engages and limits the right to privacy.[11] The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

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9 IMB, EM, p. 4.

10 Identity Matching Bill, statement of compatibility (IMB, SOC) p. 40.

11 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 25-27; *Report 11 of 2017* (17 October 2017) p. 84-91. See, also, for example, *Peck v United Kingdom* (2003) 36 EHRR 41.

2.180 The statement of compatibility to the Identity Matching Bill acknowledges that authorising the Department of Home Affairs to collect, use and disclose information including personal and sensitive information engages and limits the right to privacy but argues that this limitation is permissible.[12] The statement of compatibility states that the measure pursues a range of objectives for each identity matching service (namely, the FVS, FIS, OPOLS, FRAUS and IDSS). These include the detection and prevention of identity fraud, national security, law enforcement, protective security, road safety and community safety.[13] The initial human rights analysis assessed that these are likely to constitute legitimate objectives for the purposes of international human rights law.

2.181 The statement of compatibility to the Identity Matching Bill indicates that matching facial images, biometric data and identities through the Hub and the NDLFRS is also likely to be rationally connected (that is, effective to achieve) these objectives.

2.182 In relation to proportionality, each of the identity matching services provide for differing degrees of use, access and disclosure of personal information. However, there are general concerns in relation to proportionality that underlie each of the services. As such, the services are discussed collectively below. Where there are particular concerns in relation to a specific identity matching service, these are also discussed further below.

2.183 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. In relation to the scope of the limitation on the right to privacy proposed under the Identity Matching Bill, the statement of compatibility explains:

> The Bill is designed to facilitate Home Affairs to provide the identity-matching services, rather than authorise information-sharing by other organisations participating in the services. The Bill has been developed on the basis that other agencies or organisations participating in the identity-matching services must have their own legal authority to do so, and must comply with legislated privacy protections that apply to them.
>
> This provides an additional layer of protection for the identification information held within the NDLFRS or transmitted via the interoperability hub, by ensuring that there is no automatic exemption from privacy protections for users of the identity-matching services.[14]

12 IMB, SOC, p. 44.

13 IMB, SOC, p. 45-56.

14 SOC, p. 44.

2.184 The initial analysis stated that providing that agencies must have their own authorisation to access data could assist to circumscribe the limitation on the right to privacy. However, it appeared that, depending on the scope of the authorisation provided to other agencies, facilitating access to identity matching services via the Hub and NDLFRS still could be a very extensive limitation on the right to privacy. In this respect, the scope provided for Commonwealth, state and territory agencies to determine what information they will provide and the circumstances in which information will be available through an authorisation, does not fully address privacy concerns in relation to the Identity Matching Bill.[15] This is because these agencies may not have adequate and effective safeguards in place to ensure that the disclosure and use of information to and from the Hub is a proportionate limit on the right to privacy.

2.185 More generally, the question of who can access facial images and other biometric data, and in what circumstances, is relevant to whether the measure is sufficiently circumscribed. The Identity Matching Bill sets out who can use particular identity matching services through the Hub and the NDLFRS and in some cases for what purposes. The extent of access differs depending on the particular service. For example, the FIS can be used by a defined list of commonwealth, state and territory agencies as well as those prescribed through delegated legislation.[16] The initial analysis stated that restricting access to the FIS to specified particular agencies would assist with the proportionality of the measure. This is because the FIS is a more extensive limitation on the right to privacy in that it allows agencies to identify an unknown person. However, it was noted that in relation to the FIS, the minister is empowered to prescribe further agencies by delegated legislation, such that it is unclear whether the measure is sufficiently circumscribed. In relation to the FVS, providing an agency otherwise has authorisation, the FVS may be used more broadly by an agency of the Commonwealth, state or territory or local government authorities or non-government entities that have been prescribed by regulation.[17] For the FVS and other identity matching services (the FRAUS, IDSS and OPOLs), there would therefore appear to be a potentially broad range of agencies that could access such services for a range of purposes.

2.186 Further, to the extent that current Australian privacy laws may apply to the proposed facility to match facial images and other biometric data, it was noted that there are questions as to whether the current laws would provide adequate and effective safeguards for the purposes of international human rights law. In particular, while facial images are a type of personal information protected by the Australian

15 See, SOC, p. 44.

16 Identity Matching Bill, subsection 8(2).

17 Identity Matching Bill, subsection 10(2).

Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act),[18] compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including (as noted by the minister) where its use or disclosure is authorised under an Australian Law,[19] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[20] Therefore, in the absence of greater safeguards in the Identity Matching Bill, the initial report stated that there are serious questions as to whether the safeguards currently provided under Australian law would be sufficient for the purposes of international human rights law.

2.187 The number and type of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS is also relevant to the proportionality of the limitation. The statement of compatibility indicates the broad range of facial images and biometric information which would be accessible or searchable through the Hub including state and territory driver licences (via the NDLFRS). As the Hub will permit access to driver licences, the personal information of a significant proportion of the adult Australian population will be retained. As noted in the initial analysis, a centralised facility for searching such large repositories of facial images and biometric data is a very extensive limitation on the right to privacy. The extent of the limitation heightens concerns as to whether the measure is overly broad and insufficiently circumscribed. The initial analysis stated that there is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

2.188 The statement of compatibility explains that the Identity Matching Bill restricts the authorisation for the Department of Home Affairs to collect, use and disclose information to a defined set of purposes, including providing an identity matching service for the purpose of an identity or community protection activity. Section 6 of the Identity Matching Bill defines 'identity or community protection activities' as detecting identity fraud, law enforcement activities, national security activities, protective security activities, community safety activities, road safety activities and verifying identity. Given these broad purposes, it appears that the range of information that could be subject to collection, disclosure and use is

18 See, Privacy Act, section 6.

19 APP 9; APP 6.2(b).

20 APP 6.2(e).

extensive. As noted above, driver licence photographs will be subject to the Hub and so the Hub will include personal information of a large number of the adult population. As such, it was unclear that restricting the Department of Home Affairs' authorisation to these purposes is sufficient to ensure that the measure is adequately circumscribed. Indeed, it appears that the measure may allow, for example, photographs to be collected from a range of sources. It appears possible that social media photographs could be used.

2.189 The scope of historical facial images that will be subject to the Hub was also unclear. In this respect, while the Identity Matching Bill contains a number of offence provisions relating to unauthorised access and disclosure, there was still a further concern about whether the Hub will provide adequate and effective protection against misuse in respect of vulnerable groups. For example, it was unclear the extent to which there are specific safeguards for survivors of domestic or gender-based violence who may have changed their identity and to protect against the risks of unintended consequences. If historical facial images are available, it is also possible that it may reveal that a person has undergone a change in gender identity, particularly as identification information is defined to include current or former sex or gender identities.[21] This may also engage the right to equality and non-discrimination.

2.190 More generally, the initial analysis noted that international human rights case law has raised concerns as to the compatibility of biometric data retention programs with the right to privacy. In *S and Marper v United Kingdom,* the European Court of Human Rights held that laws in the United Kingdom that allowed for fingerprints, cellular samples and DNA profiles to be indefinitely retained despite the affected persons being acquitted of offences was incompatible with the right to privacy. The court expressed particular concern about the 'indiscriminate and open-ended retention regime' which applied the same retention policy to persons who had been convicted to those who had been acquitted.[22] The court considered that the 'blanket and indiscriminate nature of the powers of retention' failed to strike 'a fair balance between the competing public and private interests'.[23]

2.191 Similarly, the United Kingdom (UK) Court of Appeal in *Wood v Commissioner of Police for the Metropolis,*[24] concluded that the retention of photographs which had been taken by police of a person in circumstances where the person had not

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21 See, Identity Matching Bill, section 5.

22 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [119]. See, also, for example, *NK v Netherlands*, UN Human Rights Committee, CCPR/C/120/D/2326/2013 (27 November 2017).

23 See, *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [127].

24 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009).

committed any criminal offence had a disproportionate impact on the right to privacy under the UK *Human Rights Act.*[25] Collectively, these authorities suggest that the indiscriminate retention of a person's data (including biometric information and photographs) may not be a proportionate limitation on the right to privacy. In relation to accessing biometric information, the UK courts have recently found that data retention and access programs were inconsistent with the right to privacy in the context of European Union (EU) law to the extent the objective pursued by that access was not strictly limited solely to fighting serious crime and where access was not subject to prior review by a court or independent administrative authority.[26] The interpretation of the human right to privacy under the European Convention of Human Rights and the EU Charter of Fundamental Rights in those cases is instructive in informing Australia's international human rights law obligations in relation to the corresponding right to privacy under the ICCPR.

2.192 Further, some of the identity matching services under the Identity Matching Bill appear to have a more extensive impact on the right to privacy than others. For example, as noted above, the FIS would allow images of unknown individuals to be searched and matched against government repositories of facial images through the Hub. This particular identity matching service raises specific concerns given the scope of its potential impact on the right to privacy. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where. For example, this could be the case with matching unidentified CCTV images of people with facial images held by government agencies. This in turn could potentially allow conclusions to be drawn about the person's political opinions, sexual habits, religion or medical concerns. This also raised concerns about whether such a measure could engage other human rights such as the right to freedom of association and the right to freedom of expression. In this context, it appeared that the FIS may not be the least rights restrictive approach to achieve the stated objectives, particularly noting that the facial images of the vast majority of adult Australians will be searchable through the Hub.

2.193 The committee therefore requested the advice of the Minister for Home Affairs as to whether the limitations on the right to privacy contained in the Identity

25 *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 (21 May 2009) at [89] and [97].

26 *Secretary of State for the Home Department v Watson MP & Ors* [2018] EWCA Civ 70 (30 January 2018) applying the Court of Justice of the European Union decision in *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* [2016] EUECJ C-203/15; see also *Digital Rights Ireland Limited v Minister for Communications, Marine and Natural Resources & Others* and *Seitlinger and Others* [2014] EUECJ C-293/12. See, also, for example, the committee's consideration of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 in its *Fiftieth Report of the 44th Parliament* (14 November 2014) pp. 10-22.

Matching Bill are reasonable and proportionate measures to achieve the stated objective. This includes information in relation to:

- whether the provisions in the Identity Matching Bill governing access to facial images and other biometric data are sufficiently circumscribed for each of the identity matching services;
- whether the *Privacy Act 1988* (Privacy Act) will apply to the operation of the Hub and, if so, whether it will act as an adequate and effective safeguard noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;
- whether the Identity Matching Bill contains adequate and effective safeguards for the purposes of international human rights law;
- whether, in light of the number, types and sources of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS, these measures are the least rights restrictive approach (including whether having facial images of the vast majority of Australians searchable via the Hub is the least rights restrictive approach and whether there are restrictions as to the sources from which facial images may be collected);
- whether the measures are a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [2.190] – [2.191];
- the extent to which historical facial images will be subject to the Hub, and whether the Identity Matching Bill provides adequate and effective protection against misuse and in respect of vulnerable groups; and
- in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against government repositories of facial images through the Hub is the least rights restrictive approach to achieve the stated objective.

Minister for Home Affairs' response

Restrictions on and access to identity matching services

2.194 In relation to whether the provisions governing access to facial images and other biometric data are sufficiently circumscribed for each of the identity matching services, the minister provides the following information:

> The Bill contains a number of measures to appropriately circumscribe access to data through each of the identity-matching services.
>
> Firstly, the Bill does not authorise any agency other than the Department of Home Affairs (Home Affairs) to collect, use or disclos[e] identification information. The Bill is primarily intended to provide Home Affairs with

> legal authority to operate the interoperability hub and to host the National Driver Licence Facial Recognition Solution (NDLFRS).
>
> The Bill does not seek to, nor does it, authorise other agencies to share information through the services. Each agency's use of information it receives through the services will be governed by its own legal authority to collect, use and disclose the information for particular purposes, including any legislated protections that apply to the agency under Commonwealth, state or territory privacy legislation.
>
> By taking this approach, the Bill specifically avoids providing a blanket authorisation for all information-sharing that occurs through the services. Where an agency seeks to obtain information from another agency through the services, both the requesting agency and data-holding agency will need to have a legal basis to share information with the other. This is no different to current data-sharing arrangements, and ensures that the services are only available to those agencies that have a legal basis to share information through them under other legislation.

2.195 The minister's response further explains that each of the identity matching services have specific restrictions. In relation to the FIS, the minister's response explains, for example that:

> ...as noted by the Committee, the Face Identification Service (FIS) will only be able to be used by a specific list of agencies set out in the Bill. The Committee also noted that the Bill provides for the Minister to prescribe further agencies by delegated legislation. However, subclause 8(3) of the Bill restricts this power such that the Minister is only able to prescribe a new authority for access to the FIS if the authority has one or more of the functions that used to be functions of an authority already prescribed in the Bill.
>
> The purpose of subclause 8(3) is to restrict this power to the extent that it is only available to cover situations where one of the agencies already listed in the Bill changes names as a result of machinery of government changes or for other reasons, or where their functions shift to a different authority. As set out in the explanatory memorandum, this provision is intended to supplement, rather than replace, the relevant provisions of the *Acts Interpretation Act 1901*, which already provide for the continuation of provisions naming specific government agencies when a machinery of government change occurs, if those provisions do not apply.
>
> As a result, any substantive change to the breadth or nature of the agencies that have access to the FIS will need to be made by an amendment to the Act, rather than through the making of a rule. This will help to prevent 'scope creep' and will ensure appropriate Parliamentary oversight of any substantive changes to FIS access.
>
> Provision of the FIS is also restricted by paragraph 8(1)(b) of the Bill, which provides that the comparison must be undertaken in the course of an identity or community protection activity covered by subsections 6(2) to

> 6(6). This specifically excludes two of the identity and community protection activities, namely *road safety activities* (subclause 6(7)), and *verifying identity* (subclause 6(8)).
>
> This restriction has been imposed in recognition of the greater privacy implications of the FIS compared to the other identity-matching services provided for by the Bill. This ensures the provision of the FIS is appropriately circumscribed relative to its privacy impacts.

2.196 This further information indicates that, in respect of the FIS, the minister's power to prescribe further agencies by delegated legislation is sufficiently circumscribed. As set out above, restricting access to the FIS to specified particular agencies and circumscribing some of the activities for which comparison may be undertaken would assist with the proportionality of the measure. The minister's response explains that the other services are limited in different ways:

> …The Facial Recognition Analysis Utility Service (FRAUS) and the One-Person-One-Licence Service (OPOLS) are both restricted for use only by agencies that provide data into the NDLFRS, which will primarily be state and territory road agencies. This restriction is contained in the definitions of the services:
>
> - For the FRAUS, subparagraph 9(a)(i) provides that a FRAUS relates to a request *made by an authority of a State or Territory that has supplied identification information to a database in the NDLFRS*.
> - For the OPOLS, paragraph 12(b) provides that the authority [that requests the service] *issues government identification documents of a particular kind and has supplied identification information…to a database in the NDLFRS*.
>
> In addition, the services only enable comparison against data in the NDLFRS – in the case of the FRAUS, only the data supplied by the same authority making the request (i.e. against their own data), and in the case of the OPOLS, only data relating to identification documents of the same type (i.e. driver licences).
>
> These services are primarily designed to assist road agencies to manage their own data, and improve the integrity of their licence-issuing processes by providing a secure and automated tool to check whether the individual holds licences in other states and territories. As such, they are appropriately circumscribed for these purposes.
>
> The Identification Data Sharing Service (IDSS) is also restricted by its definition, which limits its use to disclosures of identification information between *one authority of the Commonwealth or of a State or a Territory to another authority of the Commonwealth or of a State or a Territory* (paragraph 11(1)(c)). Although this is still quite broad compared to some of the other services, the IDSS can still only be used for the identity and community protection activities, and agencies using the service must have their own legal basis to share this information and comply with any privacy

> or information protection laws that apply to them. As with the other services, the Bill is not intended to provide new powers for agencies to share information, but simply to facilitate more automated, auditable and secure information-sharing through the interoperability hub.

2.197 The restrictions on access to these services are likely to assist with the proportionality of the limitation. However, as acknowledged in the minister's response many of the services may still be accessed by a large number of entities.

2.198 Further, the minister's response argues that, although the FVS will be available to the broadest number of entities including the private sector, access to this service is also sufficiently circumscribed:

> The last of the services, the Face Verification Service (FVS), assists users to verify a claimed or known identity by comparing information they have about an individual (often provided by the individual) with a government record matching the same details. It will be available to the broadest range of users, and is the only service that will be available to non-government users. In most cases, the system will return a match/no match response, rather than an image, and never more than one image.
>
> Even so, the Bill contains provisions to ensure that the provision of the service is appropriately circumscribed. In particular, a number of conditions apply to local government and non-government use of the FVS, as set out in subclause 7(3). These include that the verification of an individual's identity is reasonably necessary for the functions or activities of the entity, the individual has given consent for the use and disclosure of their information to verify their identity, the entity resides or carries on activities in Australia, and privacy protections equivalent to those provided by the *Privacy Act 1988* (Cth) apply to the entity.

2.199 As the FVS only allows access to more limited information for the purposes of verifying a claimed identity this is likely to assist with the proportionality of the measure. It is acknowledged that there are circumstances where it may be necessary to verify a person's claimed identity including, on occasion, by the private sector. The information provided by the minister indicates that while the FVS will be available to the broadest range of users including the private sector, there are a number of relevant safeguards as to access and use which will also assist with the proportionality of the limitation.

Application of the Privacy Act and other safeguards

2.200 In relation to whether the Privacy Act will apply to the operation of the Hub and, if so, whether it will act as an adequate and effective safeguard, the minister's response states:

> The Privacy Act applies to all 'APP Entities', which includes Home Affairs. The operation of the interoperability hub by Home Affairs will therefore be subject to the Privacy Act, and Home Affairs will manage the hub consistently with its obligations under that Act.

> The Privacy Act and the Australian Privacy Principles contained therein provide the privacy architecture for Australian Government entities. A key objective of the Privacy Act is to balance the protection of privacy with the interests of entities in carrying out their lawful and legitimate functions and activities. The adequacy and effectiveness of the privacy safeguards contained in the Privacy Act, including the appropriateness of the exceptions to restrictions on collection, use and disclosure of information under the Privacy Act, have been considered by the Parliament in the development of the Act and subsequent amendments to it. To the extent that various exemptions in the Privacy Act may apply to the operation of the interoperability hub, this is consistent with the application of the Privacy Act across the many entities to which it applies.

2.201 It is relevant to the proportionality of the measure that the Privacy Act will apply. However, questions remain as to whether the Privacy Act is an adequate and effective safeguard for the purposes of ensuring the limitation on the right to privacy is proportionate in the context of the measure under international human rights law. In this respect, the fact that the Privacy Act has previously been considered by parliament or that it applies across government agencies does not fully address such issues. As noted in the initial analysis, the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose. The particular concern is that the breadth of some of these exceptions in the context of the measure may facilitate the disclosure of personal information in circumstances that are not compatible with the right to privacy.

2.202 For example, it is an exception to the prohibition on use or disclosure of personal information for a secondary purpose under the APPs and Privacy Act if the use or disclosure is authorised under another Australian law.[27] This means that, for example, an agency could request and receive biometric information through the FRAUS providing there was an Australian law (that is, a Commonwealth, state or territory law) which authorised it. This would be regardless of whether this other Australian law is a proportionate limit on the right to privacy. Given that the measure facilitates the disclosure of personal information through the Hub, the adequacy of safeguards governing access to such information is an important issue from the perspective of whether the measure itself is proportionate. As such, it would have been useful if the minister's response had provided a more detailed and specific assessment of the adequacy of the Privacy Act and APPs as safeguards in the context of the measure.

2.203 The minister's response further states that there are additional privacy safeguards, under the *Intergovernmental Agreement on Identity Matching Services* (IGA) and the policy and administrative arrangements, which will:

27 APP 9; APP 6.2(b).

> …increase the overall adequacy and effectiveness of the privacy framework governing the operation of the hub.
>
> For example, under the IGA, the interoperability hub will not retain any facial images or other identity information – it acts purely as a router to transmit information between participating entities. The only data that will be retained by the hub will be that required for auditing purposes. This 'hub and spoke' design feature is consistent with the 'privacy by design' approach to the identity-matching services, in that it avoids the need for the Department to build a new database combining visa and citizenship, passport and state and territory identification information in one place. Instead, the interoperability hub simply provides an interface to connect end-users with separate databases, enable them to make queries against each of the databases separately but simultaneously. In turn, this minimises the amount of information retained by Home Affairs, as it is not necessary for Home Affairs to retain the information contained in the queries or responses routed through the interoperability hub to and from the databases.
>
> Furthermore, the interoperability hub will be subject to independent penetration and vulnerability tests and security reviews, as well as a range of stringent user access arrangements under a common Face Matching Services Participation Agreement between all participating Commonwealth, state and territory agencies, which will provide a legally binding framework for participation in the services. This includes measures to protect privacy such as a set number of user accounts per agency, user training and accountability requirements, and regular auditing.

2.204 This information indicates that the design of the Hub may be such as to address some of the concerns in relation to the unauthorised access of information. Adequately addressing the potential for the misuse or unauthorised use of personal information is relevant to the proportionality of the measure. However, it is noted that administrative and policy safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. In this respect, the minister's response also notes that the bill creates offences for the unauthorised use of information shared through the Hub as well as reporting on the use of the services:

> …clause 21 creates an offence for unauthorised recording or disclosure of information by employees of Home Affairs (including secondees, and contractors working on the NDLFRS or interoperability hub). This creates an effective safeguard against unlawful interference with a person’s right to privacy by people who may have access to identification information contained in the NDLFRS or shared through the interoperability hub. Annual reporting on use of the services and a requirement for a review to be commenced within 5 years provide further safeguards to ensure that any arbitrary or unlawful interference is detected, and subject to public scrutiny.

> The privacy safeguards in the Bill are also supported by a range of further measures under the IGA, the Face Matching Services Participation Agreement referred to above, and an NDLFRS Data-Hosting Agreement, which will provide the framework for Home Affairs to host state and territory data in the NDLFRS. These include annual audits of each participating agency, strict access controls on users of the services, additional authorisation requirements for the FIS, and privacy impact assessments.

2.205 These types of offences are a relevant safeguard in relation to the unauthorised use of information and accordingly assist with the proportionality of the measure.

Availability of less rights restrictive alternatives

2.206 In relation to whether, in light of the number, types and sources of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS, the measures in the bill are the least rights restrictive approach, the minister states:

> The biometric face matching services that will be provided through the interoperability hub and NDLFRS have been developed to address increasing incidences, and sophistication of, identity misuse and fraud in Australia, which has wide-ranging impacts for individual privacy, as well as law enforcement and national security.
>
> Under the *Intergovernmental Agreement to a National Identity Security Strategy* agreed by the Council of Australian Governments in 2007, the Commonwealth implemented a national Document Verification Service (DVS). The DVS enables government and non-government users to compare the claimed identity information of a customer or client with a government record to verify their identity. The DVS matches key biographic details about the individual and their Australia-issued identifying credentials (such as a passport or driver licence), and provides a 'yes' or 'no' match response.
>
> The DVS is currently used by around one hundred government entities and seven hundred businesses, including all major finance and telecommunications companies, with more than 30 million DVS transactions processed in 2017. The DVS has a limited impact on individual privacy because it only provides for one-to-one verification of a claimed identity, does not return biographic information (users receive a 'yes'/'no' match result only), and operates on a consent basis.
>
> Whilst expanding use of the DVS has made it harder for criminals to use fictitious identities, it is also creating incentives for them to use documents in stolen identities that have genuine biographic details (which will pass a DVS check) combined with a fraudulent photo. The biographic-based DVS cannot detect these fraudulent identities, creating a need for a different solution to tackle the growing use and sophistication of these stolen identities.

The misuse of this personal information for criminal purposes causes substantial harm to the economy and individuals each year. The *Identity Crime and Misuse in Australia Report 2016* prepared by the Attorney-General's Department, in conjunction with the Australian Institute of Criminology, indicated that identity crime is one of the most common and costly crimes in Australia, impacting around 1 in 20 Australians every year (and around 1 in 5 Australians throughout their lifetime), with an estimated annual cost of over $2.2 billion.

In addition to financial losses, the consequences experienced by victims of identity crime can include mental health impacts, wrongful arrest, and significant emotional distress when attempting to restore a compromised identity. In some cases where complete takeover of a victim's identity has occurred, the report indicates that it took victims over 200 hours to obtain new credentials and resolve other issues associated with the compromise of their identity.

Identity crime is also a key enabler of serious and organised crime, including terrorism. Australians previously convicted of terrorism related offences are known to have used fraudulent identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives, and mobile phones to communicate anonymously to evade detection. An operation by the joint Australian Federal Police and New South Wales Police Identity Security Strike Team found that the fraudulent identities seized from just one criminal syndicate were linked to 29 high profile criminals linked to historic or ongoing illicit drug investigations; more than $7 million in losses associated with fraud against individuals and financial institutions; and more than $50 million in funds that were laundered offshore and were likely to be proceeds of crime.

Current methods for verifying an identity or identifying an individual using facial images can be slow, difficult to audit, and often involve manual tasking between requesting agencies and data holding agencies. In some cases, this can take several days or longer. Given the significant impact that identity crime has on individuals and on the safety and security of Australians more broadly, it is imperative that government agencies, and private sector organisations (which operate at the frontline of day-to-day identity verification), have access to the modern tools necessary to continue to detect and prevent identity fraud, including using facial matching.

The face matching services that will be supported by the Bill have been developed to balance the need to address this threat with the privacy rights of individual Australians. The design of the services and the systems that support them, including the 'hub-and-spoke' model of service delivery through the interoperability hub, ensure that the services take the least rights restrictive approach to addressing the serious issue of identity fraud.

By delivering the services through the establishment of a central hub that connects to a number of separate databases, the Government has

specifically avoided a need to develop a single, central database of identification information. In addition, although the Commonwealth is hosting a national driver licence database (the NDLFRS) to centralise driver licence information for the purpose of the services, under the IGA the Commonwealth will not have direct access to view the data stored within the national database. State and territory road agencies will provide their data into partitioned sections of the database, and will retain control over access to that data.

Furthermore, users access the services on a query and response basis, where a user submits query information into the hub interface, which is then transmitted to the relevant database/s for matching with the results returned to the user. This ensures that users only have access to the information that is relevant to their query, and cannot go looking for additional information directly within the databases. To provide a further safeguard for the information transmitted through the hub, the hub itself does not store any of the identification information contained in the query or the response.

Alternative options to the provision of the face matching services through the interoperability hub include a continuation of the status quo, through which agencies that need to share information for identity verification or identification purposes do so through existing manual methods of data-sharing – via hard copy or email or other electronic transmission. These ad-hoc methods vary amongst agencies, as does the security and auditability of the transmissions. By providing a single tool through which participating agencies can share identification information, the interoperability hub will improve the consistency of data-sharing and enable it to be more easily monitored, managed and audited.

The Government acknowledges that the face matching services may cause privacy concerns for some individuals. However, the services and the systems that support them have been designed to minimise those impacts and improve the security and accountability of data-sharing between participating agencies. The identification information being made available for matching through the services is already held by government across multiple agencies, and shared between agencies consistent with their legislative authorities. The face matching services will enable agencies to use that information more securely and effectively to protect Australians from national security and criminal threats, identity crime, and other threats, in the least rights restrictive way.

2.207 The minister's response provides useful information as to the extent of the concerns regarding identity fraud and the operation of the current system of identity verification. This information indicates that less rights restrictive approaches have been tried but are subject to some constraints as to their effectiveness. This includes constraints in relation to the management and auditing of requests for sharing identification information.

2.208 However, while acknowledging the constraints in the current system, concerns remain as to whether the approach proposed is the least rights restrictive approach as required to be a proportionate limitation on the right to privacy. This is because the scope of the identity matching services envisaged by the bill is broad. It would facilitate the matching of facial images of the majority of Australians across multiple government databases.

Sources of facial images

2.209 In relation to whether there are restrictions as to the sources from which facial images may be collected, the minister states:

> …The databases to which the interoperability hub will initially connect will be the visa and citizenship database maintained by Home Affairs, the passports database maintained by the Department of Foreign Affairs and Trade, and the NDLFRS to be hosted by Home Affairs, containing replicated state and territory licence information. Due to some states and territories holding information about other licence types within the same databases as their driver licence information (for example, marine licences or proof of age cards), this information may also be replicated in the NDLFRS, where there is a legal basis to do so.
>
> Although the Bill does not explicitly restrict the connection of other databases to the interoperability hub in future, the availability of other data sources would, as with all aspects of the services, be subject to the information-sharing authorisations of participating agencies. That is, an agency providing access to its database through the hub would need the legal authority to share the information with other agencies for the purposes for which the face matching services are provided, and a participating agency wishing to access the information would also need to have a legal basis to do so.
>
> Whether the hub could be connected to other databases in the future will also be limited by the general purpose for which the face matching services are being provided, and the practicalities of facial recognition, which requires high quality images to achieve the most accurate matching results. The services are intended to assist participating agencies to determine the genuine identity of an individual, based on facial image comparison. This is why the initial databases to which the hub will connect are databases of identification information related to primary identification documents containing facial images. These databases provide a reliable source of identification information that can assist agencies to confirm a person's true identity.
>
> The nature of the processes for obtaining these identification documents also ensures that the majority of facial photographs in these databases are of sufficiently high quality for facial recognition purposes. Facial recognition software relies heavily on the availability of high quality, front-on, unobscured facial images, to enable the most accurate matching. The integrity of the face matching services is therefore directly related to the

quality of the images in the databases used for matching. This practical issue will likely limit the types of databases that may be connected to the services in future.

2.210 The fact that the bill contains no express restrictions on the databases that may be connected to the Hub, and the sources of facial images that such databases may contain, raises concerns in relation to the proportionality of the limitation imposed by the bill. In particular, it suggests that the scope of private information that may be collected, used and disclosed through the Hub may be wider than necessary to achieve the objectives of the Hub. Although agencies require their own legal authority to share images through the Hub, this does not necessarily address these concerns, as the relevant legal authority to share images may not itself be sufficiently circumscribed. For example, if an agency were to be using the Privacy Act and the APPs as a basis for its authority to collect, use and share images through the Hub,[28] this could raise concerns in relation to the right to privacy. As noted above, this is because, among other factors, the breadth of exemptions under the Privacy Act for the use and disclosure of personal information for a secondary purpose may permit such information to be disclosed in circumstances where it may not constitute a proportionate limitation on the right to privacy.[29] As a result, there is a particular concern that measures in the bill, by facilitating the sharing of such images or biometric details through the Hub, may not be a proportionate limitation on the right to privacy. It does not appear from the information provided that there are adequate and effective safeguards in such circumstances.

2.211 Further, while it is noted that there are practical restrictions on using lower quality facial images for the purposes of the Hub, this does not fully address concerns

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28 APP 3 relevantly outlines when an agency may collect solicited personal information including sensitive information. 'Personal information' is defined under section 6 of the Privacy Act as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.' 'Sensitive information' is defined under section 6 of the Privacy Act to include 'biometric information that is to be used for the purposes of automated biometric verification or biometric identification'. As such photographs which are collected and then shared through the Hub are likely to constitute 'sensitive information'. Under APP 3 sensitive information must generally be collected with the consent of the individual. It is noted that the issue of consent does not fully address human rights concerns in relation to the collection of personal information in the context of the measure. Further, under APP 3 there are exceptions to the requirement of consent including where the collection of sensitive information is: authorised under another Australian law, for a permitted general situation, for a permitted health situation or by an enforcement body for an enforcement related activity. See, also, Australian Privacy Principles guidelines, Chapter 3: Australian Privacy Principle 3 — Collection of solicited personal information (2015) <https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP_guidelines_complete_version_2_March_2018.pdf>.

29 See, APP 6.

as to the potential wide range of images that may be subject to the services in the future. There are no express restrictions on the inclusion in the future of images obtained from CCTV footage, surveillance photographs, or social media.

Relevance of international jurisprudence

2.212 As to whether the measures are a proportionate limitation on the right to privacy, with reference to the potential relevance of international jurisprudence such as that outlined at [1.21] – [1.22], the minister's response states:

> …the Bill contains a range of measures to ensure that the provision of each of the face matching services is proportionate to the legitimate objectives it pursues. Respectfully, the case law cited by the Committee at [1.148] – [1.149] of its [*Report 3 of 2018*] does not alter that fact.
>
> A number of the cases referenced deal with the matter of collection of biometric information directly from members of the public and the retention of that information for law enforcement purposes. With reference to these cases, it is important to note that the Bill does not seek to govern the collection of identification information, including biometrics, from individuals, nor the handling of identification information by agencies other than the Department of Home Affairs (as the operator of the systems authorised by the Bill).
>
> The face matching services authorised by the Bill are simply tools to enable agencies to more securely share and match information with each other. Participating agencies must have their own legal basis to collect, use and disclose the information both when using the services as a requesting agency or an agency providing access to its data. This also applies to their collection of the primary biometric information from an individual (such as the collection of CCTV footage or passport photos).
>
> As part of the existing legal framework that already applies to the collection, use and disclosure of identification information by agencies that will participate in the face matching services, agencies must comply with data retention regimes that apply to them with respect to the storage and destruction of that information. This will continue to be the case with respect to identification information an agency obtains through using the services. The Face Matching Services Participation Agreement (mentioned above) that will govern participation in the services will reiterate this by requiring agencies to only retain information for as long as they require it for the purpose for which it was collected, or for the minimum period required by law.
>
> The Committee also refers to European cases dealing with retention of communications data, and its own comments on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. The issues raised in relation to metadata largely relate to concerns about the retention of significant amounts of data not previously retained, and the purposes for which it can be accessed.

> As set out above, the Bill is not intended to deal with the collection and retention of data from individuals – it provides for information-sharing between agencies and organisations. The data intended to be transmitted through the services is information that is already collected and retained by participating agencies, and shared in accordance with their legislative authority to do so. In this way, it is not analogous with the establishment of large databases of new metadata not already retained…
>
> The Committee also notes that the European cases relating to communications data raise the issue of access to information without a requirement for prior review by a court of independent administrative authority. The Bill is not seeking to authorise participating agencies other than Home Affairs to access identification information through the services. Those agencies will need to have their own legal basis to do so. Many participating agencies already have a legal basis to share this information, in most cases without prior review by a court or independent administrative authority. It is not appropriate for the Bill to impose this additional requirement on participating agencies – this would be a matter for other legislative processes relevant to those agencies, or their particular jurisdictions.
>
> For the reasons set out above, and in the Statement of Compatibility with Human Rights, the measures in the Bill are a proportionate limitation on the right to privacy notwithstanding the referenced jurisprudence.

2.213 While the minister states that the bill is not intended to deal with the collection and retention of data from individuals, an assessment of whether facilitating information matching and sharing through the Hub is a proportionate limitation on the right to privacy requires consideration of the provisions of the bill in context. That is, an assessment of the proportionality of the authorisation for information sharing between agencies requires consideration of what information will be shared and to what extent. In this respect, the jurisprudence referred to points to concerns in relation to the right to privacy in circumstances where government retention of, or access to, personal information is insufficiently circumscribed. This means that, as noted above, unless the databases themselves and access to them are sufficiently circumscribed there is a risk that the Hub will facilitate information sharing in circumstances where it is not proportionate. Further, it is noted that the bill specifically contemplates the development of the NDLFRS which will contain the photographs and biometric details from state and territory driver licences. The fact that this data was originally collected by a state or territory government does not address human rights concerns about its collection into a centralised database. Additionally, it does not address concerns that such data may be searched and more easily accessed by a range of agencies for a broad number of purposes. It is noted that the obligation to ensure that legislation operates in compatibility with Australia's international obligations rests with the Commonwealth, irrespective of whether the relevant legislation or processes operate at the federal, state or territory level.

Historical facial images and vulnerable groups

2.214 In relation to the extent to which historical facial images will be subject to the Hub, and whether the bill provides adequate and effective protection against misuse and in respect of vulnerable groups, the minister states:

> Historical facial images may be contained in databases to which the hub connects. However, specific safeguards exist to protect people with legally assumed or protected identities, and the nature of the services will also limit the risk of revealing a former identity in many cases.
>
> The Bill provides specifically for Home Affairs to share information for the purposes of protecting individuals with legally assumed or protected identities. This will help to protect individuals who have been issued with an assumed or protected identity by an authorised Commonwealth, state or territory agency, from being inadvertently identified. Data about these individuals contained in each database connected to the interoperability hub is sanitised directly by the agencies responsible for the assumed/protected identity prior to agencies having access to the database through the FIS (which allows for identification of individuals without knowing their name).
>
> In relation to other vulnerable groups that may have changed their identities but do not have a legally assumed or protected identity, the structure of the services will help to prevent their former identities from being revealed in most circumstances. For example, the most widely available service, the FVS, only provides for one-to-one verification of an identity. In order to receive a match, the user will need to provide biographic details about the individual (such as their name and date of birth), which will then be checked against one or more databases and results only returned if the biographic details match a record in the database. Although some databases may contain, and return, known alias information, this will only be returned to certain users with a need for that information (such as police) based on their user access arrangements.
>
> Access to the FIS, which allows for identification of an unknown individual, is much more restricted to protect the privacy of individuals whose details may be returned because of a possible facial match with a person of interest. Only a prescribed set of law enforcement, national security and anti-corruption agencies will have access to this service, and within those agencies access will also be restricted to users with a need to use it and training in facial recognition. This will help to ensure that if an individual's former identity is revealed through these services, only those with a strict need to know that information will have access to it. Other strict access controls on the FIS, including a requirement to enter the particular purpose for which it is being used in each instance, will help to prevent any misuse of the service to identify a person other than for the activities provided for by the Bill.

> Under the Face Matching Services Participation Agreement, FIS access is also subject to additional supervision and authorisation requirements. All users of the FIS must be monitored by a supervising officer when using the service. In addition, a more senior authorising officer (at Australian Public Service Executive Level 2/Director level or equivalent) must approve certain FIS requests, including all queries for community safety activities, queries relating to a person under the age of 18 years, and queries to identify witnesses to a crime.
>
> In addition, the NDLFRS, which is the only database being built specifically for use in these services, is designed only to rely on the most recent image of an individual for facial matching. In addition, this data will be updated daily through direct connections between the NDLFRS and the state and territory databases from which the data is drawn, to ensure that the images being used for matching are the most up-to-date.
>
> These controls provide adequate and effective protection for vulnerable groups by ensuring that only those with a need to identify an individual for specific activities will have access to identification information through the services. Although it may be possible that the results of a query may reveal sensitive information about an individual, it is not possible to entirely avoid this without undermining the purpose for which the services have been developed, which is to assist with identifying and verifying the identity of individuals. The Bill, and the design of the services that will be facilitated by it, puts in place a regime of strict controls and tiered safeguards that appropriately balance the need to protect vulnerable groups with the effectiveness of the services as a tool for identity resolution.

2.215 As such, the minister's response outlines a range of legislative and operational safeguards to assist to protect the identity of vulnerable groups. In this respect, the content of the Face Matching Services Participation Agreement is likely to be of relevance to the proportionality of the measure. It is noted that while the Face Matching Services Participation Agreement has been relied upon as a safeguard in the minister's response, a copy of this agreement has not been provided to the committee. It is difficult to assess whether the Face Matching Services Participation Agreement will provide an adequate and effective safeguard without a copy of this agreement.

Proportionality of the FIS

2.216 In relation to the FIS and whether allowing images of unknown individuals to be searched and matched against government repositories of facial images through the Hub is the least rights restrictive approach to achieve the stated objective, the minister states:

> The FIS is designed to assist Australia's law enforcement, national security and anticorruption agencies to identify unknown persons of interest in the course of their identity fraud prevention and detection activities, and their

> national security, law enforcement, protective security and community safety activities. This could include, for example, identifying a suspect from a still image taken from CCTV footage of an armed robbery, identifying an individual suspected to be involved in terrorist activities or in [a] siege situation, or determining if a person of interest is using multiple fraudulent identities.
>
> As detailed above, many of these agencies already share this information, and can request matching against various databases. However, this currently occurs on an ad-hoc basis which can be slow and difficult to audit. The Bill does not seek to expand the legal basis on which these agencies are authorised to share information with each other – they will still need to have a separate legal basis to do so before using the services. The services provide these agencies with a faster, secure tool for transmitting these requests to multiple data sources at once and receiving the results as quickly as possible, with a clear audit trail for accountability purposes.
>
> In many law enforcement and national security scenarios, it is imperative that a person of interest is identified quickly to prevent a new or ongoing threat to the public. In the current environment, this is often not possible, and the various different methods agencies use to share information with each other are inefficient and make auditing and oversight difficult. By providing agencies with a tool to help them resolve the identity of a person of interest quickly, and in an auditable way, the services will help to ensure that these agencies can operate effectively and continue to keep Australians safe, whilst being accountable to the Australian public.

2.217 A measure which allows for the electronic matching of unknown individuals against government repositories of data is a significant restriction on human rights. There is potential that without sufficient safeguards such tools could be used for wide scale monitoring or surveillance. This would be a serious interference with a person's private life. The measure may also potentially have implications for other human rights including the right to freedom of assembly and right to equality and non-discrimination. While reference is made to situations of need in the context of national security or law enforcement, there is no express threshold of seriousness for agencies to access these services under the bill where they are otherwise legally authorised to do so. It means that, in the absence of specific safeguards, facilitating access to the FIS may not be the least rights restrictive approach.

Summary of analysis

2.218 In summary, the bill would facilitate the matching and sharing of facial images and biometric data across government databases through the Hub. These databases will contain the facial images and biographical details of the vast majority of Australians. The minister's response outlines some mechanisms to assist with the proportionality of the limitation imposed on the right to privacy. This includes restricting access to more privacy intrusive services such as the FIS to particular

agencies, the design of the Hub, the operation of the Face Matching Services Participation Agreement and offences for unauthorised disclosure of information. These are important safeguards in relation to the operation of the measure. However, there are concerns about whether these are sufficient to ensure that the measure is a proportionate limitation on the right to privacy. This is because there is reliance placed by the minister on the fact that an agency will need to be otherwise authorised to collect, use and disclose personal information. However, the particular concern here is that if this authorisation is not sufficiently circumscribed there is a risk that the Hub will facilitate information sharing in circumstances where it is not proportionate.

Committee response

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

2.220 The minister's response has outlined a number of safeguards in relation to the operation of the measure. However, the preceding analysis indicates that there may be a risk of incompatibility with the right to privacy where the Hub facilitates the sharing of information but the authorisation for an agency to collect, use, share, or retain facial images or biographic information is not sufficiently circumscribed.

2.221 It is noted that while the Face Matching Services Participation Agreement has been relied upon as a safeguard in the minister's response a copy of this agreement has not been provided to the committee. The committee will write separately to the minster to request a copy of the Face Matching Services Participation Agreement. It is difficult for the committee to conclude whether the Face Matching Services Participation Agreement will provide an adequate and effective safeguard without a copy of this agreement.

Department of Foreign Affairs and Trade participation in identity matching services

2.222 The Australian Passports Amendment (Identity-Matching Services) Bill 2018 (the Passport Amendment Bill) seeks to amend the *Australian Passports Act 2005* (Passports Act) to insert an additional purpose for the use and disclosure of personal information. Specifically, the Passport Amendment Bill would authorise the Department of Foreign Affairs and Trade (DFAT) to participate in a specified service to share and match information relating to the identity of a person.[30] It would also provide that the minister may arrange for the use of computer programs to make decisions or exercise powers under the Passports Act.[31]

30 See proposed subsection 46(d) of the Passports Act.

31 See proposed section 56A of the Passports Act.

Compatibility of the measure with the right to privacy

2.223 Permitting the minister to authorise DFAT to participate in the identity matching services and thereby share and match identity information, engages and limits the right to privacy. According to the statement of compatibility, the types of information to be disclosed and matched include biographic details such as names, dates of birth and gender as well as facial images.[32]

2.224 The statement of compatibility acknowledges that the measure engages and limits human rights but argues that this limitation is permissible.[33] It argues that the measure is 'pursuing the legitimate objective of making fast and secure identity verification available to support a range of identity-check processes'.[34] The initial analysis stated that this would appear to be a description of the process the measure will facilitate rather than an explanation of why this process pursues a legitimate objective for the purposes of international human rights law. For a limitation on a right to seek to achieve a legitimate objective, it must be demonstrated that the objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. In this respect, the statement of compatibility goes on to state the services will provide a tool in support of the legitimate objective of 'combatting identity crime and supporting national security, law enforcement and community safety'.[35] As set out above, these are likely to be legitimate objectives for the purposes of international human rights law. It also appears that the measure is rationally connected to these objectives.

2.225 However, as outlined above at [2.182]-[2.192], there are serious questions about the proportionality of the limitation the identity matching services impose on the right to privacy. These concerns apply equally in relation to DFAT sharing and matching personal information through such services.

2.226 Additionally, the measure will authorise the sharing and matching of DFAT's repositories of personal information including passport photographs and biographic information. This means that the photographs and biometric data of a significant proportion of the population including children will be subject to the identity matching services through the Hub. As noted in the initial analysis, there is a serious question as to whether having databases of, and facilitating access to, facial images of a very significant portion of the population in case they are needed is the least rights restrictive approach to achieving the stated objectives of the measure.

2.227 Beyond stating that there will be policy and administrative safeguards, the statement of compatibility provides limited information as to the nature of any

32 Statement of compatibility (SOC) to the Passport Amendment Bill, p 4.

33 SOC, Passport Amendment Bill, p. 4.

34 SOC, Passport Amendment Bill, p. 5.

35 SOC, Passport Amendment Bill, p. 5.

safeguards that will be in place with respect to DFAT sharing personal information via the identity matching services. Accordingly, it was unclear whether there are adequate and effective safeguards in place to ensure that the limitation on human rights is proportionate or that the measure is sufficiently circumscribed.

2.228 The committee therefore requested the advice of the Minister for Foreign Affairs as to whether the limitations on the right to privacy imposed by the measures in the Passport Amendment Bill are reasonable and proportionate to achieve the stated objective. This includes information in relation to:

- whether the *Privacy Act 1988* (Privacy Act) will apply to DFAT's disclosure of photographs and biographical information and, if so, whether it will act as an adequate and effective safeguard for the purposes of international human rights law noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;
- whether the Passport Amendment Bill contains adequate and effective safeguards and is sufficiently circumscribed for the purposes of international human rights law;
- whether, in light of the number, types and sources of facial images and other biometric data that may be shared and matched, these measures represent the least rights restrictive approach to achieving the stated objectives (including whether having facial images of the vast majority of Australians searchable via the identity matching services is the least rights restrictive approach);
- whether the measure is a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [2.190]-[2.191];
- the extent to which DFAT's historical facial images will be subject to the identity matching services, and whether the Passport Amendment Bill or other Australian laws provide adequate and effective protection against misuse and in respect of vulnerable groups; and
- in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against DFAT facial images through the Hub is the least rights restrictive approach to achieve the stated objective.

Minister for Foreign Affairs and Trade's response

2.229 The minister's response confirms that DFAT's disclosure of photographs and biographical information will be subject to the Privacy Act. The application of the Privacy Act is relevant to the proportionality of the limitation on the right to privacy. This is because the Privacy Act may or may not provide a relevant safeguard in the context of the measure.

2.230 Consistently with the Minister for Home Affair's response discussed above, the response from the Minister for Foreign Affairs and trade argues the 'adequacy and effectiveness of the privacy safeguards contained in the Privacy Act, including the appropriateness of the exemptions to restrictions on collection, use and disclosure of information under the Privacy Act, have been considered by the Parliament in the development of the Act and subsequent amendments to it'. In this respect, as noted above, the fact that the Privacy Act has previously been considered by parliament or that it applies across government agencies does not fully address whether the provisions of the Privacy Act provide an adequate safeguard for the purposes of international human rights law. As noted above and in the initial analysis, the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information for a secondary purpose. The particular concern is that the breadth of some of these exceptions in the context of the measure may facilitate the disclosure of personal information in circumstances that are not compatible with the right to privacy. Of relevance to the scope of such exemptions, the minister's response states that:

> The Privacy Act is not the only legislation relevant to the collection, use and disclosure of photographs and biographical information by DFAT in the passports context. Australian Privacy Principle 6.2(b) provides, relevantly, that personal information (including sensitive information) may be used and disclosed for a secondary purpose (to the purpose for which the information was collected, in this case being the processing of an application for an Australian travel document) where it is required or authorised by or under an Australian law.

2.231 This means that, for example, an agency could request and receive passport information such as biographic details and photographs providing there was an Australian law (that is, a Commonwealth, state or territory law) which authorised it. This would be regardless of whether this other Australian law is a proportionate limit on the right to privacy. Accordingly, sharing information in such circumstances may not be a proportionate limit on the right to privacy.

2.232 Further, the response does not directly address whether the authorisation provided to DFAT under the bill to participate in the identity matching services could itself constitute such an exemption for the purposes of the prohibition on disclosure for a secondary purpose under the APPs and Privacy Act. That is, there is a question as to whether an agency, to which the APPs apply, would be permitted to share photographs and biographical information with DFAT because it is 'authorised by or under' the bill. In this respect, the minister's response explains states that:

> The Bill is not seeking to authorise participating agencies to "access" DFAT's identification information through the services. No broad "access" will be possible under the services that is not consistent with the hub and spoke model under which participating data holding agencies maintain control over their data holdings. Rather, a request for disclosure of certain information will be made to DFAT by a requesting agency and DFAT will

> either disclose that information or not pursuant to pre-agreed conditions. Those agencies requesting information from DFAT will need to have their own legal basis to collect information that DFAT discloses to it. Most (if not all) participating agencies already have a legal basis to collect this information from DFAT, in most cases without prior review by a court or independent administrative authority…

2.233 This suggests that the bill is not intended to authorise disclosure for the purposes of the Privacy Act. It would have been useful to the committee's analysis if questions regarding the interaction between the bill and the Privacy Act had been more fully explored in the minister's response.

2.234 As to whether the Passport Amendment Bill otherwise contains adequate and effective safeguards and is sufficiently circumscribed for the purposes of international human rights law, the minister's response provides the following information:

> The *Australian Passports Act 2005* (Cth) and *Australian Passports Determination 2015* (Cth) relevantly provide the primary legislative framework for the collection, use and disclosure of passport-related personal information and sensitive information. The *Australian Passports Act 2005* (Cth) and its related Australian Passports Determination 2015 (Cth) set out various permitted collections, uses and disclosures of personal information and sensitive information in the passports context and already provide a legal basis, although not sufficiently workable, for most of the types of disclosures envisaged by DFAT's participation in the biometric face matching services. The primary intention of the Bill is to augment into one, workable, comprehensive legal basis the various existing, but fragmented, legal bases that currently exist to permit disclosures of passport-related information (addressed below).
>
> The Bill provides for DFAT's participation in identity-matching services that will be subject to other privacy safeguards under the Intergovernmental Agreement on Identity Matching Services (IGA). In addition, the policy and administrative privacy safeguards, including requirements for privacy impact assessments before agencies access the services and compliance audits, will help to ensure the use of the services remains proportionate to the need, and prevent any misuse of identification information.
>
> The principle governing these arrangements is that the minimum necessary information is disclosed to meet the legitimate purpose of the services. The IGA provides that strict privacy controls, accountability and transparency must apply to all the services. Within this framework, data-holding agencies retain discretion to determine specific purposes for which, entities to which, and other circumstances under which, they make their data available through the services.
>
> These and other privacy, accountability and transparency measures provide appropriate safeguards against unnecessary impositions on the right to privacy as a result of the Minister making Australian travel

document data available for all the purposes of, and by the automated means intrinsic to, the services.

The Privacy Act, the *Australian Passports Act 2005* (Cth) and the *Australian Passports Determination 2015* (Cth) already provide various legal bases to cover DFAT's disclosures of passport-related personal information and sensitive information to agencies and organisations participating in the biometric face matching services. However, legal complexities inherent to applying various existing legal bases in the context of the biometric face matching services (including the diverse nature of participating organisations and the multiple purposes for disclosure) means the only practical way for DFAT to participate in the biometric face matching services as a data holding agency is to augment the various existing legal bases for disclosure into a single, comprehensive legal basis for disclosure for the purposes of participating in the biometric face matching services, as is proposed by the Bill.

The Bill's provision for certain automated decision-making in relation to passport-related information disclosures is intended to supplement DFAT's current ability to make manual decisions to disclose personal or sensitive information so as to allow DFAT's participation in the proposed automated 'hub and spoke' model inherent to the biometric face matching services. The Department of Home Affairs has outlined separately the automated nature of the biometric face matching service's operation, and the reasons for this.

The safeguards inherent to the use, collection and disclosure of passport-related personal and sensitive information have already been assessed as adequate and effective by parliament in the context of the *Australian Passports Act 2005* (Cth) and its related *Australian Passports Determination 2015* (Cth). The Bill augments the existing legal framework. As such, those privacy safeguards already assessed as adequate and effective in the context of disclosures of passport information will continue to be adequate and effective.

2.235 The minister's response outlines some relevant safeguards. However, it is noted that the response does not specifically assess whether the use, collection and disclosure of information under existing laws imposes a proportionate limitation on human rights. An assessment of the proportionality of DFAT's participation requires consideration of what information will be shared through the Hub and to what extent. For example, if the initial collection of personal information was not proportionate then the sharing of such information may not be proportionate either. In this respect, the *Australian Passports Act 2005* was legislated prior to the establishment of the committee, and for that reason, the scheme has never been required to be subject to a foundational human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Accordingly, it is unclear on what basis the minister is making the claim that 'those privacy safeguards already assessed as adequate and effective in the context of

disclosures of passport information will continue to be adequate and effective.' It is noted that merely because parliament considered and passed particular legislation does not mean that it necessarily complies with Australia's obligations under international human rights law.

2.236 Consistent with the response from the Minister for Home Affairs discussed above, the foreign minister's response provides information as to the scope of concerns regarding identity fraud and the operation of the current system of identity verification. As noted above, this information indicates that less rights restrictive approaches have been tried but are subject to some constraints as to their effectiveness. This includes constraints in relation to the management and auditing of requests for sharing identification information. However, while acknowledging the constraints in the current system, there are still some concerns as to whether the approach proposed is the least rights restrictive approach as required to be a proportionate limitation on the right to privacy. This is because the scope of the identity matching services envisaged by the bill is very broad. Specifically, DFAT's participation in the services, by including passport information, would allow for the matching of the facial images of a significant number of Australians.[36]

2.237 In relation to whether the measure is a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence outlined at [2.190]-[2.191], the minister's response states:

> …Respectfully, the case law cited by the Committee at [1.148] - [1.149] of its Report does not alter that fact.
>
> A number of the cases referenced deal with the matter of collection of biometric information directly from members of the public and the retention of that information for law enforcement purposes. The identity-matching services that the Bill allows DFAT to participate in are simply tools to enable agencies to more securely disclose (and collect) information to each other.
>
> As part of the existing legal framework that already applies to the collection, use and disclosure of identification information in the passport context, DFAT will still have to comply with data retention regimes that apply to it with respect to the storage and destruction of that information.
>
> Furthermore, the services will be subject to a range of stringent user access arrangements under a common Face Matching Services Participation Agreement between all participating Commonwealth, state and territory agencies, which will provide a legally binding framework for participation. This will include, *inter alia*, requiring agencies to only retain information for as long as they require it for the purpose for which it was collected, or for the minimum period required by law.

36 Department of Foreign Affairs and Trade, *2017 Passport Facts* https://www.passports.gov.au/2017-passport-facts

> The Committee also refers to European cases dealing with retention of communications data, and its own comments on the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*. The issues raised in relation to metadata largely relate to concerns about the retention of significant amounts of data not previously retained, and the purposes for which it can be accessed.
>
> As set out above, the Bill is not intended to deal with the collection and retention of data from individuals - it provides for information-sharing between DFAT and other participating agencies. The data to be transmitted through the services is information that DFAT will have already collected from individuals with their consent and retained. In this way, the services are not analogous with the establishment of large databases of new metadata not already retained.
>
> As each data holding agency, including DFAT, will retain control over the data it holds (including ensuring adequately [sic] information security measures are in place pursuant to Australian Privacy Principle 11), no new data mining or metadata issues should arise other than those which already exist in relation to DFAT's collection, use and disclosure of passport-related information under existing legal authority.
>
> The Committee also notes that the European cases relating to communications data raise the issue of access to information without a requirement for prior review by a court of independent administrative authority. The Bill is not seeking to authorise participating agencies to "access" DFAT's identification information through the services. No broad "access" will be possible under the services that is not consistent with the hub and spoke model under which participating data holding agencies maintain control over their data holdings. Rather, a request for disclosure of certain information will be made to DFAT by a requesting agency and DFAT will either disclose that information or not pursuant to pre-agreed conditions. Those agencies requesting information from DFAT will need to have their own legal basis to collect information that DFAT discloses to it. Most (if not all) participating agencies already have a legal basis to collect this information from DFAT, in most cases without prior review by a court or independent administrative authority. It is not appropriate for the Bill to impose this additional requirement on participating agencies - this would be a matter for other legislative processes relevant to those agencies, or their particular jurisdictions.

2.238 While noting that the response outlines some safeguards, the jurisprudence referred to points to concerns in relation to the right to privacy in circumstances where government retention of, or access to, personal information is insufficiently circumscribed. As noted above, the fact that collection and retention of personal information already occurs does not address whether these regimes are a proportionate limitation on the right to privacy. Indeed, the measure in this bill would facilitate easier access to DFAT's databases of passport information. Unless the databases themselves and access to them are sufficiently circumscribed there is a

risk that DFAT could share passport information in circumstances where it is not proportionate.

2.239 In relation to the extent to which DFAT's historical facial images will be subject to the identity matching services, the minister's response states that 'acknowledging the importance of providing adequate and effective protection against misuse and in respect of vulnerable groups, DFAT will only provide access to individuals' most recent facial images through the services'. This will assist with the proportionality of the limitation. The minister's response further outlines a range of legislative and operational safeguards to assist to protect the identity of vulnerable groups including the content of Face Matching Services Participation Agreement.

2.240 In relation to the FIS and whether allowing images of unknown individuals to be searched and matched against DFAT facial images through the Hub is the least rights restrictive approach to achieve the stated objective, the minister provides the following information:

> The FIS is designed to assist Australia's law enforcement, national security and anticorruption agencies to identify unknown persons of interest in the course of their identity fraud prevention and detection activities, and their national security, law enforcement, protective security and community safety activities. This could include, for example, identifying a suspect from a still image taken from CCTV footage of an armed robbery, identifying an individual suspected to be involved in terrorist activities or in siege situation, or determining if a person of interest is using multiple fraudulent identities.
>
> In recognition of the greater privacy implications of the FIS, it will only be able to be used by a restricted and specific list of agencies set out in the Department of Home Affairs' *Identity-Matching Services Bill 2018*. Any substantive change to the breadth or nature of the agencies that have access to the FIS will need to be made by an amendment to the Act, rather than through the making of a rule. This will help to prevent 'scope creep' and will ensure appropriate Parliamentary oversight of any substantive changes to FIS access.
>
> Many of these agencies already share this information, and can request matching against various databases. However, this currently occurs on an ad-hoc basis which can be slow and difficult to audit. DFAT's participation in the identity-matching services will provide it with a faster, secure tool for transmitting these requests to multiple data sources at once and receiving the results as quickly as possible, with a clear audit trail for accountability purposes.
>
> ln many law enforcement and national security scenarios, it is imperative that a person of interest is identified quickly to prevent a new or ongoing threat to the public. ln the current environment, this is often not possible, and the various different methods agencies use to share information with each other are inefficient and make auditing and oversight difficult. By

> providing agencies with a tool to help them resolve the identity of a person of interest quickly, and in an auditable way, the services will help to ensure that these agencies can operate effectively and continue to keep Australians safe, whilst being accountable to the Australian public.

2.241 Restricting the agencies that may access more privacy intrusive services such as the FIS is a relevant safeguard in relation to the proportionality of the measure. However, it is noted that a measure which allows for the electronic matching of unknown individuals against DFAT passport databases is restrictive of human rights. While reference is made to situations of need in the context of national security or law enforcement, there is no express threshold of seriousness before an agency can use the FIS in circumstances where they are otherwise legally authorised to do so. It means that, in the absence of specific safeguards, sharing passport information may not be the least rights restrictive approach.

2.242 In summary, the bill would authorise DFAT to participate in the identity matching services which allow for the matching and sharing of DFAT's databases through the Hub. These databases will contain the facial images and biographical details of many Australians, including children. The minister's response outlines some mechanisms to assist with the proportionality of the limitation imposed on the right to privacy. This includes restricting access to more privacy intrusive services such as the FIS to particular agencies, the design of the Hub, the operation of the Face Matching Services Participation Agreement and offences for unauthorised disclosure of information. These are important safeguards in relation to the operation of the measure. However, as outlined above, there are concerns about whether these are sufficient to ensure that DFAT's participation in the services is a proportionate limitation on the right to privacy. This is because there is reliance placed by the minister on the fact that an agency will need to be otherwise authorised to collect, use and disclose personal information. However, if this authorisation is not sufficiently circumscribed there is a risk that the Hub will facilitate information sharing in circumstances where it is not proportionate.

Committee response

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

2.244 The minister's response has outlined a number of safeguards in relation to the operation of the measure. However, the preceding analysis indicates that there may be a risk of incompatibility with the right to privacy to the extent that DFAT's participation in the services facilitates the sharing of its information in circumstances where the authorisation for an agency to collect, use, share, or retain facial images or biographic information is not sufficiently circumscribed.

2.245 The *Australian Passports Act 2005* was legislated prior to the establishment of the committee and has never been subject to a foundational human rights

compatibility assessment in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. It may benefit from a foundational review.

Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708]

Purpose	Prescribes tertiary courses that must be completed, and exams that must be passed, in order to register as a migration agent. Prescribes the English language tests that certain persons must take in order to register as a migration agent, and the minimum scores that a person must achieve
Portfolio	Home Affairs
Authorising legislation	Migration Agents Regulations 1998
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives on 5 February 2018)
Rights	Equality and non-discrimination (see **Appendix 2**)
Previous reports	3 & 4 of 2018
Status	Concluded examination

Background

2.246 The committee first reported on the instrument in its *Report 3 of 2018*, and requested a response from the Minister for Home Affairs by 11 April 2018.[1] The minister's response was received on 30 April 2018 and discussed in *Report 4 of 2018*.[2]

2.247 The committee requested a further response from the minister by 23 May 2018. A response from the Assistant Minister for Home Affairs was received on 30 May 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Requirement for certain persons to complete additional English language exams to register as a migration agent

2.248 Relevantly, section 7(2) of the Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the instrument) introduces new language proficiency exams for persons seeking to

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 65-69.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 58-63.

register as a migration agent unless specified residency and study requirements are met. Persons are exempt from language proficiency exams if they have successfully met specified requirements in Australia, New Zealand, the United Kingdom, the Republic of Ireland, the United States of America, the Republic of South Africa or Canada as follows:

- secondary school studies to the equivalent of Australian Year 12 level with minimum 4 years secondary school or equivalent study, and have successfully completed a Bachelor degree or higher; or
- they have successfully completed the equivalent of secondary school studies to at least Australian Year 10 with at least 10 years of primary or secondary schooling, or their secondary school studies and degree; and
- while completing their primary or secondary schooling, or their secondary school studies and degree, they were resident in one of those countries.

2.249 If these requirements are not met, then section 8 of the instrument provides that persons who are required to complete the English-language proficiency test must achieve:

- in the International English Language Testing System (IELTS), an overall score of at least 7, with a minimum score of 6.5 in each component of the test (speaking, listening, reading and writing); or
- in the Test of English as a Foreign Language internet-based test (TOEFL iBT), an overall score of at least 94, with minimum scores of 20 in speaking and listening, 19 in reading, and 24 in writing.

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

2.250 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 are entitled without discrimination to the equal and non-discriminatory protection of the law.

2.251 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has described indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects

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

people with a particular personal attribute (for example, national origin or language).[4]

2.252 The initial human rights analysis stated that requiring certain persons to complete an English language proficiency test to be eligible for registration as a migration agent engages the right to equality and non-discrimination on the basis of language competency or 'other status'. It may also indirectly discriminate on the basis of national origin as it may disproportionately impact individuals from countries where English is not a national language or widely spoken.

2.253 Further, by providing that persons who completed their education and were resident in specified countries are not required to undertake a language proficiency test, the measure may also further indirectly discriminate on the basis of national origin. This is because it will have a disproportionate negative effect on individuals from countries that are not excused from the English language proficiency test requirement. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[5]

2.254 The statement of compatibility states that the instrument does not engage any of the applicable rights or freedoms,[6] and so does not provide an assessment of whether the right to equality and non-discrimination is engaged by the measure.

2.255 Under international human rights law, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.[7]

2.256 The statement of compatibility states that the objective of the instrument is to 'strengthen the educational qualifications of migration agents…to ensure that their clients receive high standards of service'.[8] The initial analysis stated that these are likely to be legitimate objectives for the purposes of human rights law, particularly given the complexities of the Australian migration system and the potentially serious effect that poor advice can have on individuals.[9]

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4 See, e.g., *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

5 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).

6 Statement of compatibility (SOC), p. 8.

7 *Althammer v Austria* HRC 998/01, [10.2].

8 SOC, p. 8.

9 C N Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report* (September 2014), p. 142.

2.257 Notwithstanding the legitimate objectives of the measure, it was unclear whether the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective. In this respect, it was acknowledged that a level of proficiency in English may be needed to practise effectively as a migration agent in Australia. Requiring a person either to complete all or part of their education in English, or to complete an English-language proficiency test, may therefore be an effective means of ensuring the necessary level of proficiency.

2.258 However, the initial analysis noted that the IELTS and the TOEFL iBT may exceed those requirements necessary to enter tertiary study.[10] It was unclear from the information provided that merely completing 10 years of primary and secondary education, to the equivalent of Australian Year 10 level, would ensure a person possesses a level of English proficiency equivalent to that of a person who achieves the required IELTS or TOEFL iBT scores. Consequently, it appears possible that persons who are not educated in Australia, or in another prescribed country, may be required to meet a potentially higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration agent. This raised concerns as to whether the differential requirements would be effective to achieve the stated objectives, and whether the differential requirements are based on reasonable and objective criteria.

2.259 Similarly, it was unclear from the information provided that the exemption for a person who completed their school education at an institution in one of the prescribed countries where they were resident is rationally connected to the stated objective. This is because it was unclear that this would necessarily ensure the person's proficiency in English at the required level.

2.260 In relation to the proportionality of the measure, the statement of compatibility states:

> Strengthening educational requirements for the migration agent industry does not exclude applicants from the profession, provided they meet the applicable standards, which are reasonable and transparent.[11]

2.261 However, there are questions as to whether the application of these standards is sufficiently circumscribed with respect to the stated objective of the measure. For example, the instrument would require a person to complete an English proficiency test irrespective of whether their education was primarily in English, if the person did not complete their education in a prescribed country. For

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10 See, for example, Flinders University, English language requirements, http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

11 SOC, p. 8.

example, English may be the primary language used in an institution (for example, an international school) in a country that is not a prescribed country. Further, a number of universities consider that secondary and tertiary studies completed in English from countries that are not listed in the instrument satisfy the English proficiency requirements necessary for entry into the migration law program.[12] This raised questions as to whether requiring a person who was educated primarily in English to also sit a proficiency test is the least rights-restrictive means of achieving the stated objectives of the measure.

2.262 Accordingly, the committee requested the advice of the minister as to:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and
- whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).

Minister's response

2.263 In relation to the right to equality and non-discrimination engaged by the instrument and discussed in the previous analysis, the minister provides the following general information:

> Guided by the 2014 Kendall Review, the Government is committed to protecting vulnerable visa applicants by ensuring that new and re-registering migration agents be required to prove that they have English language proficiency. The amendments made to the English language tests in *IMMI 18/003: Specified courses and exams for registration as a migration agent instrument* were a correction to the previous instrument *IMMI 12/097 Prescribed courses and exams for applicants for registration as a Migration Agent (Regulation 5)*. The Test of English as a Foreign Language (TOEFL) scores set out in the previous instrument 12/097 (with the exception of the writing subtest) were incorrect and did not align with the benchmarked International English Language Testing System (IELTS-TOEFL) equivalent scores.
>
> With IMMI 12/097 being repealed and replaced to reflect the new educational requirements for migration agents, it was an opportune time to revise the TOEFL scores. The TOEFL scores in IMMI 18/003 align with the benchmarks for all departmentally accepted English language tests.
>
> The broad application of these accepted English language proficiency levels for registered migration agents (which aligns with benchmarks

12 See, for example, Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

required for certain visa applicants) is non-discriminatory. The measures are also reasonable and proportionate to ensure the quality and standards of advice to protect clients of migration agents.

2.264 As set out in the committee's initial report, it is acknowledged that the measure appears to pursue a legitimate objective for the purposes of international human rights law. However, as set out in detail above at [2.250]-[2.261] there are questions as to whether the measure as formulated is rationally connected and proportionate to that objective. In this respect while the minister's response states that the measure is non-discriminatory, no further information is provided in support of this statement. The information provided by the minister otherwise does not substantively engage with the committee's inquiries and does not provide sufficient information for the committee to consider whether the instrument is compatible with human rights.

2.265 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to include an *assessment* of whether the legislative instrument is compatible with human rights,[13] and this has not occurred in relation to the statement of compatibility accompanying the instrument that is the subject of this analysis. As noted in the Committee's *Guidance Note 1,* the committee considers that statements of compatibility are essential to the examination of human rights in the legislative process, should identify the rights engaged by the instrument, and should provide a detailed and evidence-based assessment of the measures against the limitation criteria where applicable. In the absence of such information in the statement of compatibility, the committee may seek additional information from the proponent of the instrument and it is the committee's usual expectation that the minister's response would substantively address the committee's inquiries. In other words, the committee requires a more detailed assessment of the human rights engaged by the instruments beyond the minister's statement that the measure is non-discriminatory.

2.266 The committee therefore restated its request for the advice of the minister in relation to the compatibility of the measure with the right to equality and non-discrimination, including:

- how the measures are effective to achieve (that is, rationally connected to) the stated objectives; and
- whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).

13 Section 9(2) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Assistant minister's response

2.267 The assistant minister explains the importance of migration agents having sufficient English language skills:

> The Department seeks to ensure that the migration agent industry is able to service a clientele that may have little or no English language capability. The capacity of a migration agent to convey instructions and information to and from the Department on behalf of a vulnerable client is often critical to the outcome of the visa application.
>
> The duties of migration agents include, not just the completing of forms and the handling of funds on behalf of visa applicants, but also interpretation of complex legislation and its application to the circumstances of a particular applicant. Migration agents are also required to provide clear advice and information, prepare detailed submissions and review of visa applications provided for in the *Migration Act 1958* (Cth).

2.268 Noting the potential vulnerabilities of clients and the type of work performed, this information indicates that migration agents are likely to require well-developed English language skills. As set out in the previous human rights analysis, on this basis, the measure addresses the legitimate objective of ensuring the clients of migration agents receive high standards of service as well as conveying instructions to clients.

2.269 The assistant minister's response argues that requiring a person to either complete the English-language proficiency test or have met residency and education requirements in specified countries is rationally connected to its stated objective:

> The current legislative instrument states that if a person is not in a class of persons specified, an English language proficiency exam is required to be completed. In order for an individual to be exempt from sitting the English language exam, the individual must have been resident in one of the specified countries (Australia, New Zealand, United Kingdom, Republic of Ireland, United States of America, Republic of South Africa or Canada) for the duration of the specified schooling. This is similar to previous legislative instruments introduced in 2012 (FR2012L01932 IMMI 12/097 and prior to that F2012L01343 IMMI 12/035) which also included the specified class of persons.
>
> The Department does not consider the specified class of persons being exempt from undergoing the English language exam as unreasonable or disproportionate. Requiring migration agent applicants who have not completed educational requirements whilst being resident in the five specified countries [Australia, New Zealand, United Kingdom, Republic of Ireland, United States of America, Republic of South Africa or Canada] to complete the English language exam, is rationally connected to the legitimate aim of ensuring migration agents are able to convey instructions and information to, and from, the Department on behalf of their clients.

> The New Zealand Immigration Advisers Authority also requires educational requirements to be delivered in the English language and completed while applicants are living in the specified countries (New Zealand, Australia, Canada, Ireland, UK and the US), in their Competency Standard 5.
>
> Similarly, to Australia, English is the common language (ie the majority of the population are native English speakers) in the USA, UK, Canada, Ireland and New Zealand. According to publically available information in 2015, 54 sovereign states and 27 non-sovereign entities had English as an official language, however only six had English as the common language (Australia, USA, UK, Canada, Ireland and New Zealand). A common language in any given country gives prominence over other languages spoken inside the country by the people. Often it is one that is spoken by the majority of the population of the country (e.g. Australia, USA). Therefore it is considered by the Department that people from the specified countries are more likely to meet the English language requirement.

2.270 The information provided in the assistant minister's response indicates there is a strong correlation between having been resident in, and completing schooling in, a number of the specified countries and possessing requisite English language skills. Put another way, individuals who have been resident in and completed schooling in English in countries where English is the 'common language' or is widely spoken will be likely to have significant English language skills. However, the assistant minister's response does not specifically address the circumstances of the Republic of South Africa, which is specified under the instrument, and whether he also considers that English is the common language in South Africa. Yet, on balance, in most circumstances, the requirement of either having completed an English language test or satisfying schooling in English *and* residency requirements in the specified countries is likely to be rationally connected to the stated objective of the measure.

2.271 In relation to the proportionality of the measure, the assistant minister's response further explains, in his view, why residency and schooling in specified countries are a reasonable substitute for having completed an English language proficiency test:

> The intended purpose of this requirement is to reduce the unnecessary regulatory burden on migration agent applicants who were educated in English in one of the specified countries whereby the need for them to undertake English testing is unnecessary duplication. The Department's recognition of English as a 'common language' in these countries and acknowledgment that a level of education in English contributes to higher English language proficiency, achieves a balance between the necessity of migration advice standards assurance and reduction of regulatory burden.
>
> The 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Review) recommended that English language proficiency equivalent to an IELTS score of 7 should be the required level of English

proficiency for both new and repeat applicants for registration as a migration agent (recommendation 16).

2.272 The assistant minister's response further explains that residency and schooling in English in the specified countries shows that the individual possesses a level of English equivalent to IELTS 7 and 'therefore does not need to be subject to over regulation through English testing'. As such, the assistant minister's response indicates that persons who are not educated in Australia, or in another prescribed country, are not required to meet a higher standard of English language proficiency than their Australian (or prescribed country) counterparts in order to be eligible for registration as a migration agent. This information addresses some of the concerns about the proportionality of the measure and differential treatment.

2.273 In this respect, the assistant minister's response further states that the Department 'relies on both the specified countries and the fact that individual's education was conducted in English as a reliable assurance that the potential migration agent will have English language proficiency'. It is acknowledged that a criteria, which requires both residence in particular countries where English is widely spoken *and* education in English, may be capable of being reasonable and objective. However, in this respect, the assistant minister's response has not provided sufficient information as to why some English speaking countries have been specified and others have not. For example, it is unclear why South Africa has been specified noting it is also unclear whether it meets the minister's own criteria of being a country where English is a 'common language'. It may be that there are other factors that mean that the specification of the seven countries (as opposed to other countries where English is widely spoken) is based on reasonable and objective criteria. For example, an assessment may have been made about meeting certain educational standards, literacy levels or the prominence of English in those countries. As this kind of information has not been provided, it remains unclear whether the requirements are based on reasonable and objective criteria.

Committee response

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

2.275 The measure may be capable of being based on reasonable and objective criteria, noting that to qualify for an exemption from having to complete an English proficiency test a person must have resided in a specified country *and* have been educated in English in that country. However, it is unclear from the information provided whether the specification of these particular countries is based on reasonable and objective criteria. On this basis, it is not possible to conclude that the measure is compatible with the right to equality and non-discrimination.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Purpose	To transfer oversight for offshore greenhouse gas storage environmental management from the minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives, 28 March 2018
Rights	Presumption of innocence (see **Appendix 2**)
Previous report	4 of 2017
Status	Concluded examination

Background

2.276 The committee first reported on the bill in its *Report 4 of 2018*, and requested a response from the Minister for Resources and Northern Australia by 23 May 2018.[1]

2.277 The minister's response to the committee's inquiries, received on 23 May, is discussed below and is reproduced in full at **Appendix 3**.

Reverse legal burden offences

2.278 The bill contains a number of offence provisions which contain offence-specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction;[2] and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time.[3]

2.279 In respect of each of these defences, the defendant bears a *legal* burden of proof.[4] This means that the defendant rather than the prosecution must prove the existence of the matters relevant to the defence on the balance of probabilities.[5]

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2018* (8 May 2018) pp. 17-19.

2 See, proposed sections 579A, 591B, 594A; and Item 40 of the bill, proposed amendment to section 584; Explanatory Memorandum (EM) p. 11.

3 See, proposed Schedule 2B, section 23; EM pp. 12-13.

Compatibility of the measures with the right to be presumed innocent

2.280 The right to be presumed innocent until proven guilty according to law usually requires that the prosecution prove each element of the offence (including fault elements and physical elements).[6]

2.281 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact also engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, a statutory exception, defence or excuse may effectively reverse the burden of proof, such that a defendant's failure to make out the defence may permit their conviction despite reasonable doubt. These provisions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

2.282 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective.

2.283 As noted in the initial human rights analysis, the statement of compatibility acknowledges that the offence-specific defences (which require the defendant to carry a reverse legal burden) engage and limit the right to be presumed innocent, but argues that this reverse burden is permissible. The statement of compatibility explains that in each case 'the burden is reversed because the matter is likely to be exclusively within the knowledge of the defendant, particularly given the remote nature of offshore operations'.[7] However, it was unclear from the information provided why the offence provision reverses the legal rather than merely the evidential burden of proof. This raised concerns that the reverse burden offences may not be the least rights restrictive approach to achieving the objective of the proposed legislative regime. Further, the statement of compatibility does not

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4 Under section 13.5 of the Criminal Code a legal burden of proof on the defendant must be discharged on the balance of probabilities.

5 See, *Criminal Code Act 1995* (Criminal Code), schedule 1, subsection 13.1(3)-(5). By contrast, evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist: Criminal Code section 13.3(6).

6 See, Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

7 EM, Statement of Compatibility (SOC) pp. 11, 13; EM p. 33.

expressly explain how the reverse burden offences pursue a legitimate objective or are rationally connected to this objective.

2.284 The committee therefore requested the advice of the minister as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and whether reversing the legal burden of proof rather than the evidential burden of proof is necessary); and
- whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden.

Minister's response

2.285 The minister's response provides the following information on the regulatory context of the measures:

> The task of regulators of the offshore resources industry is difficult given the remote location and high hazard nature of the industry's key operations. For this reason, providing effective and comprehensive compliance and enforcement tools to the regulator is vital in order to deliver human health and safety and environmental protection outcomes. Furthermore and of relevance in consideration of a human rights protection context, it is regulation pertaining, by and large, to large multinational companies as opposed to individuals. The companies who participate in this industry are well resourced, sophisticated and voluntarily engaging in activities for profit.

2.286 Accordingly, the information provided in the minister's response usefully clarifies that the offences will largely apply to corporations rather than individuals. As international human rights law is concerned with the impact of measures on individuals rather than corporations, this regulatory context is relevant to the human rights compatibility of the reverse burden offences.

2.287 The minister's response explains the proposed reverse burden offences in the context of existing offences:

> [The bill] contains a number of offence provisions which have corresponding offence specific defences:
>
> - it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction (the breach of directions defence); and

- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time (the well integrity defence).

These defences operate as optional exceptions to the criminal responsibility regime established under the *Offshore Petroleum and Greenhouse Gas Storage 2006* (the Act). Both of these defences are already substantively contained in the Act:

- Breach of Directions Defence: The inclusion of the breach of directions defence in the current Bill represents an expansion of an existing defence (section 584 of the Act) to reflect new measures in the Bill relating to the transfer of regulatory responsibility for greenhouse gas operations from the Minister to NOPSEMA.
- Well Integrity Defence: The inclusion of the well integrity defence is a mirrored application to a well integrity law of an existing defence for a failure to comply with OHS (clause 92 of Schedule 3) and environmental management laws (clause 18 of Schedule 2A). This is in connection with the measure in the Bill to create a new Schedule 2B to provide a complete and comprehensive suite of compliance powers relating to the well integrity function, which was transferred to NOPSEMA in 2011.

2.288 In relation to the objectives of the measure, the minister's response states:

> The Act, in part, establishes a regulatory framework for the management of remote and high hazard industry activities associated with offshore resources exploration and production. These activities, if not conducted properly, have the potential to result in serious injury or death and/or extraordinary environmental harm. The robustness of the regulatory regime, including an effective compliance and enforcement framework, is critical to achieving this objective. The objective of both the breach of directions defence and the well integrity defence assist in achieving the objective of ensuring the safety of persons in the industry as well as the protection of the environment. As such, the regulatory regime positively engages with the right to life, and helps to protect other human rights which would be negatively affected by significant environmental damage.

2.289 The objectives of ensuring the safety of persons in the industry and the protection of the environment are likely to constitute legitimate objectives for the purposes of international human rights law. As to how the measure is effective to achieve the legitimate objectives, the minister's response states:

> A direction issued by NOPSEMA is an enforcement tool designed to achieve a very particular outcome, to direct the industry participant to either do or refrain from doing something in order to deliver OHS, environmental management or well integrity outcomes. Directions are not used frequently — they are used in extraordinary circumstances, usually to deal with a specific emergent risk that the regulations do not adequately

> cover, and their application and use is taken very seriously. The defence in connection with the offence of non-compliance with a direction allows an optional exception; it is an opportunity for the defendant to prove that they took all reasonable steps to comply with the direction. As a result, the measure is effective in achieving the objectives of the Act.
>
> Well integrity laws relate specifically to the regulatory oversight of the structural integrity of wells, the management of which is seen as posing the greatest risk to both OHS and the environment. A failure in well integrity can result in the death of workers and widespread damage to the environment, such as that recently seen in the Gulf of Mexico with the explosion of the Macondo rig. Strict compliance with these laws is deemed critical and a central tenet of the offshore regime. However, this defence acknowledges and provides for an exception to strict compliance in emergency circumstances. As a result, the measure is effective in achieving the objectives of the Act.

2.290 This information indicates that the offence provisions as drafted are likely to be effective to achieve (that is, rationally connected to) their stated objectives.

2.291 In relation to whether the limitation is a reasonable and proportionate measure to achieve the stated objective, the minister's response states:

> Both of these defences are not related to issues essential to culpability, but instead provide exceptions or an excuse for the conduct. In addition, both defences relate to the serious potential consequences of non-compliance (as outlined above — risks of serious injury or death and/or major environmental consequences). Conduct resulting in the offence would, in most circumstances, take place at a remote location and without the ability for the regulator to immediately or even quickly gain access in order to ascertain the facts directly relating to these defences. As a result, the facts and information directly relevant to the defence is entirely within the defendant's knowledge; only the defendant, with their particular knowledge of, and involvement in, the circumstances happening in the event of the failure to comply with the direction, or during a well integrity emergency, is able to prove the requisite and exception-based matters of reasonable steps or practicable actions.
>
> Both defences are likely to be used by companies with significant resources, who are more than capable of shouldering the legal burden if they wish to claim a defence. The industry is highly regulated and companies involved have chosen to voluntarily participate in this regulated environment on a for profit basis. In addition, in relation to the breach of directions defence, the penalties are generally 100 penalty units and do not involve imprisonment.
>
> As a result, both measures contain a limitation that is both reasonable and proportionate to the achievement of the relevant objective. It is also the least rights restrictive approach while still balancing the ability of the measures to effectively achieve their objective.

2.292 As to whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden, the minister's response states:

> Allowing for a reversal of the evidential burden of proof only would create internal inconsistencies in the Act and its established treatment of offences and defences. It is essential to avoid any perception by the offshore petroleum and greenhouse gas storage industries that the Commonwealth is 'soft' on compliance. Defences should be available only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that they have done so.
>
> To provide the ability of a defendant to simply point to evidence that suggests a reasonable possibility that reasonable steps were taken to comply with a direction or that compliance with well integrity laws was not practicable in the face of an emergency would result in the regulator being unable to successfully and meaningfully take enforcement action in the case of an offence being committed, and this would undermine the legitimate objective in question.
>
> In the aftermath of an event where one or more workers may have suffered serious injury or may have died, or where significant environmental damage may have occurred, it is appropriate that a titleholder should have to demonstrate, on the balance of probabilities, that the titleholder took all available action to prevent the occurrence, rather than merely to meet the evidential burden relating to the possibility of having done so.
>
> Due to the remote occurrence of the regulated activities, the regulator is not able to, at the relevant time, independently assess and verify what is reasonable or practicable in the event of non-compliance. Accordingly, the defence would almost always succeed without the real ability of the prosecution to contest its veracity. The relevant facts are entirely within the defendant's knowledge and not at all within the regulator's knowledge. This puts the regulator at a significant disadvantage when attempting to establish the chain of causation of an adverse event and to meet a legal burden of proof that a defence cannot be relied upon. This would ultimately lead to suboptimal outcomes for OHS of offshore workers and protection of the marine environment.

2.293 Accordingly, the information provided indicates that the measure is likely to be a proportionate means of achieving its legitimate objectives. Specifically, noting the regulatory context, it appears that the reverse burden offences are the least rights restrictive approach.

Committee response

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

2.295 The committee notes that the measures are likely to be compatible with the right to be presumed innocent.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

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

- Counter-Terrorism Legislation Amendment Bill (No. 1) 2018;
- Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 [F2018L00503];
- Family Assistance (Public Interest Certificate Guidelines) (Education) Determination 2018 [F2018L00464];
- Financial Framework (Supplementary Powers) Amendment (2018 Measures No. 1) Regulations 2018 [F2018L00456];
- Migration (IMMI 18/046: Determination of Designated Migration Law) Instrument 2018 [F2018L00446];
- Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251];
- Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245]; and
- Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018.

Appendix 2

Short guide to human rights

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

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

Right to life

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

4.3 The right to life has three core elements:

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

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

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

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

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

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

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

Prohibition against torture, cruel, inhuman or degrading treatment

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

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

4.7 The prohibition contains a number of elements:

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

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

Non-refoulement obligations

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

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

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

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

Prohibition against slavery and forced labour

Article 8 of the ICCPR

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

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

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

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

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

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

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

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

- the right to compensation for unlawful arrest or detention.

Right to security of the person

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

Right to humane treatment in detention

Article 10 of the ICCPR

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

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

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

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

Right to a fair trial and fair hearing

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

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

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

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

Presumption of innocence

Article 14(2) of the ICCPR

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

Minimum guarantees in criminal proceedings

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

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

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

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

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

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

Right to privacy

Article 17 of the ICCPR

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

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

4.27 The right to privacy contains the following elements:

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

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

Right to protection of the family

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

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

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

4.29 The right also encompasses:

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

Right to freedom of thought and religion

Article 18 of the ICCPR

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

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

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

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

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

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

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

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

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

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

Right to freedom of association

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

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

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

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

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

Right to take part in public affairs

Article 25 of the ICCPR

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

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

Right to equality and non-discrimination

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

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

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

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

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

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

Rights of the child

CRC

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

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

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

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

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

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

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

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

Article 12 of the CRC

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

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

Right to nationality

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

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

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

Right to self-determination

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

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

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

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

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

Rights to and at work

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

Right to work

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

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

Right to just and favourable conditions of work

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

Right to social security

Article 9 of the ICESCR

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

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

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

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

Right to an adequate standard of living

Article 11 of the ICESCR

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

Right to health

Article 12 of the ICESCR

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

Right to education

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

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

Right to culture

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

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

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

Right to an effective remedy

Article 2 of the ICCPR

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

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

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

Appendix 3

Correspondence

THE HON ANGUS TAYLOR MP
MINISTER FOR LAW ENFORCEMENT AND CYBER SECURITY

MS18-001465

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

Dear Mr ~~Goodenough~~ Ian

Thank you for your correspondence of 28 March 2018 in which further information was requested on the *Anti-Money Laundering and Counter- Terrorism Financing Amendment Instrument 2017 (No. 4)* and *Legislation (Deferral of Sunsetting- Australian Crime Commission Regulations) Certificate 2017.*

I have attached the response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters.

Thank you for raising this matter.

Yours sincerely

ANGUS TAYLOR

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4) [F2017L01678]

Committee comment

1.17 The right to a fair trial and fair hearing may be engaged and limited by the measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.18 Accordingly, the committee requests the advice of the Attorney-General as to whether the measure is compatible with the right to a fair trial and fair hearing including:

- **whether an exemption granted by the AUSTRAC CEO could permit law enforcement officers (acting through reporting entities) to incite or encourage the commission of an offence (including whether there are any safeguards in place);**
- **if the right to a fair trial and fair hearing may be limited by the measure:**
    - **how the measure is effective to achieve (that is, rationally connected to) its stated objectives; and**
    - **whether any limitation is a reasonable and proportionate means of achieving the stated objective (including whether there are adequate and effective safeguards in place, such as, to ensure that law enforcement officers are not able to incite or encourage the commission of an offence, or to rely on evidence that has been improperly obtained in criminal proceedings).**

Response

Background – policy objectives of the legislative instrument

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) imposes a number of obligations on persons that provide designated services (known as reporting entities). Relevantly, these obligations include:

- **Identification and verification**. Reporting entities must identify their customers, and verify those customers' identity before providing a designated service.
- **Developing and maintaining an AML/CTF Program**. Reporting entities must have and comply with anti-money laundering and counter-terrorism financing programs (AML/CTF programs), which are designed to identify, mitigate and manage the money laundering or terrorist financing (ML/TF) risks a reporting entity may reasonably face in providing a designated service.
- **Ongoing customer due diligence**. As part of its AML/CTF Program, reporting entities are required to have in place appropriate systems and controls to determine

whether additional customer information should be collected and/or verified on an ongoing basis to ensure that the reporting entity holds up-to-date information about its customers. This process is known as 'ongoing customer due diligence' (OCDD). OCDD ensures customers are monitored on an ongoing basis to identify, mitigate and manage any ML/TF risk posed by providing designated services. The decision to apply the OCDD process to a particular customer depends on the customer's level of assessed ML/TF risk.

- **Enhanced customer due diligence**. As part of OCDD, reporting entities are also required to implement a transaction monitoring program and develop an 'enhanced customer due diligence' (ECDD) program. Where a reporting entity determines that the ML/TF or other serious crime risk associated with dealing with a certain customer is high, it is required to implement a range of ECDD measures. These measures may include:
    - **seeking further information from the customer** to clarify or update existing information, obtain further information, or clarify the nature of the customer's ongoing business with the reporting entity;
    - **undertaking more detailed analysis of the customer's information** and beneficial owner information, including, where appropriate, taking reasonable measures to identify the source of wealth and source of funds for the customer and each beneficial owner; and
    - **conducting further analysis and monitoring of the customer's transactions**, including the purpose or nature of specific transactions, and the expected nature and level of transaction behaviour, including future transactions.

An issue arises where, as a result of law enforcement enquiries, a reporting entity forms a suspicion that a customer or their account is involved in or is being used to facilitate ML/TF or other serious crimes. The reporting entity is then obliged to take action in line with its OCDD/ECDD obligations under the AML/CTF Act. These actions may result in the customer being tipped-off to the fact that either they personally or their financial transactions have been flagged as suspicious and are likely under enhanced scrutiny. These customers often decide to cease their activities with the reporting entity, thereby limiting the ability of law enforcement agencies to continue to investigate and follow the financial transactions.

The amendments made by the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 4)* (the Amendment Instrument) are intended to address this issue. The Amendment Instrument may provide reporting entities with assurance that they will not be in breach of their obligations under the AML/CTF Act if, after being alerted to the high-risk nature of a customer following law enforcement enquiries and/or at the request of law enforcement agencies, the reporting entities refrain from conducting any additional OCDD/ECDD queries and continue to provide that customer with designated services to avoid 'tipping off' the customer whilst investigation of their financial transactions is ongoing.

The Amendment Instrument also exempts reporting entities from a number of provisions in Part 12—Offences of the AML/CTF Act. The exemption from these provisions addresses a situation where, as a result of law enforcement enquiries, a reporting entity is made aware that a customer is not who they claim to be. If the reporting entity were to continue to provide

that person with a designated service, they could potentially be in breach of sections 136 (false or misleading information), 137 (producing false or misleading documents), 138 (false documents), 139 (providing a designated service using a false customer name or customer anonymity).

Reporting entities are also exempted from section 142 of the AML/CTF Act (conducting transactions so as to avoid reporting requirements relating to threshold transactions). This is necessary to ensure that they do not commit an offence when conducting transactions that they have reason to believe, following law enforcement enquiries, are likely to have been deliberately structured to avoid giving rise to a threshold transaction that would otherwise need to have been reported under section 43 of the AML/CTF Act.

Whether the measures incite or encourage the commission of an offence

The Committee's report notes that the right to a fair trial, which is guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), also encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence, citing the European Court of Human Rights (ECHR) cases of *Ramanauskas v. Lithuania*[1] and *Teixeira de Castro v. Portugal*[2] in support.

In *Ramanauskas,* the ECHR held that 'incitement' occurs where law enforcement officers (whether themselves or through persons acting on their instructions) do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence (that is, to provide evidence and institute a prosecution).[3] In other words, the Court considered whether the offence would have been committed without the authorities' involvement.[4]

In *Teixeira de Castro*, the ECHR held that law enforcement officers had not confined themselves to investigating criminal activity in a passive manner because they had instigated the offence, and there was no evidence to suggest that without their intervention the offence would have been committed. The Court distinguished the officers' actions from those of ordinary undercover agents, who may conceal their identities in order to obtain information and evidence about a crime without actively inciting its author to commit it. In reaching its conclusion, the Court emphasised that the authorities did not appear to have had any good reason to suspect Mr Teixeira de Castro of being a drug dealer: he had no criminal record and there was nothing to suggest that he had a predisposition to become involved in drug trafficking until he was approached by the police. The Court also found that there were no objective suspicions that Mr Teixeira de Castro had been involved in any criminal activity, nor was there any evidence to support the argument that he was predisposed to commit offences.[5]

The principles outlined by the ECHR in *Ramanauskas* and *Teixeira de Castro* accord with the approach taken in Australian jurisdictions in similar cases dealing with 'entrapment'. As noted by the High Court in *Ridgeway v R*, while Australia does not generally recognise entrapment as a defence to a criminal charge, the cases that have been decided "favour the view that relief should only be granted if the accused 'otherwise would not have committed or would have been unlikely to commit [the offence]'".[6]

The purpose of the Amendment Instrument is to allow law enforcement agencies to maintain their visibility over criminal wealth and financial flows through suspect accounts that may otherwise be closed by reporting entities due to perceived ML/TF risks, or abandoned by customers that had been alerted to the fact that their transactions were subject to enhanced scrutiny. The Amendment Instrument makes no provision for, and is not capable of in any way authorising or affecting, the use of particular investigatory techniques by law enforcement agencies, nor does it provide any means for law enforcement to exert influence

[1] ECHR Application No. 74420/01, 5 February 2008.
[2] ECHR Application No. 25829/94, 9 June 1998, at 1463, § 38 .
[3] Note 1 above, at 55.
[4] *Baltiņš v. Latvia*, ECHR Application No. 25282/07, 8 January 2013, at 56.
[5] Note 2 above, at 1463, § 37-39.
[6] (1995) 129 ALR 41, at 81, citing *Sloane* (1990) 49 A Crim R, at 273

over a customer or incite them to commit an offence, that is not otherwise available to them within the existing confines of the law.

The mechanism provided for by the Amendment Instrument may only be exercised where an investigation into a serious offence *has already commenced*, i.e. where law enforcement already have sound reasons to suspect the persons prior involvement in particular unlawful activities.[7] Further, it requires a requesting officer—of the requisite seniority[8]—to provide a written statement to the AUSTRAC CEO confirming that they reasonably believe that the continued provision of a designated service(s) by a reporting entity would assist with the ongoing investigation of that offence. Accordingly, the relevant law enforcement agency must already have formed the relevant suspicion and commenced an investigation in order to make an application; the exemption mechanism cannot be utilised to establish criminal intent that had previously been absent.

It is also important to note that the Amendment Instrument has no coercive or compulsive effect. The exemption mechanism provides reporting entities with the comfort of regulatory relief in the event that they choose to assist and cooperate with a law enforcement investigation into a serious offence. The Amendment Instrument does not allow law enforcement agencies to compel a reporting entity to continue to provide a designated service to a customer; that will continue to be a decision made by each reporting entity in line with its risk-based AML/CTF systems and controls.

Reasonableness and proportionality

The measures introduced by the Amendment Instrument are a reasonable and proportionate way of meeting its objectives, which are to support cooperation and collaboration among reporting entities, AUSTRAC, and other government agencies, particularly law enforcement agencies, in the detection and disruption of serious and organised crime, money laundering, and the financing of terrorism.

The measures are subject to appropriate safeguards, including requirements for applications to:

- be made by a senior official having reasonable grounds to believe that the exemption would assist in the investigation of a serious offence;
- include a declaration that the information provided in the application is true, accurate, and complete; and
- be signed off by the AUSTRAC CEO.

The operation of the exemption is also limited to a defined period of six months, starting on the date specified in the notice of the exemption decision, or until the eligible agency notifies both the AUSTRAC CEO and the exempted reporting entity or entities that the relevant investigation has ceased—whichever occurs first.

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[7] See *Baltiņš v. Latvia*, note 4 above at 56.

[8] An application may only be made by the head of an eligible agency, a member of the eligible agency who is an SES employee or an equivalent under State or Territory legislation, or a member of an eligible agency who holds the rank of Superintendent or higher.

The Hon Dan Tehan MP
Minister for Social Services

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7560

MC18-003606

23 MAY 2018

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

Dear Mr Goodenough Ian,

Thank you for your letter of 9 May 2018 regarding the Parliamentary Joint Committee on Human Rights' consideration of the Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018 (the Bill) in its Report 4 of 2018.

As you would be aware, the Bill received bipartisan support and was passed without amendment on 10 May 2018. Notwithstanding the Bill's passage, I am pleased to provide further information on National Disability Insurance Scheme (NDIS) worker screening regime as requested by the Committee.

Compatibility of the measure with the right to privacy and the right to work

The Committee has invited me to provide further information as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- whether the risk assessment framework outlined in the Minister's response will be set out in legislation or legislative instrument; and
- whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.

The worker screening regime is a shared responsibility of Commonwealth, state and territory governments. The Commonwealth is responsible for leading the broad national policy design and the states and territories are responsible for the implementation and operational elements of the worker screening regime, including introducing legislation establishing the worker screening units responsible for screening NDIS workers in each state and territory.

The various elements of the national policy that make up the worker screening regime are set out in an Intergovernmental Agreement ('the IGA') between the Commonwealth and state and territory governments. In relation to the risk assessment framework I referred to in my previous letter to the Committee, the framework is a national policy that will be agreed to by all participating jurisdictions. Consistent with the Council of Australian Government's division of responsibility for NDIS worker screening, states and territories will implement the risk assessment framework in their jurisdiction, including, where necessary, by amending existing legislation or introducing new legislation to give effect to the requirements under the IGA.

I note that before a state or territory worker screening unit can be prescribed for the purpose of performing NDIS worker screening checks, under the Bill the Minister needs to be satisfied that the worker screening unit:

- is required or permitted by or under a Commonwealth law, a state law or a territory law to obtain and deal with information about persons who work, or seek to work, with a person with disability; and
- complies with applicable Commonwealth law, state law or territory law relating to privacy, human rights and records management; and
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with disability.

Accordingly, before a state or territory worker screening unit can be prescribed for the purpose of NDIS worker screening each jurisdiction must demonstrate it satisfies each of the above criteria, including importantly, the requirement to comply with the principles of natural justice.

As the Committee has noted, under the existing working with children checks regime, states and territories do provide review rights for those individuals who are subject to an adverse finding. The Committee may also like to note that under the IGA, state and territory worker screening units will agree to provide certain review and appeal rights to individual workers who may be subject to an adverse decision. This will enable an individual to seek review of decisions of state or territory worker screening units to:

- issue an exclusion (meaning a person cannot work in certain roles in the NDIS);
- revoke a clearance;
- apply an interim bar (or temporary exclusion); and
- suspend a clearance.

In such cases the rules of natural justice and procedural fairness will apply and where there is an intention to make an adverse decision states and territories, consistent with the IGA, will:

- disclose the reason the adverse decision is proposed, except where the NDIS worker screening unit is required under Commonwealth, state or territory law to refuse to disclose the information;
- allow the individual a reasonable opportunity to be heard; and
- consider the individual's response before finalising the decision.

I note the Committee's Report queries whether there are less rights restrictive alternatives available, including whether only 'serious offences or offences that are relevant to a person's suitability as a disability worker' should be taken into account by worker screening units. In my previous letter to the Committee I noted that even less serious offences such as shoplifting are considered directly relevant to an individual's suitability as offences of this nature are directly relevant to an individual's trustworthiness and integrity. I also note the weight given to such lesser offences will be relevant in any state and territory worker screening unit decisions. My previous letter noted this is particularly relevant when individuals employed within the NDIS will have access to the person with disability's personal belongings, finances and medication.

I reiterate that state and territory worker screening units must be provided with sufficient information in order to effectively and diligently perform their functions and discharge their duties. Limiting the criminal history information available to the worker screening unit will diminish the effectiveness of their risk assessments and would fail to give due regard to the rights of persons with disability to be protected from workers who may pose an unacceptable risk of harm. I also reiterate that the fact that an individual may have a criminal conviction for a minor offence, which occurred a long time ago, only forms one part of the analysis and risk assessment undertaken by a state or territory worker screening unit and will not necessarily prevent that worker from gaining employment with an NDIS provider.

The Committee may wish to note that during the development of the Bill, my Department consulted with the Office of the Australian Information Commissioner. In addition to Ministerial oversight of the worker screening regime through the process of prescribing state or territory worker screening units, there will also be Parliamentary oversight and scrutiny of the worker screening regime through the Bill's requirement to table two written reports of the operation of the worker screening regime. The first report is to be tabled by 31 December 2019, and the second is to be tabled by 31 December 2022.

Having regard to the objective of the worker screening regime, the supporting framework in the IGA, the risk-based worker screening assessments under legislation to be implemented by states and territories, I consider the Bill pursues the legitimate objective of ensuring persons with disability are protected from harm and the measures are reasonable, proportionate and necessary.

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

The Committee has also invited me to provide further information as to the proposed safeguards in relation to the criminal history checks undertaken as part of the proposed NDIS Worker Screening Check, including:

- whether the risk assessment framework outlined in the Minister's response will be set out in legislation or legislative instrument; and
- whether a decision relating to a person's suitability for employment following worker screening is able to be reviewed.

In response to the Committee's specific questions I refer the Committee to my comments above. To address some of the additional concerns raised by the Committee in relation to the engagement of the right to equality and non-discrimination I provide the following further information.

The right to equality and non-discrimination is set out at articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) provides that each state undertakes to respect and ensure to all individuals the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.

The Committee has acknowledged that differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective, and is a proportionate means of achieving that objective.

Any differential treatment as envisaged by the Act is reasonable and proportionate. This is because the legitimate objective of the Bill is to protect persons with disability from harm. I also hold this view because of the various criteria that must be satisfied before a worker screening unit can be prescribed under the legislation, including the safeguards which have been deliberately incorporated within the Bill and the broader NDIS worker screening framework. Furthermore, any differential treatment will not constitute unlawful discrimination on the basis that there is sufficient research and objective evidence that supports the relevance of criminal records as a basis for determining an individual's risk to vulnerable people.

I also note the measures in the Bill are consistent with many of the recommendations that emerged from the Royal Commission Working With Children Checks Report. This Report along with the other findings of the Royal Commission serves to highlight the importance of Commonwealth and state and territory governments working together to ensure that our most vulnerable community members are protected from harm. The measures in this Bill will help ensure that persons with disability within the NDIS are afforded the same level of protection as is currently provided under the Working With Children Checks regime.

The Bill requires that only a prescribed person or body can receive, use or disclose information for the purpose of worker screening.

I trust this information is of assistance to the Committee and thank the Committee for its consideration of the Bill.

Yours sincerely

DAN TEHAN

The Hon Christian Porter MP
Attorney-General

MC18-003357

Mr Ian Goodenough MP
Chair
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27 APR 2018

Dear ~~Chair~~ Ian

Thank you for your letter of 28 March 2018 regarding Report 3 of 2018 of the Parliamentary Joint Committee on Human Rights addressing recently made extradition regulations. In the Report the Committee seeks further information on the human rights compatibility of the *Extradition Act 1988* in order to make a determination as to compatibility of the regulations with human rights. I appreciate the time you have taken to bring these matters to my attention.

I attach my response to the issues raised by the Committee. This notes that I am satisfied that the safeguards in Australia's extradition regime are adequate and appropriate for implementing Australia's human rights obligations, including through the use of discretionary powers. I trust that the enclosed information is of assistance.

Thank you for raising these matters with me.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to Parliamentary Committee on Human Rights Report 3 of 18

Response to the Parliamentary Joint Committee on Human Rights Report 3/18: Extradition (El Salvador) Regulations 2017; Extradition Legislation Amendment (2017 Measures No. 1) Regulations 2017

Overall comment applicable to all aspects of the Committee's report regarding discretionary power

I note that the matters raised in the Committee's Report have been canvassed and responded to in the context of previous Committee Reports. I reiterate that the Government does not accept the Committee's position that in order for Australia's domestic system to be consistent with our human rights obligations there needs to be express statutory provisions implementing the obligation. The Government is committed to ensuring that Australia's domestic extradition regime under the *Extradition Act 1988* (the Extradition Act) operates in a manner that is consistent with Australia's international law obligations, including international human rights law obligations. Under paragraph 22(3)(f) of the Extradition Act, the Attorney-General has a general discretion not to surrender a person. In exercising this discretion, an assessment of Australia's human rights obligations is undertaken on a case by case basis, which covers the matters identified by the Committee in its report. For these reasons I consider that the general discretion is an appropriate and adequate safeguard.

Balancing extradition and human rights obligations

Australia takes its human rights obligations very seriously and is committed to implementing them. Australia also has international obligations under bilateral and multilateral treaties to extradite persons in certain circumstances. Australia's extradition regime is an important part of our ability to combat domestic and transnational crimes, including serious offences such as terrorism, murder, drug trafficking and so forth. Many of these crimes impact upon community safety. Both of these sets of obligations are carefully considered when developing extradition arrangements. Human rights obligations are given a high priority and only limited where it is necessary to do so and proportionate to the objectives of ensuring Australia is not a safe haven for alleged criminals seeking to evade justice and ensuring Australia can pursue alleged criminals offshore.

EXTRADITION (EL SALVADOR) REGULATIONS 2017

1.63 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in the El Salvador regulations and Extradition Act in relation to the extradition of persons who may be in danger of being subject to cruel, inhuman or degrading treatment or punishment upon return to the extradition country.

The safeguards in the Extradition Act adequately protect persons who may be in danger of being subject to cruel, inhuman or degrading treatment or punishment upon return to an extradition country.

Subsection 22(3) of the Extradition Act is consistent with Australia's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). When determining whether an eligible person is to be surrendered to a foreign country, the Attorney-General must be satisfied, in accordance with paragraph 22(3)(b), that the person will not be subjected to torture on surrender of the kind falling within the scope of Article 1 of the CAT.

Similarly, even where a person has waived extradition, under paragraph 15B(3)(a) of the Extradition Act, the Attorney-General may only surrender the person if the Attorney-General does not have substantial grounds for believing that the person would be in danger of being subjected to torture, if surrendered.

Subsection 22(3) does not require explicit reference to the matters in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) in order to fulfil Australia's obligations under that Covenant. Under paragraph 22(3)(f) of the Extradition Act, the Attorney-General has a broad, general discretion whether to surrender a person to a foreign country. In accordance with the principle of procedural fairness, a person who is the subject of an extradition request may make submissions on any matter he or she wishes the Attorney-General to take into consideration when making a surrender determination. This can include submissions regarding compatibility of the person's surrender with Australia's obligations under Article 7 of the ICCPR. In addition, in the absence of such representations, if the Attorney-General's Department was aware of any issue or situation which might engage Australia's obligations under Article 7 of the ICCPR, the Department would bring this to the Attorney General's attention. For example, the Department's analysis may consider country information, reports prepared by non-government organisations and information provided through the diplomatic network.

As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

1.67 The committee seeks the advice of the Attorney-General as to the adequacy of the safeguards in place to protect the right to life of persons who may be subject to the death penalty if extradited.

Undertakings

In accordance with Australia's longstanding opposition to the death penalty, the Australian Government will not surrender a person to a foreign country in circumstances where the death penalty would be imposed. The safeguards in the Extradition Act adequately protect the right to life of persons who may be subject to the death penalty if extradited.

Paragraph 22(3)(c) of the Extradition Act provides that where an offence is punishable by a penalty of death, Australia cannot extradite a person unless an undertaking is given by the requesting party that:

- the person will not be tried for the offence
- if the person is tried for the offence, the death penalty will not be imposed on the person, or
- if the death penalty is imposed on the person, it will not be carried out.

Similarly, even where a person has waived extradition, under paragraph 15B(3)(b) of the Extradition Act, the Attorney-General may only surrender that person if he or she is satisfied that there is no real risk that the death penalty will be carried out upon the person in relation to any offence, if surrendered.

There is no discretion in the Extradition Act that would allow a person to be surrendered in the absence of an undertaking from the requesting country that the death penalty will not be imposed.

The assessment of the risk that a person might be subjected to the death penalty occurs well prior to any request for an undertaking which would satisfy paragraph 22(3)(c). An extradition request raising potential death penalty issues is identified by the Attorney-General's Department at the earliest stages of the extradition process. If the Department held any concerns about the bona fides of a death penalty undertaking, the Department would recommend that the Attorney-General did not accept and progress the request. If a death penalty undertaking is requested, it would be requested and provided by a formal Government to Government communication. The Full Federal Court decision in *McCrea v Minister for Justice and Customs [2005] FCAFC 180* sets out the test for an acceptable death penalty undertaking. The test requires that the Attorney-General be satisfied that 'the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the death penalty would not be carried out'.

If, notwithstanding the receipt of an undertaking, the Attorney-General considered that a real risk remained that the person will be subject to the death penalty, the Attorney-General could refuse extradition in the exercise of the general discretion under paragraph 22(3)(f) of the Extradition Act. As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

These safeguards allow Australia to meet its obligations under the ICCPR and the Second Optional Protocol to the ICCPR.

Monitoring compliance with undertakings

The Department of Foreign Affairs and Trade (DFAT) is responsible for the provision of consular assistance to Australians encountering difficulties overseas. Where DFAT has been informed that an Australian citizen has been arrested, detained or imprisoned overseas, DFAT will write to the individual to offer consular assistance. On acceptance of the services offered, DFAT will provide details of local lawyers and interpreters, conduct welfare checks and, when necessary, take steps to ensure the detainee is treated fairly to the extent possible under the laws of the relevant country, given that consular assistance cannot override local laws. Australia does not monitor the status of foreign nationals who have been extradited by Australia, as Australia has no consular right of access to non-nationals. The decision to monitor a foreign national is a matter for that person's country of citizenship. With the consent of the person, Australia can inform consular authorities of their country of citizenship of their extradition to a third country. Attempts to monitor foreign nationals may be seen as infringing on the foreign country's sovereignty and criminal justice processes.

It is the Attorney-General's Department's longstanding experience that death penalty undertakings are respected. The Department is not aware of any case in which the terms of a diplomatic undertaking issued to Australia by a country pursuant to paragraph 22(3)(c) of the Extradition Act have been breached. If the Department held real concerns that a death penalty undertaking would not be honoured, it would not recommend that the Attorney-General progress the extradition request. Extradition between countries is based on reciprocity. As such, any conditions imposed are likely to be honoured by the receiving country. This is due to the Government to Government

nature of extradition, and recognition by that country that undertakings must be respected to ensure future cooperation. In the event that the Department or the Attorney-General became aware of a potential breach, this would be raised with the country at the highest diplomatic levels. The use of undertakings is an important practice that allows Australia to establish extradition partnerships with important partner countries that retain the death penalty, such as the United States.

The Attorney-General's Department has provided information on extradition matters in its annual reports to Parliament since the establishment of the Extradition Act. This information currently includes for that financial year:

- the number of extradition requests made to, granted by and refused by Australia
- the countries which had an extradition request granted by Australia (and how many for each country)
- the number and nationality of persons who have been extradited from Australia
- the number of Australian permanent residents extradited from Australia
- the major categories of offences for which extradition has been granted by Australia, and
- whether there had been any breaches of undertakings by a foreign country in relation to a person extradited from Australia.

I note that there have been no breaches of death penalty undertakings to report.

1.73 The committee seeks the advice of the Attorney-General as to:

- **the adequacy of the safeguards in place to prevent the extradition of persons who may, on surrender, suffer a flagrant denial of justice; and**
- **whether, in not requiring any evidence to be produced before a person can be extradited, and in preventing a person subject to extradition from producing evidence about the alleged offence, the El Salvador regulations and the Extradition Act are compatible with the right to a fair trial and fair hearing.**

Fair trial

As has been previously noted by the Committee and the Government, it is the Australian Government's view that Article 14 of the ICCPR does not contain *non-refoulement* obligations. In any event, the Extradition Act provides adequate safeguards to address matters relating to fair trials.

In addition to the mandatory ground of refusal relating to double jeopardy (under paragraph 22(3)(a) read together with section 7), the Attorney-General has a broad discretionary ground to refuse surrender under paragraph 22(3)(f) of the Extradition Act. This discretionary power provides a sufficient basis to refuse extradition in circumstances where there are legitimate concerns about the person's access to a fair trial. While Australia's *non-refoulement* obligations under the ICCPR do not extend to Article 14 of the ICCPR, in relevant matters, the Department would put

particular claims that a person may not receive a fair trial in light of their circumstances or any other fair trial issues before the Attorney-General as relevant considerations in exercising his or her general discretion. The relevant considerations may include the extent to which an individual would receive minimum procedural guarantees in a criminal trial in the country to which he or she is being returned. Assessment of these claims may include analysis of the person's claims and any representations or undertakings from the requesting country. The assessment may also consider country information, reports prepared by non-government organisations and information provided through the diplomatic network.

Expressly including fair trial as a ground for refusal may generate litigation about issues which are essentially attributable to differences between the bases of common law and civil legal systems. Allowing individuals to challenge extradition on this basis would also be incompatible with the international principle of comity.

As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

Evidence requirements

As noted above, Article 14 of the ICCPR does not contain *non-refoulement* obligations.

Extradition is an administrative legal process whereby a person may be transferred from one country to another to face prosecution or to serve a prison sentence for offences against the law of the other country. The extradition process in Australia does not involve an assessment of guilt or innocence; it is not a criminal trial.

The purpose of an extradition hearing is to determine whether a person should be extradited; it is not to test evidence in the case against them. It is important that a person faces prosecution or serves a sentence in the country in which he or she has been accused or sentenced. The 'no evidence' standard has been Australia's preferred approach since 1988 and all of Australia's modern extradition treaties have been negotiated on this basis.

The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the offence and the applicable penalty, and a statement setting out the conduct alleged against the person in respect of each offence for which extradition is sought, but it does not require evidence to be produced which is sufficient to prove each element of each alleged offence under the laws of the requested country (such as 'prima facie' evidence including witness statements and affidavits). Given it is not the purpose of an extradition hearing to test the evidence, it is appropriate that the person sought to be extradited does not produce evidence about the alleged offence.

The 'no evidence' standard is in line with the international trend toward simplifying the extradition process and is consistent with the United Nations Model Treaty on Extradition. It has allowed Australia to enter into extradition relations with many civil law countries that would otherwise have been unable to conduct extradition with Australia. A return by Australia to a prima facie evidentiary standard would cause considerable disruption to our existing extradition relationships, and would be very counterproductive in terms of international law enforcement cooperation.

1.79 The committee seeks the advice of the Attorney-General as to:

- **whether a presumption against bail except in special circumstances is a proportionate limitation on the right to liberty;**

It is accepted international practice for a person to be held in administrative detention pending extradition proceedings. The remand of the person is not undertaken as a form of punishment and in no way relates to guilt or innocence of any offence. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljković v Commonwealth [2006] HCA 40*.

The presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice. Unfortunately, reporting and other bail conditions are not sufficient to prevent individuals who wish to evade extradition from absconding. In extradition cases there is an increased risk of persons absconding before they can be surrendered to the requesting foreign country. If a person who has been remanded on bail absconds during extradition proceedings, it jeopardises Australia's ability to extradite the person which in turn would impede Australia's treaty obligations to return a person to the requesting country. Ultimately, it can also lead to a state of impunity where a person can disappear and continue to evade law enforcement authorities.

The High Court in *United Mexican States v Cabal [2001] HCA 60* observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community. Bail can be granted where special circumstances exist. The courts have shown their willingness to grant bail when these special circumstances arise.

For these reasons the Government considers the current presumption that bail should only be granted in 'special circumstances' is appropriate, given the significant flight risk posed by people subject to extradition proceedings, and should be maintained. It is a reasonable and proportionate limitation on the right to liberty, necessary to achieve the legitimate objective of securing the return of alleged offenders to face justice, noting that extradition offences are serious offences, including terrorism, murder and transnational organised crimes.

- **whether, having regard to *Griffiths v Australia*, the El Salvador regulations and the Extradition Act provide an opportunity for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR;**

Article 9(4) of the ICCPR provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Following amendments to the Extradition Act in 2012, a person may make an application for bail at each stage of the extradition process (prior to the *Griffiths* matter a person could only make bail applications in the early stages of extradition proceedings). The court may grant bail if there are

special circumstances justifying the person's release, and the courts have shown their willingness to grant bail when these circumstances arise.

In addition, there are a number of other avenues for a person to review the lawfulness of their detention, including:

- the person may seek a remedy under section 39B of the *Judiciary Act 1903*
- a writ of mandamus in the High Court under section 75(v) of the Constitution, and
- a habeas corpus application.

Australia's legal framework for extradition therefore provides numerous opportunities for persons to review the lawfulness of their detention pending extradition in accordance with article 9(4) of the ICCPR.

- **whether detaining persons during the extradition process without first testing the evidence against the person is compatible with the right to liberty; and**

Article 9(1) of the ICCPR requires that persons not be subject to arrest and detention except as provided for by law, and provided that neither the arrest nor the detention is arbitrary.

As noted above, extradition is an administrative legal process whereby a person may be transferred from one country to another to face prosecution or to serve a prison sentence for offences against the law of the other country. The extradition process in Australia does not involve an assessment of guilt or innocence; it is not a criminal trial. For this reason it would not be appropriate for the evidence to be tested by Australian courts.

The extradition process is provided for by law and is not arbitrary; it is supported by a legal framework which has been designed to be proportionate to the legitimate aim of securing the return of alleged offenders to face justice, noting that extradition offences are serious offences, including terrorism, murder and transnational organised crimes.

- **whether section 6 of the El Salvador regulations, which increases the period in which a person must be brought before a magistrate or eligible Federal Circuit Court judge after being arrested from 45 days to 60 days, is a proportionate limitation on the right to liberty.**

The 60 day period is common to Australia's recent extradition practice, and has been included for a broad range of countries, including for example, the US, Canada, Mexico, Brazil, Croatia and others. This time period takes into account the time required to comply with the requirements of the Extradition Act, namely the complexities of securing the delivery of original documents and translations thereof in the correct form from foreign countries via the diplomatic channel, and the formal acceptance of the request by the Attorney-General. During this 60 day period the person can make an application for bail under section 15 of the Extradition Act, which provides that a person who is arrested under an extradition arrest warrant must be brought as soon as practicable before a magistrate or eligible Federal Circuit Court Judge in the State or Territory in which the person is arrested, and the person may be remanded on bail where there are special circumstances. As noted above, the extradition framework has been designed to be proportionate to the legitimate aim of

securing the return of alleged offenders to face justice, noting that extradition offences are serious offences, including terrorism, murder and transnational organised crimes.

1.83 The committee seeks the advice of the Attorney-General as to the compatibility of the El Salvador regulations and the Extradition Act with the right to equality and non-discrimination. In particular, the committee seeks information as to the safeguards in place to ensure:

- **a person is not extradited where their surrender is sought for the purpose of prosecuting or punishing the person on account of her or his personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act; and**
- **a person is not extradited where they may be prejudiced at her or his trial, or punished, detained or restricted in her or his personal liberty, by reason of a personal attribute that is protected under article 26 of the ICCPR but not listed in section 7 of the Extradition Act.**

The Extradition Act includes grounds for refusing surrender if the person may be prejudiced by reason of his or her race, religion, nationality, political opinions, sex or sexual orientation, or where extradition is sought for the purpose of prosecuting or punishing the person on account of any of these factors. This provides a broad basis to refuse extradition where there may be adverse impacts because the person may be discriminated against. The Attorney-General's broad discretion in paragraph 22(3)(f) of the Extradition Act to refuse surrender provides a sufficient basis to refuse extradition in circumstances where there are other concerns about discrimination against a person.

As the Committee points out in its report, the grounds in Article 26 of the ICCPR that are not contained in the Extradition Act are language, colour, national or social origin, birth (although nationality and race are covered), property, other opinion, or other status. Any concerns relating to these additional grounds are more appropriately considered as part of the Attorney-General's general discretion to refuse to extradite a person. Including further grounds would significantly widen the scope for appeals of extradition decisions. For example, 'other status' has no definite meaning and the inclusion of this ground as an extradition objection under the Extradition Act would make the list of discrimination grounds non-exhaustive. This would likely generate significant litigation.

As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

<u>EXTRADITION LEGISLATION AMENDMENT (2017 MEASURES NO. 1) REGULATIONS 2017</u>

<u>Removing India from the list of extradition countries in the Extradition (Commonwealth Countries) Regulations 2010</u>

1.88 The committee seeks the advice of the Attorney-General as to the compatibility of Items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights, having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**

- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

These matters are addressed above in relation to the *Extradition (El Salvador) Regulations 2017*.

1.89 The committee seeks the advice of the Attorney-General as to whether removing India from the list of 'extradition countries' in the Extradition (Commonwealth Countries) Regulations 2010 is a proportionate limitation on human rights, having regard to the safeguards in that regulation that are not present in the Extradition Act or the Extradition (India) Regulations 2010.

Evidence standard

The Committee identified the change from the 'prima facie' standard to the 'no evidence' standard in relation to the material required to support extradition. The 'no evidence' standard was addressed above in relation to the *Extradition (El Salvador) Regulations 2017*.

Ground for refusal

The Committee identified that the express ground for refusal in the *Extradition (Commonwealth Countries) Regulations 2010* regarding 'unjust, oppressive or too severe a punishment' is not expressly contained in the *Extradition (India) Regulations 2010*. These matters are covered by the general discretion to refuse surrender under paragraph 22(3)(f) of the Extradition Act.

The general discretion also provides a basis to refuse extradition in circumstances where there are concerns about the person's access to a fair trial. These matters are addressed above in relation to the *Extradition (El Salvador) Regulations 2017*.

As noted above, I consider that the general discretion is an appropriate and adequate safeguard.

Amendments to reflect changes made to the Convention on the Physical Protection of Nuclear Material 1979

1.94 The committee seeks the advice of the Attorney-General as to the compatibility of items 2 and 3 of the Extradition Legislation Amendment (2017 Measure No.1) Regulations with human rights having regard to the matters discussed at [1.61] to [1.83] above, in particular the:

- **prohibition against torture, cruel, inhuman and degrading treatment;**
- **right to life;**
- **right to a fair hearing and fair trial;**
- **right to liberty; and**
- **right to equality and non-discrimination.**

These matters are addressed above in relation to the *Extradition (El Salvador) Regulations 2017*.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-001251

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

Dear Ian,

Thank you for your letters of 28 March 2018 in which further information was requested on the *Identity-matching Services Bill 2018* (Cth) and *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

I have attached my response to the *Parliamentary Joint Committee on Human Rights' Report 3 of 2018* as requested in your letters. The response to the *Identity-matching Services Bill 2018* (Cth) should be considered in conjunction with my letter dated 04 April 2018, which outlined our response to the Chair of the Senate Standing Committee on the Scrutiny of Bills.

I trust the information provided is helpful.

Yours sincerely

26/04/18

PETER DUTTON

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

The *Identity-matching Services Bill* 2018 (the Bill) will authorise the Department to provide new biometric face matching services for a range of fraud prevention, law enforcement, national security, community safety and related activities. The Bill will help to give effect to Australian Government's commitments under the *Intergovernmental Agreement on Identity Matching Services* agreed by the Council of Australian Governments in October 2017.

Committee's Questions

The committee requests the advice of the Minister for Home Affairs as to whether the limitations on the right to privacy contained in the Identity Matching [Services] Bill are reasonable and proportionate measures to achieve the stated objective. This includes information in relation to:

Whether the provisions in the Identity Matching [Services] Bill governing access to facial images and other biometric data are sufficiently circumscribed for each of the identity matching services.

The Bill contains a number of measures to appropriately circumscribe access to data through each of the identity-matching services.

Firstly, the Bill does not authorise any agency other than the Department of Home Affairs (Home Affairs) to collect, use or disclosure identification information. The Bill is primarily intended to provide Home Affairs with legal authority to operate the interoperability hub and to host the National Driver Licence Facial Recognition Solution (NDLFRS).

The Bill does not seek to, nor does it, authorise other agencies to share information through the services. Each agency's use of information it receives through the services will be governed by its own legal authority to collect, use and disclose the information for particular purposes, including any legislated protections that apply to the agency under Commonwealth, state or territory privacy legislation.

By taking this approach, the Bill specifically avoids providing a blanket authorisation for all information-sharing that occurs through the services. Where an agency seeks to obtain information from another agency through the services, both the requesting agency and data-holding agency will need to have a legal basis to share information with the other. This is no different to current data-sharing arrangements, and ensures that the services are only available to those agencies that have a legal basis to share information through them under other legislation.

Secondly, the individual identity-matching services provided for by the Bill have more specific restrictions relevant to the particular service. For example, as noted by the Committee, the Face Identification Service (FIS) will only be able to be used by a specific list of agencies set out in the Bill. The Committee also noted that the Bill provides for the Minister to prescribe further agencies by delegated legislation. However, subclause 8(3) of the Bill restricts this power such that the Minister is only able to prescribe a new authority for access to the FIS if the authority has one or more of the functions that used to be functions of an authority already prescribed in the Bill.

The purpose of subclause 8(3) is to restrict this power to the extent that it is only available to cover situations where one of the agencies already listed in the Bill changes names as a result of machinery of government changes or for other reasons, or where their functions shift to a different authority. As set out in the explanatory memorandum, this provision is intended to supplement, rather than replace, the relevant provisions of the *Acts Interpretation Act 1901*, which already provide for the continuation of provisions naming specific government agencies when a machinery of government change occurs, if those provisions do not apply.

As a result, any substantive change to the breadth or nature of the agencies that have access to the FIS will need to be made by an amendment to the Act, rather than through the making of a rule. This will help to prevent 'scope creep' and will ensure appropriate Parliamentary oversight of any substantive changes to FIS access.

Provision of the FIS is also restricted by paragraph 8(1)(b) of the Bill, which provides that the comparison must be undertaken in the course of an identity or community protection activity covered by subsections 6(2) to 6(6). This specifically excludes two of the identity and community protection activities, namely *road safety activities* (subclause 6(7)), and *verifying identity* (subclause 6(8)).

This restriction has been imposed in recognition of the greater privacy implications of the FIS compared to the other identity-matching services provided for by the Bill. This ensures the provision of the FIS is appropriately circumscribed relative to its privacy impacts.

The other services are also limited in different ways. The Facial Recognition Analysis Utility Service (FRAUS) and the One-Person-One-Licence Service (OPOLS) are both restricted for use only by agencies that provide data into the NDLFRS, which will primarily be state and territory road agencies. This restriction is contained in the definitions of the services:

- For the FRAUS, subparagraph 9(a)(i) provides that a FRAUS relates to a request *made by an authority of a State or Territory that has supplied identification information to a database in the NDLFRS.*
- For the OPOLS, paragraph 12(b) provides that the authority [that requests the service] *issues government identification documents of a particular kind and has supplied identification information…to a database in the NDLFRS*.

In addition, the services only enable comparison against data in the NDLFRS – in the case of the FRAUS, only the data supplied by the same authority making the request (i.e. against their own data), and in the case of the OPOLS, only data relating to identification documents of the same type (i.e. driver licences).

These services are primarily designed to assist road agencies to manage their own data, and improve the integrity of their licence-issuing processes by providing a secure and automated tool to check whether the individual holds licences in other states and territories. As such, they are appropriately circumscribed for these purposes.

The Identification Data Sharing Service (IDSS) is also restricted by its definition, which limits its use to disclosures of identification information between *one authority of the Commonwealth or of a State or a Territory to another authority of the Commonwealth or of a State or a Territory* (paragraph 11(1)(c)). Although this is still quite broad compared to some of the other services, the IDSS can still only be used

for the identity and community protection activities, and agencies using the service must have their own legal basis to share this information and comply with any privacy or information protection laws that apply to them. As with the other services, the Bill is not intended to provide new powers for agencies to share information, but simply to facilitate more automated, auditable and secure information-sharing through the interoperability hub.

The last of the services, the Face Verification Service (FVS), assists users to verify a claimed or known identity by comparing information they have about an individual (often provided by the individual) with a government record matching the same details. It will be available to the broadest range of users, and is the only service that will be available to non-government users. In most cases, the system will return a match/no match response, rather than an image, and never more than one image.

Even so, the Bill contains provisions to ensure that the provision of the service is appropriately circumscribed. In particular, a number of conditions apply to local government and non-government use of the FVS, as set out in subclause 7(3). These include that the verification of an individual's identity is reasonably necessary for the functions or activities of the entity, the individual has given consent for the use and disclosure of their information to verify their identity, the entity resides or carries on activities in Australia, and privacy protections equivalent to those provided by the *Privacy Act 1988 (Cth)* apply to the entity.

Whether the *Privacy Act 1988* (Privacy Act) will apply to the operation of the Hub and, if so, whether it will act as an adequate and effective safeguard noting the various exceptions to the collection, use and disclosure of information under the Privacy Act.

The Privacy Act applies to all 'APP Entities', which includes Home Affairs. The operation of the interoperability hub by Home Affairs will therefore be subject to the Privacy Act, and Home Affairs will manage the hub consistently with its obligations under that Act.

The Privacy Act and the Australian Privacy Principles contained therein provide the privacy architecture for Australian Government entities. A key objective of the Privacy Act is to balance the protection of privacy with the interests of entities in carrying out their lawful and legitimate functions and activities. The adequacy and effectiveness of the privacy safeguards contained in the Privacy Act, including the appropriateness of the exceptions to restrictions on collection, use and disclosure of information under the Privacy Act, have been considered by the Parliament in the development of the Act and subsequent amendments to it. To the extent that various exemptions in the Privacy Act may apply to the operation of the interoperability hub, this is consistent with the application of the Privacy Act across the many entities to which it applies.

In addition, the interoperability hub will be subject to other privacy safeguards under the *Intergovernmental Agreement on Identity Matching Services* (IGA) and the policy and administrative arrangements supporting the services that will increase the overall adequacy and effectiveness of the privacy framework governing the operation of the hub.

For example, under the IGA, the interoperability hub will not retain any facial images or other identity information – it acts purely as a router to transmit information between participating entities. The only data that will be retained by the hub will be

that required for auditing purposes. This 'hub and spoke' design feature is consistent with the 'privacy by design' approach to the identity-matching services, in that it avoids the need for the Department to build a new database combining visa and citizenship, passport and state and territory identification information in one place. Instead, the interoperability hub simply provides an interface to connect end-users with separate databases, enable them to make queries against each of the databases separately but simultaneously. In turn, this minimises the amount of information retained by Home Affairs, as it is not necessary for Home Affairs to retain the information contained in the queries or responses routed through the interoperability hub to and from the databases.

Furthermore, the interoperability hub will be subject to independent penetration and vulnerability tests and security reviews, as well as a range of stringent user access arrangements under a common Face Matching Services Participation Agreement between all participating Commonwealth, state and territory agencies, which will provide a legally binding framework for participation in the services. This includes measures to protect privacy such as a set number of user accounts per agency, user training and accountability requirements, and regular auditing.

Whether the Identity Matching [Services] Bill contains adequate and effective safeguards for the purposes of international human rights law.

Under international human rights law, individuals have a right to privacy, including the right not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, and the protection of the law against such attacks[1]. However, the right to privacy may be subject to permissible limitations that are authorised by law, are not arbitrary, and which are a necessary and proportionate means of pursuing a legitimate objective.

As set out in the Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum to the Bill, the Bill engages and limits the right to privacy, but the limitation is permissible on the basis that it is reasonable, necessary and proportionate to achieving the legitimate objectives of each of the services. Privacy safeguards contained in the Bill help to ensure that the limitation in each case is restricted only to that which is necessary to the objectives of the particular service. For example, in relation to the FIS (which has the greatest privacy implications), the Bill imposes additional safeguards including restricting the agencies that can access the service and the activities for which it can be used.

In addition to specific restrictions on the individual services, the Bill also contains further safeguards that help to protect the right to privacy of individuals whose information is shared through any of the services. In particular, clause 21 creates an offence for unauthorised recording or disclosure of information by employees of Home Affairs (including secondees, and contractors working on the NDLFRS or interoperability hub). This creates an effective safeguard against unlawful interference with a person's right to privacy by people who may have access to identification information contained in the NDLFRS or shared through the interoperability hub. Annual reporting on use of the services and a requirement for a review to be commenced within 5 years provide further safeguards to ensure that any arbitrary or unlawful interference is detected, and subject to public scrutiny.

[1] *International Covenant on Civil and Political Rights*, Article 17

The privacy safeguards in the Bill are also supported by a range of further measures under the IGA, the Face Matching Services Participation Agreement referred to above, and an NDLFRS Data-Hosting Agreement, which will provide the framework for Home Affairs to host state and territory data in the NDLFRS. These include annual audits of each participating agency, strict access controls on users of the services, additional authorisation requirements for the FIS, and privacy impact assessments.

Whether, in light of the number, types and sources of facial images and other biometric data that may be collected, accessed, used and disclosed through the Hub and the NDLFRS, these measures are the least rights restrictive approach (including whether having facial images of the vast majority of Australians searchable via the Hub is the least rights restrictive approach and whether there are restrictions as to the sources from which facial images may be collected).

The biometric face matching services that will be provided through the interoperability hub and NDLFRS have been developed to address increasing incidences, and sophistication of, identity misuse and fraud in Australia, which has wide-ranging impacts for individual privacy, as well as law enforcement and national security.

Under the *Intergovernmental Agreement to a National Identity Security Strategy* agreed by the Council of Australian Governments in 2007, the Commonwealth implemented a national Document Verification Service (DVS). The DVS enables government and non-government users to compare the claimed identity information of a customer or client with a government record to verify their identity. The DVS matches key biographic details about the individual and their Australia-issued identifying credentials (such as a passport or driver licence), and provides a 'yes' or 'no' match response.

The DVS is currently used by around one hundred government entities and seven hundred businesses, including all major finance and telecommunications companies, with more than 30 million DVS transactions processed in 2017. The DVS has a limited impact on individual privacy because it only provides for one-to-one verification of a claimed identity, does not return biographic information (users receive a 'yes'/'no' match result only), and operates on a consent basis.

Whilst expanding use of the DVS has made it harder for criminals to use fictitious identities, it is also creating incentives for them to use documents in stolen identities that have genuine biographic details (which will pass a DVS check) combined with a fraudulent photo. The biographic-based DVS cannot detect these fraudulent identities, creating a need for a different solution to tackle the growing use and sophistication of these stolen identities.

The misuse of this personal information for criminal purposes causes substantial harm to the economy and individuals each year. The *Identity Crime and Misuse in Australia Report 2016* prepared by the Attorney-General's Department, in conjunction with the Australian Institute of Criminology, indicated that identity crime is one of the most common and costly crimes in Australia, impacting around 1 in 20 Australians every year (and around 1 in 5 Australians throughout their lifetime), with an estimated annual cost of over $2.2 billion.

In addition to financial losses, the consequences experienced by victims of identity crime can include mental health impacts, wrongful arrest, and significant emotional distress when attempting to restore a compromised identity. In some cases where complete takeover of a victim's identity has occurred, the report indicates that it took victims over 200 hours to obtain new credentials and resolve other issues associated with the compromise of their identity.

Identity crime is also a key enabler of serious and organised crime, including terrorism. Australians previously convicted of terrorism related offences are known to have used fraudulent identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives, and mobile phones to communicate anonymously to evade detection. An operation by the joint Australian Federal Police and New South Wales Police Identity Security Strike Team found that the fraudulent identities seized from just one criminal syndicate were linked to 29 high profile criminals linked to historic or ongoing illicit drug investigations; more than $7 million in losses associated with fraud against individuals and financial institutions; and more than $50 million in funds that were laundered offshore and were likely to be proceeds of crime.

Current methods for verifying an identity or identifying an individual using facial images can be slow, difficult to audit, and often involve manual tasking between requesting agencies and data holding agencies. In some cases, this can take several days or longer. Given the significant impact that identity crime has on individuals and on the safety and security of Australians more broadly, it is imperative that government agencies, and private sector organisations (which operate at the frontline of day-to-day identity verification), have access to the modern tools necessary to continue to detect and prevent identity fraud, including using facial matching.

The face matching services that will be supported by the Bill have been developed to balance the need to address this threat with the privacy rights of individual Australians. The design of the services and the systems that support them, including the 'hub-and-spoke' model of service delivery through the interoperability hub, ensure that the services take the least rights restrictive approach to addressing the serious issue of identity fraud.

By delivering the services through the establishment of a central hub that connects to a number of separate databases, the Government has specifically avoided a need to develop a single, central database of identification information. In addition, although the Commonwealth is hosting a national driver licence database (the NDLFRS) to centralise driver licence information for the purpose of the services, under the IGA the Commonwealth will not have direct access to view the data stored within the national database. State and territory road agencies will provide their data into partitioned sections of the database, and will retain control over access to that data.

Furthermore, users access the services on a query and response basis, where a user submits query information into the hub interface, which is then transmitted to the relevant database/s for matching with the results returned to the user. This ensures that users only have access to the information that is relevant to their query, and cannot go looking for additional information directly within the databases. To provide a further safeguard for the information transmitted through the hub, the hub itself does not store any of the identification information contained in the query or the response.

Alternative options to the provision of the face matching services through the interoperability hub include a continuation of the status quo, through which agencies that need to share information for identity verification or identification purposes do so through existing manual methods of data-sharing – via hard copy or email or other electronic transmission. These ad-hoc methods vary amongst agencies, as does the security and auditability of the transmissions. By providing a single tool through which participating agencies can share identification information, the interoperability hub will improve the consistency of data-sharing and enable it to be more easily monitored, managed and audited.

The Government acknowledges that the face matching services may cause privacy concerns for some individuals. However, the services and the systems that support them have been designed to minimise those impacts and improve the security and accountability of data-sharing between participating agencies. The identification information being made available for matching through the services is already held by government across multiple agencies, and shared between agencies consistent with their legislative authorities. The face matching services will enable agencies to use that information more securely and effectively to protect Australians from national security and criminal threats, identity crime, and other threats, in the least rights restrictive way.

The Committee has also asked whether there are restrictions on the sources from which facial images may be collected. The databases to which the interoperability hub will initially connect will be the visa and citizenship database maintained by Home Affairs, the passports database maintained by the Department of Foreign Affairs and Trade, and the NDLFRS to be hosted by Home Affairs, containing replicated state and territory licence information. Due to some states and territories holding information about other licence types within the same databases as their driver licence information (for example, marine licences or proof of age cards), this information may also be replicated in the NDLFRS, where there is a legal basis to do so.

Although the Bill does not explicitly restrict the connection of other databases to the interoperability hub in future, the availability of other data sources would, as with all aspects of the services, be subject to the information-sharing authorisations of participating agencies. That is, an agency providing access to its database through the hub would need the legal authority to share the information with other agencies for the purposes for which the face matching services are provided, and a participating agency wishing to access the information would also need to have a legal basis to do so.

Whether the hub could be connected to other databases in the future will also be limited by the general purpose for which the face matching services are being provided, and the practicalities of facial recognition, which requires high quality images to achieve the most accurate matching results. The services are intended to assist participating agencies to determine the genuine identity of an individual, based on facial image comparison. This is why the initial databases to which the hub will connect are databases of identification information related to primary identification documents containing facial images. These databases provide a reliable source of identification information that can assist agencies to confirm a person's true identity.

The nature of the processes for obtaining these identification documents also ensures that the majority of facial photographs in these databases are of sufficiently

high quality for facial recognition purposes. Facial recognition software relies heavily on the availability of high quality, front-on, unobscured facial images, to enable the most accurate matching. The integrity of the face matching services is therefore directly related to the quality of the images in the databases used for matching. This practical issue will likely limit the types of databases that may be connected to the services in future.

Whether the measures are a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148] – [1.149].

As set out above, and in more detail in the Statement of Compatibility with Human Rights included in the Explanatory Memorandum to the Bill, the Bill contains a range of measures to ensure that the provision of each of the face matching services is proportionate to the legitimate objectives it pursues. Respectfully, the case law cited by the Committee at [1.148] – [1.149] of its Report does not alter that fact.

A number of the cases referenced[2] deal with the matter of collection of biometric information directly from members of the public and the retention of that information for law enforcement purposes. With reference to these cases, it is important to note that the Bill does not seek to govern the collection of identification information, including biometrics, from individuals, nor the handling of identification information by agencies other than the Department of Home Affairs (as the operator of the systems authorised by the Bill).

The face matching services authorised by the Bill are simply tools to enable agencies to more securely share and match information with each other. Participating agencies must have their own legal basis to collect, use and disclose the information both when using the services as a requesting agency or an agency providing access to its data. This also applies to their collection of the primary biometric information from an individual (such as the collection of CCTV footage or passport photos).

As part of the existing legal framework that already applies to the collection, use and disclosure of identification information by agencies that will participate in the face matching services, agencies must comply with data retention regimes that apply to them with respect to the storage and destruction of that information. This will continue to be the case with respect to identification information an agency obtains through using the services. The Face Matching Services Participation Agreement (mentioned above) that will govern participation in the services will reiterate this by requiring agencies to only retain information for as long as they require it for the purpose for which it was collected, or for the minimum period required by law.

The Committee also refers to European cases dealing with retention of communications data, and its own comments on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014[3]. The issues raised

[2] *S and Marper v United Kingdom*, European Court of Human Rights Applications 30562/04 and 30566/04 (2008), *NK v Netherlands*, UN Human Rights Committee CCPR/C/120/D/2326/2013 (2017), and *Wood v Commissioner of Police for the Metropolis* [2009], United Kingdom Court of Appeal EWCA Civ 414 (2009).

[3] *Secretary of State for the Home Department v Watson MP & Ors* [2018] EWCA Civ 70 (30 January 2018), *Digital Rights Ireland Limited v Minister for Communications, Marine and Natural Resources & Others* and *Seitlinger and Others* [2014] EUECJ C-293/12, and Parliamentary Joint Committee on Human Rights' *Fifteenth Report of the 44th Parliament* (14 November 2014).

in relation to metadata largely relate to concerns about the retention of significant amounts of data not previously retained, and the purposes for which it can be accessed.

As set out above, the Bill is not intended to deal with the collection and retention of data from individuals – it provides for information-sharing between agencies and organisations. The data intended to be transmitted through the services is information that is already collected and retained by participating agencies, and shared in accordance with their legislative authority to do so. In this way, it is not analogous with the establishment of large databases of new metadata not already retained.

Whilst it is possible that identification information obtained through the services may reveal some limited additional information about a person (which the Committee raises concerns about at [1.147]), this must be considered in the context of the legitimate objectives that the Bill pursues. In particular, the face matching services facilitated by the Bill are designed to assist in verification of identity or the identification of unknown individuals in the context of the identity and community protection activities set out in clause 6 of the Bill. Given the services are for use in identification and identity verification, the disclosure of some identifying information about an individual is unavoidable.

However, the Bill imposes a number of restrictions to ensure that the disclosure of identification information is proportionate to its objectives. This includes restricting the types of identification information that Home Affairs is authorised to collect, use and disclose in providing the services (and specifying particular information that is not authorised because it is not relevant to identification or identity verification), restricting access to the FIS (which discloses identification information about more than one individual in response to a query), and imposing conditions on local government and private sector access to the services so that they can only obtain identification information through the services with the consent of the individual concerned.

The Committee also notes that the European cases relating to communications data raise the issue of access to information without a requirement for prior review by a court of independent administrative authority. The Bill is not seeking to authorise participating agencies other than Home Affairs to access identification information through the services. Those agencies will need to have their own legal basis to do so. Many participating agencies already have a legal basis to share this information, in most cases without prior review by a court or independent administrative authority. It is not appropriate for the Bill to impose this additional requirement on participating agencies – this would be a matter for other legislative processes relevant to those agencies, or their particular jurisdictions.

For the reasons set out above, and in the Statement of Compatibility with Human Rights, the measures in the Bill are a proportionate limitation on the right to privacy notwithstanding the referenced jurisprudence.

The extent to which historical facial images will be subject to the Hub, and whether the Identity Matching [Services] Bill provides adequate and effective protection against misuse and in respect of vulnerable groups.

Historical facial images may be contained in databases to which the hub connects. However, specific safeguards exist to protect people with legally assumed or

protected identities, and the nature of the services will also limit the risk of revealing a former identity in many cases.

The Bill provides specifically for Home Affairs to share information for the purposes of protecting individuals with legally assumed or protected identities. This will help to protect individuals who have been issued with an assumed or protected identity by an authorised Commonwealth, state or territory agency, from being inadvertently identified. Data about these individuals contained in each database connected to the interoperability hub is sanitised directly by the agencies responsible for the assumed/protected identity prior to agencies having access to the database through the FIS (which allows for identification of individuals without knowing their name).

In relation to other vulnerable groups that may have changed their identities but do not have a legally assumed or protected identity, the structure of the services will help to prevent their former identities from being revealed in most circumstances. For example, the most widely available service, the FVS, only provides for one-to-one verification of an identity. In order to receive a match, the user will need to provide biographic details about the individual (such as their name and date of birth), which will then be checked against one or more databases and results only returned if the biographic details match a record in the database. Although some databases may contain, and return, known alias information, this will only be returned to certain users with a need for that information (such as police) based on their user access arrangements.

Access to the FIS, which allows for identification of an unknown individual, is much more restricted to protect the privacy of individuals whose details may be returned because of a possible facial match with a person of interest. Only a prescribed set of law enforcement, national security and anti-corruption agencies will have access to this service, and within those agencies access will also be restricted to users with a need to use it and training in facial recognition. This will help to ensure that if an individual's former identity is revealed through these services, only those with a strict need to know that information will have access to it. Other strict access controls on the FIS, including a requirement to enter the particular purpose for which it is being used in each instance, will help to prevent any misuse of the service to identify a person other than for the activities provided for by the Bill.

Under the Face Matching Services Participation Agreement, FIS access is also subject to additional supervision and authorisation requirements. All users of the FIS must be monitored by a supervising officer when using the service. In addition, a more senior authorising officer (at Australian Public Service Executive Level 2/Director level or equivalent) must approve certain FIS requests, including all queries for community safety activities, queries relating to a person under the age of 18 years, and queries to identify witnesses to a crime.

In addition, the NDLFRS, which is the only database being built specifically for use in these services, is designed only to rely on the most recent image of an individual for facial matching. In addition, this data will be updated daily through direct connections between the NDLFRS and the state and territory databases from which the data is drawn, to ensure that the images being used for matching are the most up-to-date.

These controls provide adequate and effective protection for vulnerable groups by ensuring that only those with a need to identify an individual for specific activities will have access to identification information through the services. Although it may be possible that the results of a query may reveal sensitive information about an

individual, it is not possible to entirely avoid this without undermining the purpose for which the services have been developed, which is to assist with identifying and verifying the identity of individuals. The Bill, and the design of the services that will be facilitated by it, puts in place a regime of strict controls and tiered safeguards that appropriately balance the need to protect vulnerable groups with the effectiveness of the services as a tool for identity resolution.

In relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against government repositories of facial images through the Hub is the least rights restrictive approach to achieve the stated objective.

The FIS is designed to assist Australia's law enforcement, national security and anti-corruption agencies to identify unknown persons of interest in the course of their identity fraud prevention and detection activities, and their national security, law enforcement, protective security and community safety activities. This could include, for example, identifying a suspect from a still image taken from CCTV footage of an armed robbery, identifying an individual suspected to be involved in terrorist activities or in siege situation, or determining if a person of interest is using multiple fraudulent identities.

As detailed above, many of these agencies already share this information, and can request matching against various databases. However, this currently occurs on an ad-hoc basis which can be slow and difficult to audit. The Bill does not seek to expand the legal basis on which these agencies are authorised to share information with each other – they will still need to have a separate legal basis to do so before using the services. The services provide these agencies with a faster, secure tool for transmitting these requests to multiple data sources at once and receiving the results as quickly as possible, with a clear audit trail for accountability purposes.

In many law enforcement and national security scenarios, it is imperative that a person of interest is identified quickly to prevent a new or ongoing threat to the public. In the current environment, this is often not possible, and the various different methods agencies use to share information with each other are inefficient and make auditing and oversight difficult. By providing agencies with a tool to help them resolve the identity of a person of interest quickly, and in an auditable way, the services will help to ensure that these agencies can operate effectively and continue to keep Australians safe, whilst being accountable to the Australian public.

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 28 March 2018 regarding the human rights compatibility of the *Australian Passports Amendment (Identity-matching Services) Bill 2018*.

I attach a response to the request for information from the Parliamentary Joint Committee on Human Rights (the Committee), as set out in the Committee's *Report 3 of 2018*.

I note that the Committee has requested similar advice from my colleague, the Minister for Home Affairs and the Minister for Immigration and Border Protection, on the *Identity-matching Services Bill 2018*. In most cases, the information requested applies equally to both Bills; we have coordinated our responses where appropriate.

Should you require further information, the responsible officer for this matter in my Department is Mr Stephen Gee, Assistant Secretary, Passport Policy and Integrity Branch, who can be contacted on (02) 6261 3075.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

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Responses to questions from the Parliamentary Joint Committee on Human Rights in its *Report 3 of 2018* in relation to the *Australian Passports Amendment (Identity-matching Services) Bill 2018*

The Committee asked the advice of the Minister as to:

- **whether the limitation on the right to privacy by the measures in the *Passport Amendment Bill* are a reasonable and proportionate measure to achieve the stated objective. This includes information in relation to:**
  - **whether the *Privacy Act 1988* (Privacy Act) will apply to DFAT's disclosure of photographs and biographical information and, if so, whether it will act as an adequate and effective safeguard for the purposes of international human rights law noting the various exceptions to the collection, use and disclosure of information under the Privacy Act;**
  - **whether the *Passport Amendment Bill* contains adequate and effective safeguards and is sufficiently circumscribed for the purposes of international human rights law;**

The Privacy Act applies to all 'APP entities', which includes the Department of Foreign Affairs and Trade (DFAT). DFAT's disclosure of photographs and biographical information will therefore be subject to the Privacy Act. Nothing in the Bill exempts DFAT from these requirements.

The Privacy Act and the Australian Privacy Principles contained therein provide the privacy architecture for Australian Government agencies. The adequacy and effectiveness of the privacy safeguards contained in the Privacy Act, including the appropriateness of the exemptions to restrictions on collection, use and disclosure of information under the Privacy Act, have been considered by the Parliament in the development of the Act and subsequent amendments to it. To the extent that various exemptions in the Privacy Act may apply to DFAT's disclosure of photographs and biographical information, this is consistent with the application of the Privacy Act to the many entities that are subject to it.

The Privacy Act is not the only legislation relevant to the collection, use and disclosure of photographs and biographical information by DFAT in the passports context. Australian Privacy Principle 6.2(b) provides, relevantly, that personal information (including sensitive information) may be used and disclosed for a secondary purpose (to the purpose for which the information was collected, in this case being the processing of an application for an Australian travel document) where it is required or authorised by or under an Australian law.

The *Australian Passports Act 2005 (Cth)* and *Australian Passports Determination 2015 (Cth)* relevantly provide the primary legislative framework for the collection, use and disclosure of passport-related personal information and sensitive information. The *Australian Passports*

Act 2005 (Cth) and its related Australian Passports Determination 2015 (Cth) set out various permitted collections, uses and disclosures of personal information and sensitive information in the passports context and already provide a legal basis, although not sufficiently workable, for most of the types of disclosures envisaged by DFAT's participation in the biometric face matching services. The primary intention of the Bill is to augment into one, workable, comprehensive legal basis the various existing, but fragmented, legal bases that currently exist to permit disclosures of passport-related information (addressed below).

The Bill provides for DFAT's participation in identity-matching services that will be subject to other privacy safeguards under the Intergovernmental Agreement on Identity Matching Services (IGA). In addition, the policy and administrative privacy safeguards, including requirements for privacy impact assessments before agencies access the services and compliance audits, will help to ensure the use of the services remains proportionate to the need, and prevent any misuse of identification information.

The principle governing these arrangements is that the minimum necessary information is disclosed to meet the legitimate purpose of the services. The IGA provides that strict privacy controls, accountability and transparency must apply to all the services. Within this framework, data-holding agencies retain discretion to determine specific purposes for which, entities to which, and other circumstances under which, they make their data available through the services.

These and other privacy, accountability and transparency measures provide appropriate safeguards against unnecessary impositions on the right to privacy as a result of the Minister making Australian travel document data available for all the purposes of, and by the automated means intrinsic to, the services.

The Privacy Act, the *Australian Passports Act 2005 (Cth)* and the *Australian Passports Determination 2015 (Cth)* already provide various legal bases to cover DFAT's disclosures of passport-related personal information and sensitive information to agencies and organisations participating in the biometric face matching services. However, legal complexities inherent to applying various existing legal bases in the context of the biometric face matching services (including the diverse nature of participating organisations and the multiple purposes for disclosure) means the only practical way for DFAT to participate in the biometric face matching services as a data holding agency is to augment the various existing legal bases for disclosure into a single, comprehensive legal basis for disclosure for the purposes of participating in the biometric face matching services, as is proposed by the Bill.

The Bill's provision for certain automated decision-making in relation to passport-related information disclosures is intended to supplement DFAT's current ability to make manual decisions to disclose personal or sensitive information so as to allow DFAT's participation in the proposed automated 'hub and spoke' model inherent to the biometric face matching

services. The Department of Home Affairs has outlined separately the automated nature of the biometric face matching service's operation, and the reasons for this.

The safeguards inherent to the use, collection and disclosure of passport-related personal and sensitive information have already been assessed as adequate and effective by parliament in the context of the *Australian Passports Act 2005 (Cth)* and its related *Australian Passports Determination 2015 (Cth)*. The Bill augments the existing legal framework. As such, those privacy safeguards already assessed as adequate and effective in the context of disclosures of passport information will continue to be adequate and effective.

- **whether, in light of the number, types and sources of facial images and other biometric data that may be shared and matched, these measures represent the least rights restrictive approach to achieving the stated objectives (including whether having facial images of the vast majority of Australians searchable via the identity matching services is the least rights restrictive approach);**

The biometric face matching services have been developed to address increasing incidences, and sophistication of, identity misuse and fraud in Australia, which has wide-ranging impacts for individual privacy, as well as law enforcement and national security.

Robust identity-checking practices have significant benefits for individuals and for the community. They help to secure the legitimate identities of individuals by enabling agencies and organisations to detect and prevent the use of stolen, fake or fraudulent identity documentation.

The use of fraudulent identities is also a key enabler of organised crime and terrorism. Australians previously convicted of terrorism-related offences are known to have used fake identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives, and mobile phones to communicate anonymously to evade detection.

In addition to combating identity and related crimes, there are a range of other situations in which identity verification is essential to law enforcement, national security and community safety. This may include verifying the identity of a person suspected of committing a criminal offence, a person seeking authorisation to access a government facility, or a person who is believed to be a missing person. In circumstances such as these, there is a clear need to be able to verify the person's identity in order to protect the community or the individual themselves.

Many agencies and organisations already have data-sharing arrangements for the purpose of manual facial matching. However, these arrangements can be ad-hoc, often relying on manual processes, may not be secure and may be difficult to audit. By contrast, the services will be delivered through an interoperability hub. The hub will capture audit trail information of all services, to support accountability and transparency measures including regular audits and annual reporting.

The identity-matching services will therefore provide a fast and secure tool for identity verification by government and non-government authorities in support of the legitimate objectives of combatting identity crime and supporting national security, law enforcement and community safety. DFAT's participation in the services are necessary to support these objectives because current identity verification practices are inadequate to deal with sophisticated fraudulent identity documents, and to support fast, secure and auditable information-sharing.

Where national security or law enforcement agencies have information about potential threats, it is essential that they can act quickly and efficiently to assess the nature of the threat, including identifying any individuals involved. This is particularly important where agencies may not have sufficient information about the known identity of the individual to verify their identity using the services. This may occur where the agency has a facial image of a suspect but no other identification information about the individual.

There is a clear need for government and private sector service providers to improve their identity-verification processes to ensure they can continue to detect these increasingly sophisticated fraudulent identity documents. The services, and DFAT's participation in them, will assist with this by ensuring that the use of a wider range of fraudulent identification documents can be prevented in a fast, automated and secure way.

The Government acknowledges that the face matching services have privacy implications for individuals. However, the services and the systems that support them have been designed to minimise those impacts and improve the security and accountability of data-sharing between participating agencies. The identification information being made available for matching through the services is already held by government across multiple agencies, and shared between agencies consistent with their legislative authorities and legal frameworks. The face matching services will enable agencies to use that information more securely and effectively

to protect Australians from national security and criminal threats, identity crime, and other threats, in the least rights restrictive way.

- **whether the measure is a proportionate limitation on the right to privacy with reference to the potential relevance of international jurisprudence such as that outlined at [1.148]-[1.149];**

As set out above, the Bill contains a range of measures to ensure that the limitation on the right to privacy arising from DFAT's participation in the identity-matching services is proportionate to the legitimate objectives it pursues. Respectfully, the case law cited by the Committee at [1.148] – [1.149] of its Report does not alter that fact.

A number of the cases referenced deal with the matter of collection of biometric information directly from members of the public and the retention of that information for law enforcement purposes. The identity-matching services that the Bill allows DFAT to participate in are simply tools to enable agencies to more securely disclose (and collect) information to each other.

As part of the existing legal framework that already applies to the collection, use and disclosure of identification information in the passport context, DFAT will still have to comply with data retention regimes that apply to it with respect to the storage and destruction of that information.

Furthermore, the services will be subject to a range of stringent user access arrangements under a common Face Matching Services Participation Agreement between all participating Commonwealth, state and territory agencies, which will provide a legally binding framework for participation. This will include, *inter alia*, requiring agencies to only retain information for as long as they require it for the purpose for which it was collected, or for the minimum period required by law.

The Committee also refers to European cases dealing with retention of communications data, and its own comments on the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*. The issues raised in relation to metadata largely relate to concerns about the retention of significant amounts of data not previously retained, and the purposes for which it can be accessed.

As set out above, the Bill is not intended to deal with the collection and retention of data from individuals – it provides for information-sharing between DFAT and other participating agencies. The data to be transmitted through the services is information that DFAT will have already collected from individuals with their consent and retained. In this way, the services

are not analogous with the establishment of large databases of new metadata not already retained.

As each data holding agency, including DFAT, will retain control over the data it holds (including ensuring adequately information security measures are in place pursuant to Australian Privacy Principle 11), no new data mining or metadata issues should arise other than those which already exist in relation to DFAT's collection, use and disclosure of passport-related information under existing legal authority.

Whilst it is possible that identification information obtained through the services may reveal some limited additional information about a person (which the Committee raises concerns about at [1.147]), this must be considered in the context of the legitimate objectives that the Bill pursues. In particular, the face matching services that the Bill allows DFAT to participate in are designed to assist in verification of identity or the identification of unknown individuals in the context of the identity and community protection activities. Given the services are for use in identification and identity verification, the disclosure of some identifying information about an individual is unavoidable.

The Committee also notes that the European cases relating to communications data raise the issue of access to information without a requirement for prior review by a court of independent administrative authority. The Bill is not seeking to authorise participating agencies to "access" DFAT's identification information through the services. No broad "access" will be possible under the services that is not consistent with the hub and spoke model under which participating data holding agencies maintain control over their data holdings. Rather, a request for disclosure of certain information will be made to DFAT by a requesting agency and DFAT will either disclose that information or not pursuant to pre-agreed conditions. Those agencies requesting information from DFAT will need to have their own legal basis to collect information that DFAT discloses to it. Most (if not all) participating agencies already have a legal basis to collect this information from DFAT, in most cases without prior review by a court or independent administrative authority. It is not appropriate for the Bill to impose this additional requirement on participating agencies – this would be a matter for other legislative processes relevant to those agencies, or their particular jurisdictions.

For the reasons set out above, and in the Statement of Compatibility with Human Rights, I consider that the measures in the Bill are a proportionate limitation on the right to privacy notwithstanding the referenced jurisprudence.

- **the extent to which DFAT's historical facial images will be subject to the identity matching services, and whether the Passport Amendment Bill or other Australian laws provide adequate and effective protection against misuse and in respect of vulnerable groups; and**

Acknowledging the importance of providing adequate and effective protection against misuse and in respect of vulnerable groups, DFAT will only provide access to individuals' most recent facial images through the services.

In addition, the Department of Home Affairs' Identity-Matching Services Bill 2018 provides specifically for Home Affairs to share information for the purposes of protecting individuals with legally assumed or protected identities. This will help to protect individuals who have been issued with an assumed or protected identity by an authorised Commonwealth, state or territory agency, from being inadvertently identified. Data about these individuals contained in each database connected to the interoperability hub is sanitised directly by the agencies responsible for the assumed/protected identity prior to agencies having access to the database through the FIS (which allows for identification of individuals without knowing their name).

In relation to other vulnerable groups that may have changed their identities but do not have a legally assumed or protected identity, the structure of the services will help to prevent their former identities from being revealed in most circumstances. For example, the most widely available service, the FVS, only provides for one-to-one verification of an identity. In order to receive a match, the user will need to provide biographic details about the individual (such as their name and date of birth), which will then be check against one or more databases and results only returned if the biographic details match a record in the database. Although some databases may contain, and return, known alias information, this will only be returned to certain users with a need for that information (such as police) based on their user access arrangements.

Access to the FIS, which allows for identification of an unknown individual, is much more restricted to protect the privacy of individuals whose details may be returned because of a possible facial match with a person of interest. Only a prescribed set of law enforcement, national security and anti-corruption agencies will have access to this service, and within those agencies access will also be restricted to users with a need to use it and training in facial recognition. This will help to ensure that if an individual's former identity is revealed through these services, only those with a strict need to know that information will have access to it. Other strict access controls on the FIS, including a requirement to enter the particular

purpose for which it is being used in each instance, will help to prevent any misuse of the service to identify a person other than for the activities provided for by the Bill.

These controls provide adequate and effective protection for vulnerable groups by ensuring that only those with a need to identify an individual for specific activities will have access to identification information through the services. Although it may be possible that the results of a query may reveal sensitive information about an individual, it is not possible to entirely avoid this without undermining the purpose for which the services have been developed, which is to assist with identifying and verifying the identity of individuals. The identity-matching services will have in place a regime of strict controls and tiered safeguards that appropriately balance the need to protect vulnerable groups with the effectiveness of the services as a tool for identity resolution.

- **in relation to the Face Identification Service (FIS), whether allowing images of unknown individuals to be searched and matched against DFAT facial images through the Hub is the least rights restrictive approach to achieve the stated objective.**

The FIS is designed to assist Australia's law enforcement, national security and anti-corruption agencies to identify unknown persons of interest in the course of their identity fraud prevention and detection activities, and their national security, law enforcement, protective security and community safety activities. This could include, for example, identifying a suspect from a still image taken from CCTV footage of an armed robbery, identifying an individual suspected to be involved in terrorist activities or in siege situation, or determining if a person of interest is using multiple fraudulent identities.

In recognition of the greater privacy implications of the FIS, it will only be able to be used by a restricted and specific list of agencies set out in the Department of Home Affairs' *Identity-Matching Services Bill 2018*. Any substantive change to the breadth or nature of the agencies that have access to the FIS will need to be made by an amendment to the Act, rather than through the making of a rule. This will help to prevent 'scope creep' and will ensure appropriate Parliamentary oversight of any substantive changes to FIS access.

Many of these agencies already share this information, and can request matching against various databases. However, this currently occurs on an ad-hoc basis which can be slow and difficult to audit. DFAT's participation in the identity-matching services will provide it with a

faster, secure tool for transmitting these requests to multiple data sources at once and receiving the results as quickly as possible, with a clear audit trail for accountability purposes.

In many law enforcement and national security scenarios, it is imperative that a person of interest is identified quickly to prevent a new or ongoing threat to the public. In the current environment, this is often not possible, and the various different methods agencies use to share information with each other are inefficient and make auditing and oversight difficult. By providing agencies with a tool to help them resolve the identity of a person of interest quickly, and in an auditable way, the services will help to ensure that these agencies can operate effectively and continue to keep Australians safe, whilst being accountable to the Australian public.

THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR HOME AFFAIRS

Ref No: MS18-001844

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

Dear Mr Goodenough

Thank you for your letters of 9 May 2018 in which further information was requested on the:

- Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2017 (the Home Affairs Legislation Amendment Bill); and
- Migration (IMMI/003: Specified courses and exams for registration as a migration agent) Instrument 2018 [F2017L01708] (the Migration Instrument).

My response to both requests are attached.

I trust the information provided is helpful.

Yours sincerely

ALEX HAWKE

24 / 5 / 2018

Parliament House Canberra ACT 2600 Telephone: (02) 6277 4430 Facsimile: (02) 6277 8522

Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018

Committee's Comment

- ***How the measures are effective to achieve (that is, rationally connected to) the stated objectives; and***

- ***Whether the measures are reasonable and proportionate to achieving the stated objectives of the instrument (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).***

The Department seeks to ensure that the migration agent industry is able to service a clientele that may have little or no English language capability. The capacity of a migration agent to convey instructions and information to and from the Department on behalf of a vulnerable client is often critical to the outcome of the visa application.

The duties of migration agents include, not just the completing of forms and the handling of funds on behalf of visa applicants, but also interpretation of complex legislation and its application to the circumstances of a particular applicant. Migration agents are also required to provide clear advice and information, prepare detailed submissions and review of visa applications provided for in the *Migration Act* 1958 (Cth).

The current legislative instrument states that if a person is not in a class of persons specified, an English language proficiency exam is required to be completed. In order for an individual to be exempt from sitting the English language exam, the individual must have been resident in one of the specified countries (Australia, New Zealand, United Kingdom, Republic of Ireland, United States of America, Republic of South Africa or Canada) for the duration of the specified schooling. This is similar to previous legislative instruments introduced in 2012 (FR2012L01932 IMMI 12/097 and prior to that F2012L01343 IMMI 12/035) which also included the specified class of persons.

The Department does not consider the specified class of persons being exempt from undergoing the English language exam as unreasonable or disproportionate. Requiring migration agent applicants who have not completed educational requirements whilst being resident in the five specified countries to complete the English language exam, is rationally connected to the legitimate aim of ensuring migration agents are able to convey instructions and information to, and from, the Department on behalf of their clients.

The New Zealand Immigration Advisers Authority also requires educational requirements to be delivered in the English language and completed while applicants are living in the specified countries (New Zealand, Australia, Canada, Ireland, UK and the US), in their Competency Standard 5.

Similarly, to Australia, English is the common language (ie the majority of the population are native English speakers) in the USA, UK, Canada, Ireland and New Zealand. According to publically available information in 2015, 54 sovereign states and 27 non-sovereign entities had English as an official language, however only six had English as the common language (Australia, USA, UK, Canada, Ireland and New Zealand). A common language in any given country gives prominence over other languages spoken inside the country by the people. Often it is one that is spoken by the majority of the population of the country (e.g. Australia, USA). Therefore it is considered by the Department that people from the specified countries are more likely to meet the English language requirement.

The intended purpose of this requirement is to reduce the unnecessary regulatory burden on migration agent applicants who *were* educated in English in one of the specified countries whereby the need for them to undertake English testing is unnecessary duplication. The Department's recognition of English as a 'common language' in these countries and acknowledgment that a level of education in English contributes to higher English language proficiency, achieves a balance between the necessity of migration advice standards assurance and reduction of regulatory burden.

The 2007-08 Review of Statutory Self- Regulation of the Migration Advice Profession (the Review) recommended that English language proficiency equivalent to an IELTS score of 7 should be the required level of English proficiency for both new and repeat applicants for registration as a migration agent (recommendation 16).

The Department relies on both the specified countries and the fact that individual's education was conducted in English as a reliable assurance that the potential migration agent will have English language proficiency equivalent to the score of IELTS 7, and therefore does not need to be subject to over regulation through English testing.

Senator the Hon Matthew Canavan

Minister for Resources and Northern Australia

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

22 MAY 2018

human.rights@aph.gov.au

Dear Mr Goodenough Ian,

Thank you for your letter of 9 May 2018 concerning comments made by the Parliamentary Joint Committee on Human Rights in its Report 4 of 2018 on the recently introduced proposed legislation: Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018.

You requested a response from me by 23 May 2018 in relation to particular aspects of the proposed legislation and its human rights compatibility.

My detailed response addressing the Parliamentary Joint Committee's concerns is attached.

Yours sincerely

Matthew Canavan

Encl. (1)

Response to Report 4 of 2018 of the Parliamentary Joint Committee on Human Rights in relation to comments on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Regulatory Context

The task of regulators of the offshore resources industry is difficult given the remote location and high hazard nature of the industry's key operations. For this reason, providing effective and comprehensive compliance and enforcement tools to the regulator is vital in order to deliver human health and safety and environmental protection outcomes. Furthermore and of relevance in consideration of a human rights protection context, it is regulation pertaining, by and large, to large multinational companies as opposed to individuals. The companies who participate in this industry are well resourced, sophisticated and voluntarily engaging in activities for profit.

Offence Specific Defences

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (the Bill) contains a number of offence provisions which have corresponding offence specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction (the breach of directions defence); and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time (the well integrity defence).

These defences operate as optional exceptions to the criminal responsibility regime established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act). Both of these defences are already substantively contained in the Act:

- Breach of Directions Defence: The inclusion of the breach of directions defence in the current Bill represents an expansion of an existing defence (section 584 of the Act) to reflect new measures in the Bill relating to the transfer of regulatory responsibility for greenhouse gas operations from the Minister to NOPSEMA.
- Well Integrity Defence: The inclusion of the well integrity defence is a mirrored application to a well integrity law of an existing defence for a failure to comply with OHS (clause 92 of Schedule 3) and environmental management laws (clause 18 of Schedule 2A). This is in connection with the measure in the Bill to create a new Schedule 2B to provide a complete and comprehensive suite of compliance powers relating to the well integrity function, which was transferred to NOPSEMA in 2011.

The committee requests the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is the least rights restrictive approach and whether reversing the legal burden of proof rather than the evidential burden of proof is necessary); and**

- **whether consideration could be given to amending the measures to provide for a reverse evidential burden rather than a reverse legal burden**

Human Rights Objectives

The Act, in part, establishes a regulatory framework for the management of remote and high hazard industry activities associated with offshore resources exploration and production. These activities, if not conducted properly, have the potential to result in serious injury or death and/or extraordinary environmental harm. The robustness of the regulatory regime, including an effective compliance and enforcement framework, is critical to achieving this objective. The objective of both the breach of directions defence and the well integrity defence assist in achieving the objective of ensuring the safety of persons in the industry as well as the protection of the environment. As such, the regulatory regime positively engages with the right to life, and helps to protect other human rights which would be negatively affected by significant environmental damage.

Effectiveness

A direction issued by NOPSEMA is an enforcement tool designed to achieve a very particular outcome, to direct the industry participant to either do or refrain from doing something in order to deliver OHS, environmental management or well integrity outcomes. Directions are not used frequently – they are used in extraordinary circumstances, usually to deal with a specific emergent risk that the regulations do not adequately cover, and their application and use is taken very seriously. The defence in connection with the offence of non-compliance with a direction allows an optional exception; it is an opportunity for the defendant to prove that they took all reasonable steps to comply with the direction. As a result, the measure is effective in achieving the objectives of the Act.

Well integrity laws relate specifically to the regulatory oversight of the structural integrity of wells, the management of which is seen as posing the greatest risk to both OHS and the environment. A failure in well integrity can result in the death of workers and widespread damage to the environment, such as that recently seen in the Gulf of Mexico with the explosion of the Macondo rig. Strict compliance with these laws is deemed critical and a central tenet of the offshore regime. However, this defence acknowledges and provides for an exception to strict compliance in emergency circumstances. As a result, the measure is effective in achieving the objectives of the Act.

Reasonable and Proportionate

Both of these defences are not related to issues essential to culpability, but instead provide exceptions or an excuse for the conduct. In addition, both defences relate to the serious potential consequences of non-compliance (as outlined above – risks of serious injury or death and/or major environmental consequences). Conduct resulting in the offence would, in most circumstances, take place at a remote location and without the ability for the regulator to immediately or even quickly gain access in order to ascertain the facts directly relating to these defences. As a result, the facts and information directly relevant to the defence is entirely within the defendant's knowledge; only the defendant, with their particular knowledge of, and involvement in, the circumstances happening in the event of the failure to comply with the direction, or during a well integrity emergency, is able to prove the requisite and exception-based matters of reasonable steps or practicable actions.

Both defences are likely to be used by companies with significant resources, who are more than capable of shouldering the legal burden if they wish to claim a defence. The industry is highly regulated and companies involved have chosen to voluntarily participate in this regulated environment on a for profit basis. In addition, in relation to the breach of directions defence, the penalties are generally 100 penalty units and do not involve imprisonment.

As a result, both measures contain a limitation that is both reasonable and proportionate to the achievement of the relevant objective. It is also the least rights restrictive approach while still balancing the ability of the measures to effectively achieve their objective.

Merely Reversing Evidential Burden is Insufficient

Allowing for a reversal of the evidential burden of proof only would create internal inconsistencies in the Act and its established treatment of offences and defences. It is essential to avoid any perception by the offshore petroleum and greenhouse gas storage industries that the Commonwealth is 'soft' on compliance. Defences should be available only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that they have done so.

To provide the ability of a defendant to simply point to evidence that suggests a reasonable possibility that reasonable steps were taken to comply with a direction or that compliance with well integrity laws was not practicable in the face of an emergency would result in the regulator being unable to successfully and meaningfully take enforcement action in the case of an offence being committed, and this would undermine the legitimate objective in question.

In the aftermath of an event where one or more workers may have suffered serious injury or may have died, or where significant environmental damage may have occurred, it is appropriate that a titleholder should have to demonstrate, on the balance of probabilities, that the titleholder took all available action to prevent the occurrence, rather than merely to meet the evidential burden relating to the possibility of having done so.

Due to the remote occurrence of the regulated activities, the regulator is not able to, at the relevant time, independently assess and verify what is reasonable or practicable in the event of non-compliance. Accordingly, the defence would almost always succeed without the real ability of the prosecution to contest its veracity. The relevant facts are entirely within the defendant's knowledge and not at all within the regulator's knowledge. This puts the regulator at a significant disadvantage when attempting to establish the chain of causation of an adverse event and to meet a legal burden of proof that a defence cannot be relied upon. This would ultimately lead to suboptimal outcomes for OHS of offshore workers and protection of the marine environment.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

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

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

December 2014

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

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

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

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

Mandatory minimum sentencing

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

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

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

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

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

Civil penalty provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

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

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

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

b) The nature of the penalty

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

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

c) The severity of the penalty

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

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

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

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

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

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

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

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

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

Criminal process rights and civil penalty provisions

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

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

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

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