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] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[3]

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.

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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).

3 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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*, a copy of which is available on the committee's website.[4]

4 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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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 12 and 21 February 2019 (consideration of 8 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 6 December 2018 and 6 February 2019;[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.

Australian Crime Commission Regulations 2018 [F2018L01780]

Purpose	Remakes the Australian Crime Commission Regulations 2002 in their entirety to set out the powers and functions of the Australian Criminal Intelligence Commission (ACIC). This includes the conferral of powers and functions under state laws on the ACIC and its staff, and powers to collect, use and disclose certain information
Portfolio	Home Affairs
Authorising legislation	*Australian Crime Commission Act 2002*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 12 February 2019)
Rights	Privacy; liberty; fair trial and fair hearing; effective remedy; life; prohibition against torture and cruel, inhuman and degrading treatment
Status	Seeking additional information

Background

1.5 The Australian Crime Commission Regulations 2002 (2002 Regulations) were due to sunset (that is, to be automatically repealed) on 1 April 2018. This date was deferred by 12 months by the Legislation (Deferral of Sunsetting—Australian Crime Commission Regulations) Certificate 2017 [F2017L01709] (2017 Certificate).

1.6 The committee considered the human rights impact of deferring the sunset date of the 2002 Regulations in its *Report 3 of 2018* and *Report 4 of 2018*.[1]

1.7 The current Australian Crime Commission Regulations 2018 (2018 Regulations) remake the 2002 Regulations in their entirety, with some amendments.

Conferral of powers under state laws

1.8 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[2] of certain duties,

1 See Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 57-64; *Report 4 of 2018* (8 May 2018) pp. 124-133.

functions and powers on the Australian Criminal Intelligence Commission (ACIC),[3] members of its board or staff, or a judge of the Federal Court or the Federal Circuit Court. These may include duties, functions or powers specified in regulations.

1.9 Section 14 and Schedules 4, 5 and 6 of the 2018 Regulations prescribe provisions of state laws for the purposes of section 55A, including:

- under section 14(1), duties, functions and powers provided in 34 provisions of state and territory Acts and regulations specified in Schedule 4,[4] which may be conferred on the ACIC; and
- under section 14(2), duties, functions and powers provided in 803 provisions of state and territory Acts and regulations specified in Schedule 5,[5] which may be conferred on the Chief Executive Officer (CEO) of the ACIC, ACIC staff, or members of the ACIC board.

1.10 In each instance, the duty, function or power may be conferred on the ACIC, its staff or members of its board for the purposes of, or in relation to, investigating or undertaking of intelligence operations relating to a relevant criminal activity,[6] insofar as the activity is, or includes, an offence against a state law (whether or not that offence has a federal aspect).

Compatibility of the measures with multiple human rights

1.11 The right to privacy prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. This includes informational privacy, the right to personal autonomy and physical and psychological integrity, and prohibitions on unlawful and arbitrary state surveillance or interference with a person's home or workplace.

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2 'State' is defined in section 4 of the *Australian Crime Commission Act 2002* (ACC Act) to include the Australian Capital Territory and the Northern Territory.

3 In 2016, the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission. Pursuant to section 7(1A) of the ACC Act and section 8 of the 2018 Regulations, the Australian Crime Commission may also be known as the Australian Criminal Intelligence Commission, the ACIC, or the ACC.

4 See Schedule 4, Part 1 (items 1-3); Part 2 (items 1-4); Part 3 (items 1-3); Part 4 (items 1-8); Part 5 (items 1-6); Part 6 (items 1-4); Part 7 (items 1-2) and Part 8 (items 1-4).

5 See Schedule 5, Part 1 (items 1-70); Part 2 (items 1-95); Part 3 (items 1-44) Part 4 (items 1-130); Part 5 (items 1-84); Part 6 (items 1-124); Part 7 (items 1-128); and Part 8 (items 1-128).

6 'Relevant criminal activity' is defined in section 4 of the ACC Act as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory.' 'Relevant crime' means serious and organised crime, indigenous violence or child abuse.

1.12 The right to liberty and security of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

1.13 The right to a fair trial and a fair hearing encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[7]

1.14 Australia is also required to ensure that those whose human rights are violated have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

1.15 A number of the provisions in Schedules 4 and 5 to the 2018 Regulations, allowing the conferral of powers, functions and duties under state laws on the ACIC, its staff and its board, may engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. This is because the measures relate to matters such as criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection and spent convictions.

1.16 The committee considered the human rights implications of the measures (that is, of continuing the measures in force) in its *Report 3 of 2018* and *Report 4 of 2018*.[8] The committee sought advice as to the human rights engaged by the measures and, where the measures limited human rights, whether they pursued a legitimate objective for the purposes of human rights law, and were rationally connected and proportionate to that objective. The committee also requested advice as to whether it would be feasible to include in the 2002 Regulations, when remade, a requirement that any state powers conferred on the ACIC or its staff which limit human rights will only be exercisable where accompanied by corresponding duties and safeguards under the relevant state law.

1.17 In response, the (then) Minister for Law Enforcement and Cyber Security advised that, in re-making the 2002 Regulations, he would develop a statement of compatibility with human rights canvassing whether the identified measures are compatible with international human rights law. The minister also advised that, as part of the re-making process, he would consider any necessary amendments to ensure the regulations remain fit for purpose and contain appropriate safeguards. The committee welcomed these undertakings, and noted that it would consider the human rights implications of the re-made regulations when they were received.

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7 See, by way of analogy, *Ramanauskas v Lithuania*, European Court of Human Rights Application No. 74420/01 (5 February 2008) [55]. The European Court of Human Rights has consistently held that entrapment violates a person's right to a fair trial.

8 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 57-62; *Report 4 of 2018* (8 May 2018) pp. 124-129.

1.18 However, the statement of compatibility to the 2018 Regulations does not recognise that any human rights are engaged by the measures, and consequently provides no assessment of whether the measures are compatible with international human rights law. Further, the 2018 Regulations do not appear to contain any requirement that the conferral of powers under state laws be accompanied by the conferral of corresponding duties and safeguards.

1.19 The 2018 Regulations also appear to specify a number of additional powers, functions and duties (that is, additional to those in the 2002 Regulations) that may be conferred on the ACIC, its staff, and members of its board. A number of these powers are similar to those previously considered by the committee, and raise similar human rights concerns.

1.20 For example, Part 6 of Schedule 5 to the 2018 Regulations allows the conferral of powers on the CEO or staff of the ACIC under several provisions of the Tasmanian *Police Powers (Controlled Operations) Act 2006* (Tasmanian Act). This includes powers in section 16 of the Tasmanian Act to engage in 'specified controlled conduct' as part of a controlled operation.[9] This power may be conferred on any member of the ACIC's staff. Section 18 of the Tasmanian Act provides that, despite any law of Tasmania, a participant in an authorised operation is not criminally responsible for conduct constituting an offence, subject to certain exceptions.

1.21 The conferral of the power in section 16 of the Tasmanian Act may therefore allow any member of the ACIC's staff to be given the authority to commit an otherwise unlawful act. Schedule 5 also provides for the conferral on the CEO of ACIC of the power, in section 10(1) of the Tasmanian Act, to authorise controlled operations.[10]

1.22 While there appear to be some safeguards in relation to the authorised operations,[11] by allowing a broad range of activities that would otherwise be unlawful the provisions in the Tasmanian Act could have a significant impact on

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9 Item 48, Part 6 of Schedule 5. Section 4 of the Tasmanian Act defines 'controlled operation' as an operation that is conducted, or is intended to be conducted, for the purposes of obtaining evidence that may lead to the prosecution of a person for a relevant offence, and which involves or may involve controlled conduct. 'Controlled conduct' is also defined in that section as conduct for which a person would, but for section 18 or 25 of the Tasmanian Act, be criminally responsible. Section 25 of the Tasmanian Act deals with the recognition of authorities to engage in controlled operations granted under other state and territory laws.

10 Item 37, Part 6 of Schedule 5 to the 2018 Regulations.

11 For example, section 10(2) of the Tasmanian Act provides that an authority to conduct a controlled operation may not be granted unless the chief officer is satisfied on reasonable grounds in relation to a number of listed matters. These include that the operation will not be conducted so as to induce a person to commit an offence, and that conduct involved in the operation will not seriously endanger health or safety, cause death, involve the commission of a sexual offence, or result in unlawful loss of or serious damage to property.

various rights, including (but not limited to) the right to liberty, the right to a fair trial and a fair hearing, the right to privacy and the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment. The provisions may also prevent a person from seeking an effective remedy where rights have been violated, insofar as a participant in a controlled operation is protected from criminal liability.[12]

1.23 A number of other provisions in Schedule 5 allow the conferral of similar powers (under laws of other jurisdictions) on the CEO of the ACIC and ACIC staff.[13] These provisions raise similar concerns to those identified above.

1.24 Another example is the prescription of powers under the South Australian *Surveillance Devices Act 2016* (SA Act). Part 5 of Schedule 5 to the 2018 Regulations allows the conferral of a number of powers under the SA Act on the CEO of the ACIC and ACIC staff. These include powers to break into, enter and search any premises, stop, detail and search a vehicle, and detain and search any person, where an officer suspects on reasonable grounds that an unauthorised surveillance device is being held.[14] The use of these powers would engage and limit the right to privacy, including respect for the privacy of a person's home, workplace and correspondence. Providing for the detention of persons engages and limits the right to liberty.

1.25 In Schedule 4, several powers are also prescribed relating to the receipt or disclosure of information, which may include personal information. These include the power to receive confidential information in section 11(1) of the First Home Owner Grants Regulation 2000 (WA),[15] and the power to authorise a person to receive information in section 97(d) of the *Taxation Administration Act 1999* (ACT).[16]

1.26 Limitations on human rights may (with some exceptions)[17] be permissible, provided that the relevant measures pursue a legitimate objective, are effective to

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12 Section 18 of the Tasmanian Act. The protection from criminal liability does not apply if the person intentionally induces another person to commit an offence, or if the person engages in conduct that is likely to cause death or serious injury, or involves committing a sexual offence.

13 For example, Part 4 of Schedule 5 to the 2018 Regulations allows for the conferral of powers in relation to controlled operations under the *Criminal Investigation (Covert Powers) Act 2012* (WA). Part 8 of Schedule 5 allows for the conferral of similar powers under the *Crimes (Controlled Operations) Act 2008* (ACT). Additionally, Part 1 of Schedule 5 continues to allow for the conferral of powers in relation to controlled operations under the *Law Enforcement (Controlled Operations) Act 1997* (NSW). The measures in Part 1 were previously considered by the committee. See Parliamentary Joint Committee on Human Rights*, Report 3 of 2018* (27 March 2018) pp. 59-60; *Report 4 of 2018* (8 May 2018) pp. 126-127.

14 Items 72, 73 and 74 of Part 5 of Schedule 5 to the 2018 Regulations.

15 Item 1, Part 4 of Schedule 4 to the 2018 Regulations.

16 Item 2, Part 7 of Schedule 4 to the 2018 Regulation.

17 For example, the right to freedom from torture and other cruel, inhuman or degrading punishment is an absolute right, and may not be limited in any circumstances.

achieve (that is, rationally connected to) that objective, and are a proportionate means of achieving that objective.

1.27 However, as noted above at [1.18], the statement of compatibility does not recognise that any rights are engaged, and consequently provides no assessment of whether the measures are compatible with international human rights law. In the absence of further information, it is not possible to conclude that the measures are compatible with human rights.

Committee comment

1.28 The measures appear to engage and limit a number of human rights. The preceding analysis raises questions as to whether the measures are compatible with international human rights law.

1.29 The committee notes that the minister responsible for administering the 2002 Regulations undertook to provide an assessment of whether the measures are compatible with human rights when the regulations were remade. However, no such assessment is included in the statement of compatibility to the 2018 Regulations.

1.30 Accordingly, and consistent with the committee's previous consideration of the measures, the committee requests the minister's advice as to:

- **the human rights engaged by sections 14(1) and (2) and Schedules 4 and 5 of the 2018 Regulations; and**
- **where those measures engage and limit human rights:**
  - **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) a legitimate objective; and**
  - **whether the measure is proportionate to achieving that objective (including whether there are any less rights-restrictive means of achieving the objective and the availability of any relevant safeguards).**

1.31 The committee also requests the minister's advice as to whether it would be feasible to amend the 2018 Regulations to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of corresponding duties and safeguards in the relevant state law.

Collection, use and disclosure of 'ACC information' and 'national policing information'

ACC information

1.32 Section 4 of the ACC Act defines 'ACC information' as information that is in the ACC's possession. Section 15 and Schedule 7 of the 2018 Regulations prescribe seven international organisations to which ACC information may be disclosed, in accordance with section 59AA of the ACC Act.[18]

1.33 Section 17 and Schedule 9 of the 2018 Regulations prescribe 131 bodies corporate and 38 classes of body corporate to whom ACC information may be disclosed, in accordance with section 59AB of the ACC Act.

National policing information

1.34 Section 4 of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by regulations, and that is of a kind prescribed by regulations.[19] In this respect, national policing information is a limited subset of ACC information.

1.35 Section 6(1) and Schedule 1 of the 2018 Regulations prescribe 40 bodies that collect national policing information. Section 6(2) and Schedule 2 prescribe, as the kind of information that is national policing information, information held under, or that relates to the administration of, 23 databases and electronic systems. Section 16 and Schedule 8 of the 2018 Regulations prescribe six organisations to which national policing information may be disclosed by the CEO of the ACIC without approval by the ACIC board,[20] in addition to organisations specified in the ACC Act.[21]

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18 These include the European Monitoring Centre for Drugs and Drug Addiction; the European Police Office, the Financial Action Task Force; the Edgmont Group of Financial Intelligence Units; the International Criminal Police Organisation (INTERPOL); the International Narcotics Control Board; and the United Nations Office on Drugs and Crime.

19 The explanatory memorandum to the Australian Crime Commission Amendment (National Policing Information) Bill 2015 (NPI Bill) indicates (at p. 4) that the definition of 'national policing information' in the ACC Act is designed to capture all information that was collected, held and disseminated by CrimTrac prior to the merger of CrimTrac and the Australian Crime Commission. Submissions to the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs indicate that this may include individuals' criminal records, DNA profiles of offenders, details of missing persons and fingerprint and palm images. See Senate Standing Committee on Legal and Constitutional Affairs, *Australian Crime Commission Amendment (National Policing Information) Bill 2015 [Provisions]* (March 2016), p. 2.

20 These include the Attorney-General's Department; the Department of Finance; the New Zealand Police; the Crime and Corruption Commission of Queensland; the Independent Commission Against Corruption of New South Wales; and the Victorian Institute of Forensic Medicine.

Compatibility of the measures with the right to privacy

1.36 As set out above at [1.11], the right to privacy includes the right to informational privacy, including 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. As ACC information and national policing information may include private, confidential and personal information, the collection, use and disclosure of such information engages and limits the right to privacy.

1.37 Limitations on the right to privacy may be permissible, provided that the relevant measures pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means of achieving that objective.

1.38 The committee examined the human rights implications of the powers to collect, use and disclose 'national policing information' in its *Report 7 of 2016* and *Report 8 of 2016*.[22] The committee noted that there were a number of safeguards in place that may ensure the measures would impose only proportionate limitations on the right to privacy. However, the committee found it difficult to conclude that the measures were compatible with that right without the detail of an ACIC information-handling protocol identified in the response provided by the (then) Minister for Justice. The committee therefore requested that a copy of the protocol be provided to the committee once finalised.

1.39 The committee considered the human rights implications of (continuing in force) the measures permitting the collection, use and disclosure of national policing information and ACC information in its *Report 3 of 2018* and *Report 4 of 2018*.[23] In relation to the measures relating to national policing information, the committee noted the (then) Minister for Law Enforcement and Cyber Security's advice that finalising the information-handling protocol had been delayed owing to the need to address major changes to the ACIC's administrative arrangements, and reiterated its request that a copy of the protocol be provided to the committee. In relation to the measures permitting the collection, use and disclosure of ACC information, the committee welcomed the minister's advice that he would, in remaking the 2002

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21 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Section 59AA(1B) provides that the CEO of the ACC must obtain the approval of the board before disclosing national policing information to a body that is not listed in sections 59AA(1B)(a) to (f), or prescribed by the regulations.

22 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74. The Australian Crime Commission Amendment (National Policing Information) Regulations 2016 [F2017L00712], examined in those reports, introduced the provisions relating to national policing information into the 2002 Regulations.

23 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 57-62; *Report 4 of 2018* (8 May 2018) pp. 124-129.

Regulations, develop a statement of compatibility canvassing how the measures are compatible with the right to privacy. The committee stated that it would consider the new regulations when they were received.

1.40 The statement of compatibility to the 2018 Regulations provides a detailed assessment of the compatibility of the measures with the right to privacy, which assists the committee's assessment of the human rights compatibility of the instrument. For example, the statement of compatibility clarifies that:

> The measures in the…Regulations are intended to assist the ACIC in achieving its key function which…include collecting criminal intelligence and information, conducting and participating in integrity operations and providing systems relating to national policing information.[24]

1.41 The statement also indicates that the measures accord with the objectives of the International Covenant on Civil and Political Rights (ICCPR), including protecting public order, national security and the rights and freedoms of citizens.[25] These are likely to be legitimate objectives for the purposes of international human rights law. Providing for the collection, use and disclosure of national policing information and ACC information also appears to be rationally connected to those objectives.

1.42 The statement of compatibility also identifies a number of relevant safeguards. For example, it explains that, under section 59AA of the ACC Act, the disclosure of ACC information to prescribed bodies and international bodies is only permitted if:

- the CEO considers it appropriate to do so; and
- the information is relevant to a 'permissible purpose'; and
- the disclosure would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.[26]

1.43 The statement of compatibility indicates that these restrictions would also apply, under section 59AB of the ACC Act, to the disclosure of information to prescribed bodies corporate and classes of body corporate, in addition to the following specific requirements:

- the relevant body has undertaken not to use or further disclose the information except as authorised by the CEO or as required by a law of the Commonwealth, a state or territory; and

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24 Statement of compatibility (SOC), p. 25.

25 SOC, p. 25.

26 SOC, p. 26. 'Permissible purpose' is defined in section 4 of the ACC Act, and may include preventing, detecting or investigating a threat to national security or a criminal offence, enforcing laws (including laws of foreign countries) related to proceeds of crime or unexplained wealth, and performing functions of the ACIC set out in section 7A and 7C of the ACC Act.

- the body undertakes to comply with any conditions specified by the CEO; and
- the disclosure would not prejudice a person's safety or a fair trial.[27]

1.44 In relation to ACC information that is personal information (within the meaning of the Privacy Act), the statement of compatibility explains that, under section 59AB(2) of the ACC Act:

> The CEO may only disclose the information if the disclosure is necessary for the purposes of preventing, detecting, or facilitating the collection of criminal information and intelligence in relation to, criminal offences or activities that might constitute criminal offences.[28]

1.45 The statement of compatibility also notes that the use or disclosure of information in the ACIC's possession in breach of the provisions above is an offence, punishable by up to two years' imprisonment.[29]

1.46 The statement of compatibility further outlines mechanisms for making complaints in relation to the ACC's handling of information, and indicates that, as the ACIC is subject to the *Freedom of Information Act 1982*, individuals may seek access to and correction of their personal information.[30]

1.47 In relation to the collection, use and disclosure of ACC information that is 'national policing information', the statement of compatibility states that, under section 59AA(1) of the ACC Act, the CEO must act in accordance with any policy determined, and any direction given, by the ACIC Board (comprised of representatives of the ACIC's partner agencies in the Australian government).[31]

1.48 Finally, the statement of compatibility states that the ACIC has 'put technical and administrative mechanisms in place to ensure…national policing information continues to be collected, used and stored securely'.[32]

1.49 The safeguards on the recording, use and disclosure of ACC information and national policing information outlined above substantially assist the proportionality of the measures, and may ensure that the measures only operate in a manner that is compatible with the right to privacy. However, the committee notes that it has not received a copy of the information-handling protocol. In order to conclude its assessment of the compatibility of the measures with the right to privacy, it would be useful for the committee to consider the protocol in detail.

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27 SOC, p. 26.

28 SOC, p. 26.

29 SOC, p. 26. See also section 51 of the ACC Act.

30 SOC, p. 27.

31 SOC, p. 26.

32 SOC, p. 27.

Committee comment

1.50 The preceding analysis indicates that there are a range of safeguards on the disclosure of ACC information and national policing information that may assist to ensure that the measures operate in a manner that is compatible with the right to privacy.

1.51 The committee welcomes the inclusion of a detailed assessment of the compatibility of the measures with the right to privacy in the statement of compatibility to the 2018 Regulations, consistent with the Minister for Law Enforcement and Cyber Security's previous undertaking.

1.52 However, in order to conclude its assessment of the compatibility of the measures with the right to privacy, it would be useful for the committee to be able to consider the detail of the information-handling protocol subject to its development. The committee therefore requests that a copy of the protocol be provided to the committee.

Compatibility of the measures with the right to life and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment

1.53 Under international human rights law, every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or through 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 nation state.

1.54 In this respect, the United Nations (UN) Human Rights Committee has made clear that international law prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UN Human Rights Committee has stated that Australia lacks 'a comprehensive prohibition on providing international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the death penalty in another state'.[33]

1.55 By authorising the disclosure of ACC information overseas to specified bodies (listed at [1.32] above), the measure would allow for the sharing of personal or confidential information overseas. Such sharing of information internationally could accordingly engage the right to life.

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33 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia,* CCPR/C/AUS/CO/5 (7 May 2009) [20].

1.56 A related issue raised by the measures is that the sharing of ACC information overseas may result in a person being subjected to torture or cruel, inhuman or degrading treatment or punishment. Under international law, the prohibition on torture is absolute and can never be limited.[34]

1.57 The statement of compatibility does not recognise that the disclosure of ACC information may have implications for the right to life and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. Consequently, it does not provide an assessment of whether the measures are compatible with those rights.

1.58 A number of the safeguards identified in relation to the right to privacy are also relevant to whether the measures are compatible with the right to life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment. Particularly relevant are the requirements in section 59AA of the ACC Act relating to the disclosure of ACC information to prescribed bodies and international bodies (outlined at [1.42] above).

1.59 However, it is noted that the statement of compatibility does not explain whether and how those safeguards would be effective to ensure that ACC information is not shared in a way that could expose a person to the death penalty or to cruel, inhuman or degrading treatment or punishment. Further information is needed to assess whether the measures are compatible with the right to life and the prohibition on torture and on cruel, inhuman or degrading treatment or punishment.

Committee comment

1.60 The preceding analysis raises questions as to whether the measures are compatible with the right to life and the prohibition on torture and cruel, inhuman and degrading treatment or punishment.

1.61 Accordingly, the committee seeks the minister's advice as to the compatibility of the measures with these rights (including the existence of any relevant safeguards or guidelines).

34 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) [3].

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019

Purpose	To amend the *Australian Sports Anti-Doping Authority Act 2006* and the *Australian Sports Commission Act 1989* to abolish the Anti-Doping Rule Violation Panel, make amendments to the anti-doping regime and other related amendments
Portfolio	Regional Services, Sport, Local Government and Decentralisation
Introduced	Senate, 14 February 2019
Right	Privacy; effective remedy; fair hearing
Status	Seeking additional information

Abolition of the Anti-Doping Rule Violation Panel

1.62 Currently, under the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), the investigation of potential anti-doping rule violations involves consideration by the Anti-Doping Rule Violation Panel (panel).[1] The panel is responsible for considering whether there has been a possible anti-doping rule violation by an athlete or support person, and advising the Chief Executive Officer (CEO) of ASADA in relation to this matter.[2] The CEO of ASADA may present the panel's advice and other relevant information to the Court of Arbitration for Sport or a sporting tribunal. Those entities are responsible for determining whether an anti-doping rule violation has occurred, hearing appeals, and determining sanctions.[3] An athlete or support person may apply to the Administrative Appeals Tribunal (AAT) for review of the panel's decision to give advice to the ASADA CEO.[4]

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1 An anti-doping rule violation refers to a violation of a rule set out in the Australian Sports Anti-Doping Authority Regulations 2006 [F2018C00515] (ASADA Regulations). These include taking prohibited substances, refusing to submit to sample collection, and tampering with the doping control process. The panel is established under section 40 of the ASADA Act.

2 Section 1.03A of the ASADA Regulations. Section 4 of the ASADA Act defines 'athlete' as a person who competes in sport and who is subject to the national anti-doping scheme, and 'support person' as an athlete support person within the meaning of the World Anti-Doping Code (WADC). Support persons include persons (for example, coaches and trainers) working with, treating or assisting an athlete participating in or preparing for sports competition. See World Anti-Doping Agency, *World Anti-Doping Code* (2015) p. 132 at: https://www.wadaama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf.

3 Section 4.13 of the ASADA Regulations. See also, section 1.05 of the ASADA Regulations, definition of 'sporting tribunal'.

4 Section 4.12 of the ASADA Regulations.

1.63 Part 1 of Schedule 1 to the bill seeks to abolish the panel, and to make consequential amendments to the ASADA Act to remove the panel from the investigative process relating to anti-doping matters. This would include removing the ability for athletes and support persons to appeal to the AAT in relation to the panel's advice before a matter relating to an anti-doping rule violation proceeds to a formal hearing before a sports tribunal.

Compatibility of the measures with the right to a fair hearing

1.64 Article 14(1) of the International Covenant on Civil and Political Rights (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. The concept of a 'suit at law' encompasses judicial procedures aimed at determining certain rights and obligations, as well as equivalent notions in the area of administrative law. It may also extend to other procedures, assessed on a case-by-case basis in the light of the nature of the right in question.[5]

1.65 It appears that the panel's process (including the ability to appeal certain decisions to the AAT) may involve determining rights and obligations (for example, the ability to work in a particular sport). To the extent that this process involves the determination of rights and obligations, fair hearing rights may apply. However, the statement of compatibility provides no information in relation to this matter.

1.66 If the panel's process were to constitute a 'suit at law', there may be fair hearing concerns associated with its removal from the broader investigative process relating to anti-doping matters. For example, it is unclear whether, despite the removal of the panel's process, an athlete or support person would have access to review by a sufficiently independent and impartial tribunal. In this regard, the statement of compatibility indicates that athletes and support persons would have access to a sport's anti-doping tribunal and the proposed National Sports Tribunal (NST), which would 'act as the final arbiter[s] of whether an anti-doping rule violation has been committed'.[6] However, it does not explain whether those tribunals would provide sufficient scope for independent and impartial review. Without further information in relation to these matters, it is unclear whether, and to what extent, the right to a fair hearing may be limited.

1.67 A limitation on the right to a fair hearing may be permissible if it pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility does not recognise

5 See UN Human Rights Committee, *General Comment No. 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial* (2007) [16].

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

that the right to a fair hearing is engaged by the measures, and so provides no assessment as to whether the measures are compatible with that right.

Committee comment

1.68 The preceding analysis indicates that the right to a fair hearing may be engaged by the proposal to abolish the Anti-Doping Rule Violation Panel (panel).

1.69 Accordingly, the committee seeks the minister's advice as to:

- **whether consideration of possible anti-doping rule violations by the panel involves the determination of rights and obligations, such as would constitute a 'suit at law' for the purposes of international human rights law; and if so:**
    - **whether the proposal to abolish the panel pursues a legitimate objective for the purposes of international human rights law (including whether, and if so, how, the measures aim to address a pressing and substantial concern);**
    - **whether the measures are rationally connected to (that is, effective to achieve) that objective; and**
    - **whether the measures are a proportionate means of achieving that objective.**

Amendments to the disclosure notice framework

1.70 Currently, the CEO of ASADA may issue a written notice (disclosure notice), requiring a person to attend an interview to answer questions or to produce documents or things.[7] The CEO may only issue such a notice if they 'reasonably believe' that the person has information, documents or things relevant to the administration of the national anti-doping scheme, and three members of the panel agree with that belief.[8]

1.71 The bill would lower the threshold for issuing a disclosure notice to require only that the CEO 'reasonably suspects' that the person has relevant information,

7 Proposed section 13D(1) would provide that a person is not excused from answering questions, giving information or producing a document or thing pursuant to a disclosure notice on the grounds that to do so might tend to incriminate the person or expose them to a penalty. However, proposed section 13D(2) would also provide that 'use' and 'derivative use' immunities are available in relation to answering questions, giving information, and producing information, documents and things. Accordingly, the measure does not raise human rights concerns in relation to the right not to incriminate oneself due to the availability of relevant safeguards.

8 Sections 13(1)(ea) and 13A of the ASADA Act. Currently, the penalty for non-compliance with a disclosure notice is 30 penalty units (currently $6,300).

documents or things.[9] It would also increase the penalty for noncompliance with a disclosure notice to 60 penalty units (currently $12,600).[10]

Compatibility of the measures with the right to privacy

1.72 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use, and sharing of personal information. The right also contemplates respect for autonomy over one's own body (including in relation to medical testing and the collection of bodily samples). The current framework in the ASADA Act for issuing disclosure notices engages and limits the right to privacy. This is because disclosure notices may require a person to provide personal information. By lowering the threshold for issuing a disclosure notice and increasing penalties for non-compliance, the measures would extend existing limitations on the right to privacy associated with the disclosure notice regime.

1.73 The right to privacy may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.

1.74 The statement of compatibility acknowledges that the measures engage and limit the right to privacy.[11] In relation to whether the measure pursues a legitimate objective, the statement of compatibility indicates that lowering the threshold for issuing disclosure notices is necessary to improve ASADA's ability to pursue possible anti-doping rule violations, and states:

> The Wood Review analysed the disclosure notice provisions in the ASADA Act and concluded that 'the threshold of reasonable belief' means that disclosure notices are generally only sought, and granted [by the panel], in circumstances where ASADA…has evidence that a [rule violation] has taken place [for instance, in connection with a returned positive sample].
>
> …
>
> Doping in sport has become increasingly sophisticated as technology advances. The national anti-doping framework is borne out of the premise that [anti-doping rule violations] would be issued on the basis of an [adverse analytical finding]. However, there is an increasing reliance on

9 Items 46 and 47 of Schedule 1 to the bill. Item 13 of Schedule 1 to the bill would also remove the requirement that three members of the panel agree with the CEO's belief, as a consequence of the abolition of the panel.

10 Item 49 of Schedule 1 to the bill.

11 SOC, p. 5.

investigations as doping becomes more sophisticated and harder to detect with traditional testing.[12]

1.75 Ensuring that ASADA is able to effectively investigate potential anti-doping rule violations in the context of increasingly complex anti-doping matters is likely to be a legitimate objective for the purposes of international human rights law. Lowering the threshold for issuing a disclosure notice may also be rationally connected to this objective, insofar as the measures ensure that ASADA is able to gather the information needed to effectively perform its investigative functions.

1.76 The statement of compatibility further states that the measures are a proportionate limitation on the right to privacy.[13] However, it does not provide an assessment of how the measures are a proportionate limitation on that right. In this respect, the statement does not explain whether other, less rights-restrictive measures (for example, less coercive investigatory techniques) would be reasonably available to achieve the objective of the measures.

1.77 Also relevant to the proportionality of the measures is the nature and extent of the information, documents or things that may be required pursuant to a disclosure notice (for example, the extent to which a person may be required to disclose personal information, and whether a person may be required to provide bodily samples for testing purposes). The statement of compatibility provides no information in this regard. This raises further questions as to whether the measures are appropriately circumscribed.

1.78 It is also noted that section 67 of the ASADA Act makes it an offence, punishable by two years' imprisonment, for an entrusted person to disclose protected information, which would include information obtained under a notice, unless the disclosure is authorised under Part 8 of the ASADA Act or is made to the person to whom the information relates.[14] This is an important safeguard and assists

12 SOC, pp. 4-5.

13 SOC, p. 5.

14 Section 69 of the ASADA Act provides that an 'entrusted person' includes a number of persons with functions under the National Anti-Doping scheme, including the ASADA CEO and ASADA staff. 'Protected information' is defined in section 4 of the ASADA Act as information obtained for the purposes of the ASADA Act or an associated legislative instrument, that relates to the affairs of a person and is reasonably capable of being used to identify the person.

the proportionality of the measures.[15] However, the statement of compatibility does not identify any specific safeguards applicable to the disclosure notice regime. The committee's expectation, in cases where a measure limits a right (including by extending existing limitations), is that the statement of compatibility would identify relevant safeguards and explain how they are effective to ensure that the measure is compatible with that right.

Committee comment

1.79 The preceding analysis raises questions as to whether the measures are compatible with the right to privacy.

1.80 Accordingly, the committee requests the minister's advice as to whether the measures are a proportionate means of achieving their stated objectives, including:

- **whether any other, less rights-restrictive approaches are reasonably available;**
- **the nature of the information, documents or things that may be required pursuant to a disclosure notice; and**
- **the availability of any relevant safeguards (for example, section 67 of the ASADA Act), and how those safeguards would be effective to ensure that the measures are a proportionate limitation on human rights.**

Immunity from civil liability

1.81 The ASADA Act currently confers immunity from civil liability on a range of persons and entities, including the ASADA CEO and staff, persons assisting ASADA, and members of the Australian Sports Drug Medical Advisory Committee (ASDMAC). The immunity is conferred in relation to acts done, or omitted to be done, in good faith in the performance or purported performance of the functions of those persons and entities.[16]

1.82 The bill proposes to extend this immunity to national sporting organisations (NSOs) and to persons performing work or services for an NSO, in relation to acts

15 In this respect, it is noted that the committee considered the human rights implications of the Australian Sports Anti-Doping Authority Amendment Bill 2013 (2013 Bill), which introduced the disclosure notice framework, in its *Second Report of 2013*. The statement of compatibility to the 2013 Bill noted that sections 71 and 73 of the ASADA Act (now repealed) would, respectively, provide for the protection of personal information and preserve the operation of the *Privacy Act 1988*. In light of the information in the statement of compatibility, the committee concluded that the 2013 Bill did not appear to give rise to any privacy concerns. See Parliamentary Joint Committee on Human Rights, *Second Report of 2013* (13 February 2013) pp. 1-8. Current section 67 of the ASADA Act is broadly equivalent to former section 71.

16 Section 78 of the ASADA Act.

done or omitted to be done in good faith in implementing or enforcing the NSOs anti-doping policy.[17]

Compatibility of the measures with the right to an effective remedy

1.83 Article 2(3) of the ICCPR protects the right to an effective remedy for any violation of rights and freedoms recognised under the ICCPR. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.[18]

1.84 By conferring immunity from civil liability on NSOs, the measures engage the right to an effective remedy, insofar as an individual whose rights are violated by the conduct of an NSO cannot pursue a civil remedy. In the context of implementing and enforcing an organisation's anti-doping policy, relevant rights may include, for example, the right to privacy and the right to work. The statement of compatibility acknowledges that the measures engage the right to an effective remedy, and explains why extending the immunity from civil liability to NSOs is considered necessary in the context of the National Anti-Doping scheme:

> While the ASADA Act protects the ASADA CEO, staff and engaged personnel from civil action in its role of exercising [anti-doping rule violation] functions, NSOs do not experience this same level of statutory protection against civil action when performing similar…functions.
>
> Given anti-doping matters are becoming complex in nature, the role of NSOs in the [anti-doping rule violation] process continues to be an integral part of the investigative process. However, a lack of statutory protection in the event of civil action presents as a potential barrier for NSOs.[19]

1.85 However, the statement does not explain whether, despite the extension of the immunity from civil liability to NSOs, a person's right to an effective remedy would remain available. For example, it does not indicate what other forms of redress (for example, criminal offences or review rights) would be available to a person whose rights are violated by the conduct of an NSO. As a result, it is not possible to assess whether the measures are compatible with the right to an effective remedy (although it is noted that the fact that the immunity is restricted to things done or omitted to be done in good faith is relevant to the compatibility of the measure with this right). Further information in relation to these matters would

17 Proposed section 78(5).

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

19 SOC, p. 6.

assist in determining whether the measures are compatible with the right to an effective remedy.

Committee comment

1.86 The preceding analysis raises questions as to whether the measures are compatible with the right to an effective remedy. This matter was not fully addressed in the statement of compatibility.

1.87 The committee therefore seeks the minister's advice as to the compatibility of the measures with this right (including the circumstances in which the immunity may apply and the availability of other forms of redress, such as offence provisions or review rights).

Civil Aviation Safety Amendment (Part 91) Regulations 2018 [F2018L01783]

Purpose	Amends the Civil Aviation Safety Regulations 1998 to substitute a new Part 91 – General Operating and Flight Rules.
Portfolio	Infrastructure, Regional Development and Cities
Authorising legislation	*Civil Aviation Act 1988*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives 12 February 2019)
Rights	Rights of persons with disabilities (accessibility and personal mobility); equality and non-discrimination
Status	Seeking additional information

Power to refuse carriage of assistance animals on board aircraft

1.88 Section 91.620(3) of the Civil Aviation Safety Amendment (Part 91) Regulations 2018 (Part 91 Regulations) provides that the operator or pilot in command of an aircraft for a flight may refuse to carry an 'assistance animal' (within the meaning of the *Disability Discrimination Act 1992*) in the aircraft if the operator or pilot reasonably believes that 'carriage of the animal for the flight may have an adverse effect on the safety of air navigation'.[1] Section 91.620(3) has effect despite anything in the *Disability Discrimination Act 1992*.[2]

Compatibility of the measures with the rights of persons with disabilities

1.89 Article 9 of the Convention on the Rights of Persons with Disabilities (CRPD) requires States to take appropriate measures to provide persons with disabilities with access, on an equal basis, to the physical environment, transportation, information and communications, and other facilities and services open or provided to the public. States must take account of the diversity of persons with disabilities, including recognising that some persons with disabilities may require human or animal assistance to enjoy full accessibility.[3] Article 20 of the CRPD further requires

1 'Assistance animal' is defined in section 9 of the *Disability Discrimination Act 1992* as a dog or other animal that is accredited under certain state and territory laws, accredited by a prescribed animal training organisation, or trained to assist a person with disability and trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

2 Part 91 Regulations, section 91.620(4).

3 See UN Committee on the Rights of Persons with Disability, *General Comment No. 2, Article 9: Accessibility* (2014), [29].

States to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by facilitating access by persons with disability to forms of live assistance and intermediaries.[4] By enabling the operator or pilot in command of an aircraft to refuse carriage of an assistance animal, the measures engage and limit these rights.

1.90 The rights of persons with disabilities may be subject to permissible limitations where they pursue a legitimate objective and are rationally connected and proportionate to achieving that objective.

1.91 The statement of compatibility recognises that the measures engage the right to personal mobility, although it argues that they do not limit that right.[5] The statement does not recognise that the measures engage the right to accessibility. In relation to the objectives of the measures, the statement of compatibility states that the measures are 'aimed at the legitimate purpose of ensuring the safety of [a] flight'.[6] This may be capable of constituting a legitimate objective for the purposes of international human rights law. However, in the context of the particular measures, further evidence or reasoning is required as to how having an assistance animal on board could give rise to a risk to safety. On the basis of the information provided, it is unclear that the stated risk would amount to a pressing and substantial concern as required to constitute a legitimate objective. Regulating the carriage of animals may also be rationally connected to the stated objective; however, further information would be useful in this respect.

1.92 As to the proportionality of the measures, it is noted that in order to refuse carriage to an assistance animal, the operator or pilot in command must 'reasonably believe' that carriage of the animal may have an adverse effect on the safety of air navigation.[7] The standard of reasonable belief is an important safeguard and assists the proportionality of the measures. The statement of compatibility also provides an example of the circumstances in which an animal may be refused carriage:

> Such a situation could arise in the circumstances that the carriage of a particular animal on a particular flight or a particular aircraft presents a [safety] risk…that cannot be adequately mitigated other than by refusing carriage of the animal.[8]

1.93 It is acknowledged that there may be circumstances in which a safety risk arises that cannot be mitigated other than by refusing carriage of an assistance animal.

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4 Convention on the Rights of Persons with Disabilities, article 20(b).

5 Statement of compatibility (SOC), p. 34.

6 SOC, p. 34.

7 Part 91 Regulations, section 91.620(3).

8 SOC, p. 34.

1.94 However, concerns remain as to whether the measures are sufficiently circumscribed. In this respect, it is noted that the measures only require the operator or pilot in command to reasonably believe that carriage of an assistance animal 'may' have an 'adverse effect' on the safety of air navigation. The term 'adverse effect' is not defined in the Part 91 Regulations, the broader Civil Aviation Safety Regulations 1998 (CASR),[9] or the *Civil Aviation Act 1988* (Aviation Act), and it is unclear whether this concept may capture a broader range of matters than is strictly necessary to achieve the objectives of the measures. For example, while the statement of compatibility refers to risks 'that cannot be adequately mitigated other than by refusing carriage of the animal',[10] the Part 91 Regulations do not contain such a limitation. It appears possible that a number of relevant matters (for example, the level of risk that an animal must pose before it is refused carriage) are left to the discretion of the operator or pilot. Noting the potentially significant limitation on a person's ability to access air transportation and also on a person's personal mobility due to not being able to travel with an assistance animal, further information in relation to the matters outlined above would assist in determining whether the measures are a proportionate limitation on the rights of persons with disabilities.

Committee comment

1.95 The preceding analysis raises questions as to whether the measures are compatible with the rights of persons with disabilities under Articles 9 and 20 of the Convention on the Rights of Persons with Disabilities.

1.96 Accordingly, the committee requests the minister's advice as to:

- **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**;
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **the proportionality of the measures (including whether the measures are sufficiently circumscribed, whether any other, less rights-restrictive means are reasonably available to achieve the stated objectives of the measures, and any other information relevant to the proportionality of the measures).**

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

1.97 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute (for

9 [F2018C00621]. 'Authorisation' is defined in section 11.

10 SOC, p. 34.

example, race, sex or on the basis of disability),[11] which has either the purpose ('direct' discrimination) or the effect ('indirect' discrimination) of adversely affecting human rights.[12] This right is also enshrined in articles 3(b), 4 and 5 of the CRPD, insofar as it relates to the right of persons with disabilities. In that context, the right includes ensuring that all appropriate steps are taken to ensure that reasonable accommodation of persons with disabilities is provided.[13]

1.98 By permitting the operator or pilot in command of an aircraft to refuse carriage to assistance animals, which in turn could limit access by people with disabilities to civil aviation, the measures engage the right to equality and discrimination for people with disabilities who are accompanied by assistance animals. That is, it engages the right to equality and non-discrimination on the basis of disability.[14]

1.99 Differential treatment will not constitute unlawful discrimination if the treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective, and is a proportionate means of achieving that objective.[15]

1.100 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged by the measures, and states that the measures aim to ensure the safety of a flight.[16] As outlined at [1.91] above, there are questions as to whether the measures pursue a legitimate objective and are rationally connected to that objective.

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11 The prohibited grounds are 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: UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

12 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989).

13 Article 5(3). 'Reasonable accommodation' is defined in article 2 of the CRPD, and means necessary and appropriate modification and adjustments not imposing an undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

14 SOC, p. 34. In this respect, it is noted that article 2 of the CRPD defines 'discrimination on the basis of disability' as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms on an equal basis with others. It includes all forms of discrimination, including denial of reasonable accommodation.

15 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

16 SOC, p. 34.

1.101 As outlined above at [1.94], questions also remain as to the breadth of the power to refuse carriage to an assistance animal, noting that the absence of any definition of 'adverse effect' appears to leave a number of matters to the discretion of the relevant pilot or operator. In this respect, there is a risk that the measures may not be based on reasonable and objective criteria.

Committee comment

1.102 The preceding analysis raises questions as to whether the measures are compatible with the right to equality and non-discrimination.

1.103 Accordingly, the committee requests the minister's advice as to the compatibility of the measures with this right, including whether the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that objective, and is a proportionate means of achieving that objective.

Counter-Terrorism Legislation Amendment Bill 2019

Purpose	Seeks to amend the *Crimes Act 1914* including to introduce a presumption against parole for persons charged with or convicted of a terrorism offence; seeks to expand circumstances in which certain persons are subject to a presumption against bail; also seeks to make amendments to the continuing detention order (CDO) regime under the *Criminal Code Act 1995*
Portfolio	Attorney-General
Introduced	House of Representatives, 20 February 2019
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws; freedom of expression; freedom of association
Status	Seeking additional information

Amendments to the continuing detention order regime

1.104 Under the continuing detention order (CDO) regime the Australian Federal Police (AFP) Minister may apply to the Supreme Court of a state or territory for a CDO providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[1] The effect of a CDO is that a person may be detained in prison after the end of their custodial sentence.[2] The bill makes amendments to the CDO regime to provide that:

- offenders serving a term of imprisonment for a terrorism offence and another offence are also eligible for a CDO at the conclusion of their term of imprisonment; and
- the requirement to provide a complete copy of a CDO application to an offender is subject to any court orders made relating to the protection of information in the application or any certificate issued by the Attorney-General.

Compatibility of the measures with human rights

1.105 The committee previously examined the introduction of the CDO regime and raised human rights concerns.[3] The previous analysis noted that while multiple human rights were engaged by the CDO regime, the focus of the analysis would be

1 Criminal Code, sections 105A.3 and 105A.5.

2 Criminal Code, sections 105A.4(3) and 105A.24.

3 Parliamentary Joint Committee on Human Rights, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, *Report 7 of 2016* (11 October 2016) pp. 12-20; *Report 8 of 2016* (9 November 2016) pp. 16-26; *Report 2 of 2017* (21 March 2017) pp. 59-75.

on the right to liberty. As the CDO regime allows ongoing preventative detention of individuals who will have completed their custodial sentence, it engages and limits the right to liberty.[4] The previous analysis of the CDO regime noted that preventative detention of persons may be permissible in carefully circumscribed circumstances.[5] However, there were concerns as to whether the CDO regime, as drafted, contained sufficient safeguards to ensure that preventative detention was proportionate to its stated objective of protecting the Australian community from the risk of terrorist attacks. The CDO regime shared significant features with the continuing detention regimes in New South Wales (NSW),[6] and Queensland.[7] These regimes were subject to individual complaints to the UN Human Rights Committee in *Fardon v Australia*,[8] and *Tillman v Australia*[9] which found in these cases that continued detention was arbitrary, in violation of article 9 of the International Covenant on Civil and Political Rights (ICCPR). Specific concerns in relation to the proportionality of the CDO regime included:

- that the civil standard of proof would apply to proceedings;[10]
- the inherent difficulties arising from a court being asked to make findings in relation to the risk of future behaviour by an offender;
- while the court may only make a CDO if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk,' there were uncertainties about how this would operate and this safeguard only required consideration of whether the CDO is the least rights restrictive at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence (rather than considering interventions earlier or whether there are less rights restrictive means of managing risk prior to an application for an order being made).

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4 The right to liberty under article 9 of the International Covenant on Civil and Political Rights (ICCPR) includes the right not to be arbitrarily detained.

5 See United Nations (UN) Human Rights Committee*, General Comment 35: Article 9 (Liberty and security of person)* (2014) [15], [21]. See also UN Human Rights Committee*, General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)* (1982).

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

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

8 UN Human Rights Committee, Communication No. 1629/2007 (2010).

9 UN Human Rights Committee, Communication No. 1635/2007 (2010).

10 That is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt.

1.106 By expanding the categories of offenders who are eligible for a CDO at the conclusion of their term of imprisonment, the measures in the bill raise similar human rights concerns.

1.107 Additionally, providing that the requirement to provide a 'complete copy' of a CDO application to an offender is subject to particular exceptions may also negatively affect the proportionality of the limitation on the right to liberty in individual cases. This is because it may limit the capacity of the offender to be able to know the nature of, and refute, evidence in respect of making a CDO. As well as negatively impacting upon the proportionality of the limitation on the right to liberty, in this way, the measure also engages and may limit the right to a fair hearing. While the statement of compatibility provides some reasoning as to the need for the measures,[11] the measures in the bill would appear to exacerbate concerns that the underlying CDO regime may be incompatible with human rights.

Committee comment

1.108 The committee previously found that the Continuing Detention Order (CDO) regime raised serious human rights concerns, particularly in relation to the right not to be arbitrarily detained.

1.109 The measures in this bill may increase concerns as to the compatibility of the underlying CDO regime with human rights. Accordingly, the committee draws the human rights implications of the measures to the attention of parliament.

Presumptions against bail and parole

Presumption against bail

1.110 Section 15AA of the *Crimes Act 1914* (Crimes Act) provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth offences unless exceptional circumstances exist. One of the offences for which the presumption against bail currently applies is a 'terrorism offence', other than the offence of associating with terrorist organisations contrary to section 102.8 of the *Criminal Code*.[12]

1.111 Schedule 1 of the bill expands the offences to which the presumption against bail applies so that it would cover persons charged with or convicted of a 'terrorism offence', including the offence of associating with terrorist organisations.[13] It also applies the presumption to persons who have previously been charged with or convicted of one of the offences listed in section 15AA, and are currently being considered for bail for a further federal offence.[14]

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11 Statement of compatibility (SOC), pp. 17-19.

12 Crimes Act, section 15AA(2)(a).

13 See explanatory memorandum, p. 24.

14 SOC, p. 9.

1.112 The bill introduces new section 15AA(2A), which specifies further persons to whom the presumption against bail would apply:

- persons subject to a control order within the meaning of Part 5.3 of the Criminal Code (terrorism); and
- a person who the bail authority is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that part.

Presumption against parole

1.113 The bill also seeks to introduce new section 19ALB of the Crimes Act which imposes a presumption against parole in relation to certain persons, unless the Attorney-General is satisfied that exceptional circumstances exist that justify making the parole order. The persons covered by the presumption against parole are the same as those introduced in relation to the presumption against bail, namely a person who has been convicted of a terrorism offence (including a person currently serving a sentence for a terrorism offence), a person who is subject to a control order, and a person who the Attorney-General is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts.[15]

Non-parole period for child offenders

1.114 Section 19AG(2) of the Crimes Act provides that where a person has been convicted of certain offences (including terrorism offences), the court must fix a single non-parole period of at least three-quarters of either: the sentence for the minimum non-parole offence; or, if 2 or more sentences have been imposed on the person for minimum non-parole offences, the aggregate of those sentences.

1.115 Schedule 1 of the bill provides that when imposing the sentence for an offence covered by section 19AG on a person under the age of 18, the court must comply with the minimum single non-parole period in accordance with section 19AG(2) unless the court is satisfied that exceptional circumstances exist to justify fixing a shorter single non-parole period.[16]

'Exceptional circumstances' in relation to child offenders

1.116 The bill also provides that, in determining whether 'exceptional circumstances' exist in relation to a person under the age of 18 (to justify the grant of bail, the making of a parole order, or imposing a shorter minimum-non parole period), without limiting the matters the decision-maker may have regard to, the decision-maker must have regard to the protection of the community as the

15 Proposed section 19ALB(1),(2).

16 Proposed section 19AG(4A).

paramount consideration and the best interests of the child as a primary consideration.[17]

Compatibility of the measures with the right to liberty

1.117 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that 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 the jurisdiction.[18] As the bill expands the circumstances in which there is a presumption against bail it engages and limits this right.[19]

1.118 The statement of compatibility acknowledges this right is engaged and explains that the objective of the measures is to protect Australia's national security and the rights and freedoms of Australians from the threat of terrorist activity.[20] In support of this, the statement provides some evidence in relation to the terrorism threat level in Australia, including the number of terrorist attacks since the terrorism threat level was raised in 2014.[21] It explains that in relation to one of these attacks in Brighton, Victoria, the perpetrator who committed the attack was on parole for Victorian offences and had 'a long history of violence and was previously acquitted of a terrorism offence'.[22] In this regard, in relation to the pressing and substantial concern for extending the presumption against bail to persons who have made statements or carried out activities supporting, or advocated support for, terrorist acts, the statement of compatibility states:

> The ASIO 2017-18 annual report states that 'any terrorist attack in Australia over the next 12 months would probably involve weapons and tactics that are low-cost and relatively simple, including basic weapons, explosives and/or firearms … everyday objects that do not require

17 Proposed sections 15AA(3AA), 19AG(4B) and 19ALB(3).

18 *Smantser v Belarus,* UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands,* UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain,* UN Human Rights Committee Communication No. 526/93 (1997).

19 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010): the ACT Supreme Court declared that a provision of the *Bail Act 1992* (ACT) was inconsistent with the right to liberty under section 18 of the ACT *Human Rights Act 2004* which required that a person awaiting trial not be detained in custody as a 'general rule'. Section 9C of the *Bail Act 1992* (ACT) required those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before having a normal assessment for bail undertaken.

20 SOC, p. 10.

21 SOC, p. 10.

22 SOC, p. 5.

> specialist skills'. This demonstrates that the potential for serious harm to Australia's national security is posed not only by terrorist offenders but also those persons who have demonstrated support for, or have links to terrorist activity.[23]

1.119 In relation to extending the presumption against bail to persons subject to control orders and persons who have previously been convicted of terrorism offences, the statement of compatibility additionally states:

> A person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community. A person who is subject to a control order has been identified by law enforcement and the courts as posing a risk to society. The threshold for the use of control orders is very high. Similarly, where a person has shown support or advocates support for terrorist acts, it is appropriate that the decision maker can take this factor into account when considering bail or parole, regardless of the current offence that the person has been charged with or convicted of. It is essential that decision-makers at the key steps in the criminal justice process of bail and parole are able to take into account a person's prior actions, where those prior actions indicate a terrorism-related risk to the community and notwithstanding the person might be being considered for bail or parole for a seemingly unrelated federal offence. The inclusion of this set of offenders under the presumptions against bail and parole protects and promotes the rights of people in the community whose life, liberty and property would be imperilled by the commission of terrorism offences.[24]

1.120 The objective of protecting Australia's national security and protecting Australians from the threat of terrorist activity is capable of constituting a legitimate objective for the purposes of international human rights law. In relation to the pressing and substantial concern the measures seek to address, it is accepted that courts and decision-makers should be able to take into account a broad range of information in order to calculate the risk a person poses when deciding to grant a person bail and that the current threat level relating to terrorism may inform this risk. However, it remains unclear whether existing mechanisms available to courts and decision makers when determining whether to grant bail would be insufficient to deal with such matters or whether such matters could be taken into account without a presumption against bail.[25]

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23 SOC, p. 10.

24 SOC, p. 10. It is noted that the committee has previously raised concerns as to the compatibility of the control orders regime with human rights: See, for example, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 10; and Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

25 See, for example, Crimes Act, section 15AB.

1.121 In relation to proportionality, the statement of compatibility states that the presumption against bail is proportionate as it is subject to the exercise of discretion to address the risk of terrorism.[26] It also states that persons retain the ability to challenge the refusal of bail under the Crimes Act,[27] and that 'all relevant information [is] able to be taken into account by a decision maker' when deciding whether to grant bail because 'exceptional circumstances' is not defined.[28]

1.122 However, as the committee has previously noted in relation to the presumption against bail under section 15AA of the Crimes Act, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail.[29] That is, unless there is countervailing evidence, a person will be incarcerated pending trial. As noted earlier, international jurisprudence indicates that pre-trial detention should remain the exception and that 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 the jurisdiction.[30] There is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable, necessary and proportionate in the individual case. This is of particular concern in the context of the present measure noting that the presumption against bail would apply to persons not previously charged with or convicted of an offence,[31] and to persons subject to charges unrelated to terrorism. The committee has previously concluded that measures which provide for the presumption against bail under the Crimes Act may not be a proportionate limitation on the right to be released pending trial.[32]

Committee comment

1.123 The committee reiterates its previous comment in *Report 3 of 2018* in relation to the presumption against bail in section 15AA of the *Crimes Act 1914* that there is a risk that if the threshold for displacing the rebuttable presumption against bail is too high, it may result in loss of liberty in circumstances that may be incompatible with the right to release pending trial.

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26 SOC, p. 11.

27 Crimes Act, section 15AA(3A).

28 SOC, p. 11.

29 See, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 263-264.

30 *Smantser v Belarus,* UN Human Rights Committee Communication No. 1178/03 (2008); *WBE v the Netherlands,* UN Human Rights Committee Communication No. 432/90 (1992); and *Hill and Hill v Spain,* UN Human Rights Committee Communication No. 526/93 (1997).

31 Proposed section 15AA(2A).

32 See, Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) p. 264.

Compatibility of the measures with the rights of the child

1.124 The Convention on the Rights of the Child (CRC) requires State parties to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[33] The CRC also provides that the arrest, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.[34] The CRC additionally provides that children accused of committing a criminal offence must be treated in a manner consistent with the promotion of the child's sense of dignity and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[35]

1.125 The statement of compatibility acknowledges that the rights of the child are engaged by the presumption against bail, the presumption against parole and the change to the minimum non-parole period.[36] The statement of compatibility states that the measures are permissible on the following basis:

> A person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the community, irrespective of their age. Since 2014, the risk of children committing terrorism offences has emerged as a significant component of the ongoing threat of terrorism to our national security. Therefore it is necessary and proportionate for the presumption against bail to continue to apply to children, and for the new presumption against parole to apply to children, just as the existing arrangements for parole under Part IB of the Crimes Act already apply to children convicted of federal offences.[37]

1.126 The statement of compatibility also emphasises that the decision maker, when considering whether exceptional circumstances exist to justify bail or parole, must take into account the best interests of the child as a primary consideration.[38] However, the committee has previously raised concerns where the obligation to consider the best interests of the child is considered alongside, or subordinate to, other considerations.[39] The UN Committee on the Rights of the Child has explained that:

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33 CRC, article 3(1).

34 CRC, article 37(b).

35 CRC, article 40(1).

36 SOC, pp. 12-13.

37 SOC, p. 12.

38 SOC, p. 13.

39 See, for example, Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 21-23.

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…[40]

1.127 The UN Committee on the Rights of the Child has further explained that:

> Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[41]

1.128 It follows that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. In relation to the present measures, requiring the protection of the community to be 'the paramount consideration' and the best interests of the child 'a primary consideration' would suggest that other considerations are to be considered of equal or potentially greater weight, which is likely to be incompatible with the obligation to consider the best interests of the child as a primary consideration.

1.129 The statement of compatibility additionally states that the court would balance the child's rehabilitation with the need for deterrence and community protection, consistent with articles 37 and 40 of the CRC. It also states that the measures 'reflect the community's concern about terrorism and ensure consistent application of non-parole periods for these offences which are in the most serious category' and that 'it is important that sentences of imprisonment for terrorist offenders, including children, include sufficient time for offenders to complete rehabilitation programs specific to their offending'.[42] While these may be relevant to the proportionality of the limitation on the rights under articles 37 and 40 of the CRC, questions remain as to whether the measures are the least rights restrictive approach. For example, it is not clear whether the presumption against bail and parole is consistent with the obligation for detention and imprisonment of a child to be a measure of last resort.

Committee comment

1.130 The preceding analysis indicates that there are questions as to the compatibility of the measures with the rights of the child under articles 3, 37 and 40 of the Convention on the Rights of the Child.

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40 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013).

41 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013), p. 10.

42 SOC, pp. 12-13.

1.131 The committee reiterates its previous comments that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child.

1.132 The committee seeks the advice of the Attorney-General as to the compatibility of the measures with the rights of the child (including whether the presumption against bail and parole and the fixing of a minimum non-parole period for child offenders is compatible with the obligation for arrest, detention and imprisonment to be a measure of last resort and for the shortest possible period of time).

Compatibility of the measures with the freedom of expression

1.133 Article 19(2) of the ICCPR requires the State not to arbitrarily interfere with freedom of expression, including restrictions on political debate. The right protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as images and objects of art. This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the ICCPR.[43]

1.134 By introducing a presumption against bail and a presumption against parole for persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts, the measures engage and may limit the right to freedom of expression. This is because a person may be less likely to express certain ideas due to the risk of it impacting their opportunity to be granted bail or parole.

1.135 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.

1.136 The statement of compatibility does not acknowledge that the right to freedom of expression may be engaged and limited by the measures in Schedule 1 and so does not provide an assessment as to whether any limitation is justifiable under international human rights law. Further information as to the compatibility of the measures with this right would assist the committee in its analysis.

Committee comment

1.137 The preceding analysis indicates the presumption against bail and parole may engage and limit the right to freedom of expression. This right was not addressed in the statement of compatibility.

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43 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11].

1.138 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the measures with this right including:

- **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) the stated objective; and**
- **whether the measures are a proportionate limitation on the right to freedom of expression.**

Compatibility of the measures with the freedom of association

1.139 The right to freedom of association in article 22 of the ICCPR protects the right to join with others in a group to pursue common interests. The right prevents State parties from imposing unreasonable and disproportionate restrictions on the right to form associations, including imposing procedures that may effectively prevent or discourage people from forming an association.

1.140 By including the offence of associating with terrorist organisations within the scope of offences for which the presumption against bail and parole applies, the measures may engage the right to freedom of association. This is because a person will be at risk of having their bail or parole impacted based on their association with others.

1.141 The statement of compatibility does not acknowledge that the right to freedom of association may be engaged and limited by expanding the scope of the presumption against bail and parole, and so does not provide an assessment as to whether any limitation is justifiable under international human rights law.

Committee comment

1.142 The preceding analysis indicates the presumption against bail and parole may engage and limit the right to freedom of association. This right was not addressed in the statement of compatibility.

1.143 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the measures with this right including:

- **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) the stated objective; and**
- **whether the measures are a proportionate limitation on the right to freedom of association.**

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Purpose	Seeks to allow the minister to prevent a person from entering Australia for a specified period up to two years and to impose conditions on their return to Australia and subsequent residence
Portfolio	Home Affairs
Introduced	House of Representatives, 21 February 2019
Rights	Freedom of movement; entry to one's own country; fair hearing; children; obligation to consider the best interests of the child; privacy; protection of the family; freedom of expression; freedom of association
Status	Seeking additional information

Temporary Exclusion Order scheme

1.144 The Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 establishes a temporary exclusion order (TEO) scheme by granting the minister the power to impose a TEO on a person (including a child aged between 14 and 17).[1]

1.145 A TEO prevents a person from entering Australia for a specified period, which may be initially up to two years from the date the TEO is issued. The maximum penalty for entering Australia in breach of a TEO is two years imprisonment.[2] A TEO may also prescribe that the person must surrender an Australian travel document (e.g. a passport) or prohibit them from applying for, or obtaining, one.[3]

1.146 The minister may make a TEO, in writing, in relation to an Australian citizen of at least 14 years of age who is, at that time, located outside Australia. The minister cannot make a TEO if they have given the person a return permit to manage the person's return to Australia (discussed below), which is still in force.[4] The minister must not make a TEO unless they suspect on reasonable grounds that the TEO would substantially assist in preventing:

- a terrorist act;
- training of or with a listed terrorist organisation;
- support for, or the facilitation of, a terrorist act; or

1 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, proposed section 10.

2 Proposed section 8.

3 Proposed sections 10(4)(d)-(f).

4 Proposed sections 10(1)-(4).

- a person from providing support or resources to an organisation that would help the organisation in preparing, planning, assisting in or fostering the doing of a terrorist act.[5]

1.147 Alternatively, the minister may make a TEO if the Australian Security Intelligence Organisation (ASIO) assesses the person as being a risk, directly or indirectly, to security for reasons related to politically motivated violence.[6]

1.148 Before making a TEO (or imposing a condition on a return permit) relating to a child aged 14 to 17, the minister must have regard to the protection of the community as the paramount consideration and the best interests of the child as a primary consideration.[7]

1.149 A TEO is automatically revoked if the minister issues a return permit to the person (discussed below). The minister may otherwise revoke a TEO at their discretion, including where the person subject to the TEO applies.[8] The minister may also make additional TEOs in relation to the same person, including after an initial TEO expires or is revoked.[9]

Return permits

1.150 If a person who is subject to a TEO applies to the minister, in the specified manner, or is deported to Australia, the minister must give the person a return permit (permit). Otherwise, where a TEO is in force the minister may issue a permit on their own initiative where they consider it appropriate to do so.[10] Once issued, a permit must be personally served on the person to whom it relates.[11]

1.151 The minister may also impose one or more conditions, which are exhaustively prescribed in the bill, on a person's permit.[12] The minister must not impose a condition unless satisfied that doing so is reasonably necessary, and reasonably appropriate and adapted to any of the matters outlined above at [1.146] such as preventing a terrorist act.[13]

1.152 The bill prescribes two categories of conditions that may be imposed on a permit. Pre-entry conditions relate to the timing and manner of the person's return

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5 Proposed section 10(2)(a)(i)-(iv).

6 Proposed section 10(2)(b).

7 Proposed sections 10(3) and 12(4).

8 Proposed sections 11(1) and 11(4).

9 See, proposed section 11(5); explanatory memorandum (EM), p. 8.

10 Proposed section 12(1)-(2).

11 Proposed section 12(10).

12 Proposed section 12(3).

13 Proposed sections from 12(5) to 12(8).

to Australia.[14] Following their return, post-entry conditions may require the person to notify a specified person or body about their whereabouts, activities, employment, use of technology and associations in a manner specified in the permit.[15] The maximum penalty for failing to comply with the conditions of a permit is two years imprisonment.[16] A person would also commit an offence if they knowingly give false or misleading information in purported compliance with a condition on their permit.[17]

1.153 The minister may vary or revoke a permit on their own initiative or on application by the person to whom the permit relates.[18] As with making and revoking a TEO, the minister must cause steps to be taken that they consider reasonable and practicable to bring the variation or revocation to the person's attention.[19]

1.154 The bill also provides that the minister is not required to observe any requirements of procedural fairness when exercising a power under the bill.[20]

Compatibility of the measure with the right to freedom of movement and protection of the family

The right to freedom of moment

1.155 The right to freedom of movement is protected under article 12 of the International Covenant on Civil and Political Rights (ICCPR) and includes a right to legally and practically leave a county, as well as to enter, remain in and return to one's 'own country'.[21] 'Own country' is a concept which encompasses a country in which the person has citizenship and also one where a person has strong ties such as long standing residence, close personal and family ties and intention to remain, as well as absence of such ties elsewhere.[22] The right to freedom of movement also protects a person's liberty of movement within a country's territory.[23]

14 Proposed section 12(6).

15 Proposed sections 12(6)(a)-(j) and 12(7).

16 Proposed section 14.

17 Proposed section 16.

18 Proposed section 13.

19 Proposed section 13(2) and sections 10(6) and 11(2).

20 Proposed section 17.

21 International Covenant on Civil and Political Rights (ICCPR), article 12(4).

22 United Nations (UN) Human Rights Committee, *General Comment No. 27: Article 12* (Freedom of Movement) (1999). See also *Nystrom v Australia,* UN Human Rights Committee Communication No. 1557/2007 (2011).

23 ICCPR, article 12(1).

1.156 As the bill allows for particular Australian citizens to be denied entry into Australia for up to two years, or more on renewal of a TEO, the measure will engage and limit the right to enter one's own country. A TEO or permit may also require a person to surrender any Australian travel documents, such as the person's passport.[24] The practical effect of this condition for individuals without dual-citizenship in another country or another travel document may be to prevent them travelling internationally, including leaving the country in which they are located when the TEO is made.

1.157 The measures also engage and may limit the right to freedom of movement insofar as they allow the minister to require that, as a condition of a returned individual's permit, they notify a particular person or body if they intend to travel interstate or internationally.[25]

Right to protection of family

1.158 The right to protection of the family is contained in article 17 of the ICCPR, which prohibits arbitrary or unlawful interference with the family, and in article 23(1), which affirms the family is entitled to protection as the natural and fundamental unit of society.[26] An important element of the right includes ensuring that family members are not involuntarily and unreasonably separated from one another.[27]

1.159 Laws and measures that prevent family members from being together, impose long periods of separation or forcibly keep children from their parents, will engage this right. Given the effect of a TEO or permit which delays entry of a person into Australia may be to keep them separated from family members living in Australia, the measures engage and may limit this right. Specifying that a child or parent must surrender their Australian travel document, such as a passport, could also restrict their ability to reunite with their family outside Australia.

1.160 The statement of compatibility acknowledges that the bill engages the rights to freedom of movement and protection of the family.[28] These rights may be subject to permissible limitations, provided they pursue a legitimate objective and are rationally connected and proportionate to that objective.

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24 Proposed sections 10(4)(d) and 12(6)(l).

25 Proposed sections 12(6)(h)-(i).

26 UN Human Rights Committee, *General Comment No. 19: Article 23 (Protection of the family, the right to marriage and equality of the spouses)* (1990).

27 *Leghaei et al. v Australia,* UN Human Rights Committee Communication No. 1937/2010 (2015).

28 Statement of compatibility (SOC), p. 20.

Legitimate objective

1.161 In relation to whether introducing the TEO scheme pursues a legitimate objective, the statement of compatibility indicates that the overarching purpose of the measures is to protect Australians from the threat of terrorism.[29] The statement of compatibility states:

> The Temporary Exclusion Order (TEO) scheme will enable greater control over the return of [Australian citizens returning from overseas conflict zones] by providing a streamlined mechanism to impose conditions, specifically notification requirements, and facilitate the monitoring of the individuals who may pose a threat to the Australian community.[30]

1.162 In general terms, preventing threats to public safety and the Australian community, including prevention of terrorist acts, has been recognised as capable of constituting a legitimate objective for the purposes of international human rights law.[31] However, in order to establish whether this indeed is a legitimate objective in relation to the measures in the bill, further information is required as to whether pressing and substantial concerns currently give rise to the need for the specific measures. Although the statement of compatibility cites a greater number of Australians returning from overseas conflict zones,[32] more detailed information is required as to the substantial and pressing concern that the TEO scheme serves to address. In particular, the statement of compatibility does not address why the regular criminal law process of arrest, charge, prosecution and determination of guilt beyond reasonable doubt is insufficient to achieve the stated objective.

Rational connection to a legitimate objective

1.163 The statement of compatibility explains that the measures address threats to the Australian community by allowing law enforcement agencies to manage the return of individuals from conflict zones.[33] However, the statement of compatibility provides limited further evidence or reasoning about how the measures are rationally connected to (that is, effective to achieve) the stated objective. Further information would assist the committee to assess how a TEO preventing a person from entering Australia, except where subject to conditions, would be effective in preventing threats to the Australian community.

1.164 It is also noted above (at [1.156]) that a TEO may require a person to surrender an Australian travel document or prohibit the person from applying for or obtaining one. However, the statement of compatibility does not discuss how the

29 SOC, p. 21.

30 SOC, p. 16.

31 See, ICCPR article 12(3).

32 SOC, p. 16.

33 SOC, p. 21.

surrender of a travel document by a person who is necessarily located outside Australia is rationally connected to the protection of the Australian community. Further information in this regard would assist the committee's examination.

Proportionality

1.165 The statement of compatibility states that the limitations the measures place on human rights are reasonable, necessary and proportionate to prevent threats to the Australian community.[34] However, a number of aspects of the measures raise questions about whether they are sufficiently circumscribed, subject to adequate safeguards or the least rights restrictive approach reasonably available.

1.166 It is not clear that the threshold for making a TEO in proposed section 10(2)(a)[35] would result in outcomes that are sufficiently circumscribed in relation to the stated objective. In this respect, it is noted that the thresholds for granting a TEO, namely that the minister 'suspects on reasonable grounds' that a TEO 'would substantially assist in preventing' certain types of activities, where those activities are themselves framed in very broad terms, as set out at [1.146], cumulatively grant the minister a wide discretion to make a TEO.

1.167 Further, the threshold does not directly require the minister to contemplate the risk posed by the specific person who would be subject to the TEO, only whether making the TEO would 'substantially assist' in preventing the acts set out in proposed section 10(2)(a)(i)-(iv). This raises a concern that the measures could potentially provide for exclusion of a person from Australia who does not, in themselves, pose a risk to the Australian community. In this respect, despite the explanation of the reason for the measure provided in the statement of compatibility, the discretion to make a TEO is not confined to individuals that are, or may be, returning from conflict zones. This raises questions as to whether the measures may be overly broad in relation to their stated objective.

1.168 The statement of compatibility argues, in relation to limiting the right to freedom of movement,[36] that any limitation will not be arbitrary because the grounds for making a TEO are stated in the bill and so are predictable. However, this does not substantially address whether the measures in the bill constitute proportionate limitations on human rights. It is also noted that under international human rights law, 'arbitrariness' encompasses elements of inappropriateness,

34 SOC, p. 28.

35 As discussed below, the threshold for the minister to make a TEO under proposed section 10(2)(a) reflects the criteria for a court to issue an interim control order. See *Criminal Code Act 1995*, division 104.4.

36 SOC, p. 20.

injustice, lack of due process and proportionality.[37] Given the analysis above (from [1.165]) and noting that the bill dispenses with procedural fairness requirements in relation to making a TEO,[38] there are questions as to whether the stated grounds alone would be sufficient to assure outcomes that are compatible with human rights. Further, as the minister may make a TEO where ASIO assesses the person as a direct or indirect risk to security for reasons relating to politically motivated violence,[39] it is not guaranteed that the basis for a TEO will be sufficiently apparent or accessible in all circumstances.

1.169 In relation to safeguards, a significant factor in assessing whether the measures are proportionate for the purposes of international human rights law is the possibility of independent oversight and availability of review. However, in this case, the decision to make a TEO or impose conditions on a permit is not exercised or supervised by a judge nor does the bill provide that the minister's decision is subject to merits review. While it appears that judicial review of the minister's decision will still be available under the common law and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act),[40] the effectiveness and adequacy of judicial review as a safeguard relies, in significant part, on the clarity, specificity and scope of the powers conferred on the minister under legislation. This is because judicial review represents a restricted form of review that allows a court to consider whether the decision was lawful (that is, within the power of the relevant decision maker).

1.170 In this case, the adequacy of judicial review as a safeguard may be restricted noting the scope of discretion afforded to the minister in relation to the powers (discussed above from [1.166]) and that in exercising these powers the minister is not required to observe procedural fairness. These factors would appear to narrow the grounds on which a person might successfully challenge the making of a TEO in judicial review. In addition, where a TEO is in force, a person who wishes to challenge the making of the TEO would necessarily be obliged to access judicial review from abroad, which may inhibit their ability to effectively challenge the decision.

1.171 Further, the threshold for the minister to make a TEO under proposed section 10(2)(a) reflects the criteria for a court to issue an interim control order.[41] The committee has previously raised serious concerns about the compatibility of the

37 See, for example, UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)* (2014) [12]; and UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988) [4].

38 Proposed section 17.

39 Proposed section 10(2)(b).

40 See EM, p. 14.

41 *Criminal Code Act 1995*, division 104.4.

regime for issuing control orders with human rights.[42] However, notwithstanding such concerns, the control orders regime appears to include more safeguards than apply to the present measures in the bill. For example, interim control orders, which are sought in the absence of the person to whom they relate, are only granted where a court is satisfied of the matters listed at [1.146] on the balance of probabilities and with regard to the impact on the person.[43] Later confirmation of a control order by a court may also offer the affected person the opportunity to make representations to the court about the need for the order and its impact. In this regard, additional information about the absence of equivalent safeguards in the proposed scheme would assist the committee's analysis of whether the measures are proportionate.

1.172 It is noted that the United Nations (UN) Human Rights Committee expressed concern about the human rights compatibility of a similar TEO scheme introduced in the United Kingdom in 2015.[44] This raises significant concerns that the TEO scheme as proposed in the bill may not be compatible with human rights.

1.173 Additionally, the UK Joint Committee on Human Rights (UKJCHR), which has a similar mandate to this committee, has also specifically raised concerns that the UK TEO scheme does not reflect a least rights restrictive approach to minimising the risk to the public that may be posed by a person who has returned from a foreign conflict zone.[45] Noting that even the temporary exclusion of citizens may be incompatible with the right to return to one's own country, the UKJCHR questioned why orders obliging a person to provide advance notification of their return would be insufficient to achieve the stated objective.[46] This raises further questions as to whether the TEO scheme in the bill represents the least rights restrictive approach. It would be of assistance to the committee's assessment of the TEO scheme if additional information could be provided about this issue, including whether consideration has been given to other less rights restrictive mechanisms such as advance notification of a person's intended return (advance notification orders).

1.174 The potential duration of a person's exclusion is also relevant to the question of proportionality. In this regard, the statement of compatibility does not explain why two years is a necessary period to allow for appropriate arrangements to

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42 See, for example, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 10; and Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) p. 17.

43 See Criminal Code, division 104.4.

44 The key elements of UK TEO scheme are similar to the proposed TEO scheme in the bill. See UN Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland,* CCPR/C/GBR/CO/7 (2015) [15].

45 UK Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Security Bill (12 January 2015) [3.9]-[3.12].

46 UK Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Security Bill (12 January 2015) [3.11].

manage a person's return. It is also unclear whether the bill contains any restriction on the minister's ability to renew a TEO relating to the same person.[47] A possible interpretation is that the bill may also allow for a further TEO to be made about a person when they are already subject to an existing TEO.[48] It is further noted that the bill does not require that a TEO be revoked where the grounds for making the TEO no longer exist or cannot be substantiated. Further information is therefore required as to whether the measures include adequate and effective safeguards to ensure they are proportionate (including explaining the basis for the potential length of a TEO).

1.175 Though the statement of compatibility notes that a person will be permitted to return to Australia within twelve months if they apply to the minister for a permit,[49] an exclusion of a person from Australia for this period of time is still an extensive limitation on their right to return to Australia and the right to protection of the family. Further, a person who does not apply to the minister to obtain a permit or who fails to satisfy a prescribed pre-entry condition may, in effect, be deprived of the right to return to Australia on a more protracted basis.

Committee comment

1.176 The preceding analysis indicates that the introduction of a temporary exclusion order scheme engages and may limit the right to freedom of movement and the right to protection of the family.

1.177 The committee therefore seeks the advice of the minister as to the compatibility of the measures with these rights, including:

- **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 (including how current laws are insufficient to address this objective);**
- **how the measures are effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the measures are proportionate to achieve the stated objective, including:**
    - **whether they are sufficiently circumscribed;**
    - **whether there are adequate safeguards in place in relation to their operation (including the scope and adequacy of available review and oversight of decisions); and**

47 See proposed section 11(5).

48 Proposed section 11(5).

49 SOC, p. 20.

- **whether there are other less rights restrictive approaches reasonably available (such as, for example, ordinary criminal processes or orders requiring advance notification of a person's return to Australia).**

Compatibility of the measure with the rights to privacy, freedom of association and freedom of expression

1.178 Placing conditions on a permit so as to manage a person's return and subsequent residence in Australia engages and may limit a number of human rights. Given the number of potential permit conditions prescribed in the bill that may limit rights, the impacts on the right to privacy, right to freedom of association, and right to freedom of expression are discussed below as illustrative of relevant human rights concerns.[50]

1.179 The right to privacy, set out in article 17 of the ICCPR, protects individuals from arbitrary and unlawful interferences with their privacy and private life.[51] It includes respect for informational privacy, particularly the storing, use and sharing of personal information.

1.180 The statement of compatibility acknowledges that the post-entry notification conditions engage and limit the right to privacy insofar as they would compel a person to disclose personal information to specified authorities.[52] Such disclosures may include, for example, the person's residential address, their place of work or education, contact with associates and use of certain telecommunications or technologies (such as mobile phones, the internet or particular email and social media accounts).[53] As these disclosures are designed to facilitate monitoring of the person,[54] this is a significant limitation on the right to privacy.

1.181 The right to freedom of expression in article 19(2) of the ICCPR includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice. Requiring disclosures about accessing or using specified telecommunications or other technologies, including accounts and devices, engages and limits the right to freedom of expression. This is because the likelihood of the person's online activity being monitored for law enforcement purposes may have the effect of discouraging

50 The statement of compatibility acknowledges other rights that may be engaged by the conditions prescribed in the bill. These include the right to work in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to education in article 13 of ICESCR and article 28 of the CRC in relation to children, and the right to participation in cultural life in article 15 of ICESCR and article 31 of the CRC for children.

51 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)* (1988).

52 SOC, p. 25.

53 EM, p. 10.

54 SOC, p. 25.

them from freely expressing their views online or accessing information that interests them. The statement of compatibility recognises that such conditions may indirectly limit the freedom of expression.[55]

1.182 The right to freedom of association in article 22 of the ICCPR prevents State parties from imposing unreasonable and disproportionate restrictions on one's ability to join with others in a group to pursue common interests. It precludes State parties from introducing procedures that would prevent or discourage people from forming an association. In this regard, a prescribed condition the minister may place on a permit is to require a person to notify a specified person or body of any contact with specified individuals (whether occurring in or outside Australia) within 24 hours of the contact.[56] The requirement to disclose interactions with specified people may discourage a person from freely interacting with all people they choose and so may engage and limit the right to freedom of association. The statement of compatibility acknowledges that such conditions may limit the right to freedom of association, but argues the limitation is permissible.[57]

1.183 Each of the above rights may be permissibly limited provided that the measures pursue a legitimate objective and are rationally connected and proportionate to that objective.

Legitimate objective

1.184 As discussed above at [1.161], the statement of compatibility states the overarching objective of the measures is the protection of the Australian community. However, while this purpose is capable of constituting a legitimate objective, further information is required as to the substantial and pressing concern served by the particular measures comprising the scheme, including the ability to apply the prescribed conditions to individuals in respect of whom a TEO has been made.

Rational connection

1.185 A measure that limits human rights must be rationally connected to (that is, effective to achieve) its legitimate objective. In relation to imposing conditions on a permit, the statement of compatibility provides some general information as to the effectiveness of pre-entry and post-entry conditions in preventing threats to the Australian community. It states:

> The conditions specified under a return permit will assist law enforcement and security agencies to monitor the whereabouts, activities and

55 SOC, p. 26.

56 Proposed section 12(6)(g).

57 SOC, p. 26.

> associations of a person and intervene early to address any threats to public safety.[58]

1.186 While this information provides some evidence of a rational connection in respect of post-entry notifications, there remain questions about the efficacy of both pre-entry and post-entry conditions in pursuing the stated objective, especially given the availability of existing criminal justice procedures, as mentioned at [1.162]. Additional information in this respect will assist the committee in examining whether applying the prescribed conditions in a permit is likely to be effective in protecting the Australian community.

Proportionality

1.187 The scope of discretion to issue a permit and the broad range of conditions that the minister may impose on a permit raise questions as to whether the measure constitutes a proportionate limitation for the purposes of international human rights law.

1.188 The bill provides an expansive discretion to issue a permit in circumstances that the minister considers appropriate.[59] The pre-entry and post-entry conditions that may be applied also include flexible language (e.g. specified period/manner/person) so as to grant wide discretion relating to, for example, the travel window, date and manner of a citizen's return. In relation to a pre-entry condition, specifying the manner in which a person must enter Australia may include the mode of transport and particular flight and route,[60] but might also restrict whether the person is accompanied or subject to additional security procedures. As a further example relating to post-entry notifications, it is open-ended whether there would be any restriction on the number of individuals or forms of telecommunication about which a person must give notice. The flexibility of these mechanisms raises questions about whether the language of these provisions is appropriately circumscribed to the stated object of the measure.

1.189 It is acknowledged that the minister's discretion to impose conditions is constrained insofar as the minister must be satisfied that all conditions are 'reasonably necessary, and reasonably appropriate and adapted' to the prevention of a terrorist act, or related facilitation, training or support. However, as discussed above in relation to TEOs (at [1.169]), absence of judicial involvement or oversight in applying conditions to a permit may reduce the relative weight of this assessment as a safeguard. Given the analysis above at [1.168] and noting that the bill does not require the minister to consider the impact of specific conditions on an affected person, the imposition of conditions may not be subject to sufficient legislative

58 SOC, p. 26.

59 Proposed section 12(2).

60 EM, p. 9.

safeguards and oversight to ensure the measure is exercised in a manner proportionate to its stated objective.

1.190 As a relevant safeguard, it is noted that a permit, and any attached conditions, are strictly limited in the duration for which they may apply. Though the maximum duration of a post-entry condition, which is up to 12 months from the date the person enters Australia, might still allow conditions that apply for longer than strictly necessary in light of the risk a person poses, the inability to extend or renew their permit is relevant to whether the measure is sufficiently circumscribed.

1.191 However, there are questions as to whether other elements of the measure are sufficiently circumscribed relative to its stated objective. For example, the minister must cause a permit to be personally served on the person to whom it relates.[61] Though personal service of a permit appears to contemplate the serious consequences of imprisonment or continued exclusion from Australia that may result from failing to satisfy a condition, the bill does not stipulate a general timeframe in which such service should be effected. In this regard, it is unclear whether a permit (and its conditions) could potentially take effect before the permit is served on the affected person.[62] Additionally, although a variation becomes effective as soon as it is made,[63] the bill does not require personal service where the minister elects on their own initiative to vary a permit. As a variation might impose additional conditions, concerns arise as to whether the measure may be the least rights restrictive approach so as to constitute a proportionate limitation on human rights.

Committee comment

1.192 The preceding analysis raises questions as to the compatibility of the framework for imposing conditions on a permit with the right to privacy, right to freedom of expression and right to freedom of association.

1.193 Accordingly, the committee seeks the advice of the minister as to the compatibility of the measure with these rights, including:

- **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 (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the limitation on the relevant rights is proportionate to achieve the stated objective (including whether it is the least rights restrictive approach,**

61 Proposed section 12(10).

62 See proposed section 12(9)(c).

63 Proposed section 13(3).

whether it is sufficiently circumscribed and whether there are adequate safeguards in place in relation to its operation).

Compatibility of the measure with the rights of children

Rights of children

1.194 Children have special rights under human rights law taking into account their particular vulnerabilities. The Convention on the Rights of the Child (CRC) requires State parties to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[64] Article 9 of the CRC requires State parties ensure that a child not be involuntarily separated from his or her parents except where determined as necessary in the child's best interests and subject to judicial review.[65]

1.195 As the measures in the bill apply to children and may result in a child being delayed entry into Australia, being required to surrender their passport, being subject to permit conditions or being separated from members of their family, the measures engage and may limit the rights of children under the CRC.[66]

1.196 The statement of compatibility argues that the measures are compatible with these rights on the basis that:

> Where a child poses a threat to the Australian community, it is appropriate that the legitimate objective of protecting the Australian community is the paramount consideration with the best interests of the child being a primary consideration.[67]

1.197 Limitations on the rights of children are permissible provided each limitation supports a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Protecting the Australian community from threats, including those posed by children, may be capable of constituting a legitimate objective for the purposes of international human rights law. However, the statement of compatibility does not specifically link the inclusion of children aged 14 to 17 within the scope of the TEO scheme to a pressing and substantial concern as is required to constitute a legitimate objective for the purposes of international human rights law. There may also be a question about the extent to which the inclusion of children is rationally connected to (i.e. effective to

64 Convention on the Rights of the Child (CRC), article 3.

65 CRC, article 9. In conjunction with article 9, article 10 requires that Australia deal with applications by children or parents to enter Australia in a positive, humane and expeditious manner.

66 The rights discussed above from [1.178] and [1.182] equally apply to children. See articles 13, 15 and 16 of the CRC.

67 SOC, p. 22.

achieve) the stated objective. Further information as to how the measure is likely to be effective in achieving its stated objective is required.

1.198 In relation to the proportionality of the measures, it is unclear whether the measure includes sufficient safeguards to ensure the limitation of the rights of children is no more extensive than strictly necessary. Before making a TEO or imposing conditions on a return permit that relates to a child who is aged 14 to 17, the bill requires that the minister consider the best interests of the child as a primary consideration. Although this requirement does offer a safeguard relevant to the overall proportionality of each limitation imposed on the rights of children under the scheme, questions remain as to whether conditionally excluding children from Australia (noting their maturity and particular vulnerabilities) would constitute a least rights restrictive approach, especially having regard to the availability and efficacy of ordinary criminal justice processes (e.g. arrest, charge and remand).

1.199 Further, it is not apparent that the bill provides for systematic or active consideration of the best interests of an affected child in determining whether to make a TEO or impose conditions on a permit. In this context, the bill obliges the minister 'to have regard' to the best interests of the child as a primary consideration and protection of the community as 'the paramount consideration'.[68] This formulation raises concerns as to the relative weight the minister may accord the factors when considering the best interests of the child in light of the protection of the community.

1.200 In this respect, the statement of compatibility argues that though Australia is required to consider the best interests of the child as 'a primary consideration', this need not be the only consideration. However, the UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…[69]

1.201 The UN Committee on the Rights of the Child has further explained that:

> Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all

68 Proposed sections 10(3) and 12(4).

69 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para. 1)* (2013) p. 10.

> circumstances, but especially when an action has an undeniable impact on the children concerned.[70]

1.202 States must therefore be willing to prioritise a child's best interests in all circumstances, especially where a particular action will undeniably impact the child.[71] This includes a positive duty to record evidence of the evaluation of the impacts of the action on the child or children concerned.[72] It follows that, in considering potential exclusion from Australia and significant reporting obligations, it would be inconsistent with Australia's obligations to treat other considerations as of equal or superior weight so as to render evaluation of the best interests of the child as secondary. Accordingly, the measures in the bill raise concerns that, in the absence of further statutory protections, they may not be compatible with the rights of children.

Committee comment

1.203 The preceding analysis raises questions as to whether the measures are compatible with the rights of children.

1.204 As set out above, the inclusion of children within the scope of the measures engages and limits the obligation to consider the best interests of the child and the right of children not to be separated from their parents against their will. The committee therefore seeks the advice of the minister as to:

- **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;**
- **how the measure is effective to achieve (that is, rationally connected to) the stated objective;**
- **whether the limitations on the rights of children are proportionate to achieve the stated objective (including whether the limitations are the least rights restrictive approach and whether there are adequate safeguards in relation to their operation); and**
- **whether the measure accords sufficient weight to evaluating the impacts of a Temporary Exclusion Order or return permit conditions on affected children so as to be consistent with the rights of children (including the types of**

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70 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para. 1)* (2013) p. 10.

71 See also *Minister of State Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

72 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (*art. 3, para. 1)* (2013) p. 14.

information that would inform the minister's assessment of the best interests of the child).

Compatibility of the measure with the right to a fair hearing

1.205 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. 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. As they involve the determination of rights and obligations, the procedures for delaying and controlling a citizen's return to Australia would appear to create a suit at law for the purposes of the application of article 14 of the ICCPR.

1.206 Under the bill, the minister is not obliged to observe any requirements of procedural fairness when exercising a power, including when deciding to make a TEO or to impose the prescribed conditions on a permit.[73] The absence of such a requirement, which excludes a person's ability to make representations about decisions that affect them, engages and limits the right to a fair hearing. The statement of compatibility acknowledges that the measure engages the right to a fair hearing, but argues that it does not limit this right.[74]

1.207 The right is also engaged and may be limited insofar as the bill does not provide for merits review of a decision to make a TEO or place conditions on a permit. While judicial review is still available, as noted earlier this represents a significantly more restricted form of review that allows the court only to consider whether the decision was lawful (rather than the merits of the decision). Further, by providing that the minister is not required to observe procedural fairness, this narrows the grounds on which a judicial officer may otherwise review such decisions, which also engages and may limit the right to a fair hearing.

1.208 Limitations on the right to a fair hearing may be permissible where they pursue a legitimate objective and are rationally connected and proportionate to achieving that objective. In this regard, the statement of compatibility provides some limited information about the objective served by excluding procedural fairness requirements.[75] In particular, it indicates that inviting an affected person to make representations before a TEO is made may be practically difficult and may frustrate the purpose of the measures by warning a person they are being considered for a TEO. (It is ambiguous whether this reasoning contemplates a person returning to

73 Proposed section 17.

74 SOC, p. 24.

75 SOC, p. 24.

Australia so as not to become subject to a TEO or other broader concerns.)[76] For these reasons, the statement of compatibility argues that the exclusion of procedural fairness is 'necessary and proportionate' given:

> the complexity and fluidity of the present threat environment and the need for law enforcement and intelligence agencies to flexibly respond to the threats posed by Australians returning from overseas conflict zones.[77]

1.209 However, while acknowledging the practical difficulties in the current context, more detailed information is required as to the particular substantial and pressing concern justifying the exclusion of procedural fairness and the other limitations on the right to a fair hearing. Additional information in this respect would assist the committee to determine the extent to which the measures pursue a legitimate objective and are rationally connected to that objective.

1.210 In relation to whether the measures are necessary and proportionate to achieve their stated objective, it is unclear whether excluding procedural fairness requirements or the other limitations on the right to a fair hearing constitute the least rights restrictive approach for protecting the Australian community. Though the statement of compatibility identifies a potential risk in allowing a person to make representations before a TEO is made, it does not address the reason for excluding procedural fairness in relation to a subsequent decision to impose or vary conditions on a permit.

1.211 Further, the statement of compatibility does not explain why other elements of procedural fairness, such as the recording of reasons for a decision, are inappropriate so as to warrant their exclusion. Accordingly, the exclusion of 'any requirements of procedural fairness' may be insufficiently circumscribed. Further reasoning and analysis in this regard would therefore assist the committee's examination as to whether the measure is proportionate.

1.212 As discussed above at [1.170], the narrow scope for independent review of decisions under the bill is also relevant to the proportionality of the limitation on the right to a fair hearing. The statement of compatibility does not discuss the absence of merits review or the restricted scope of judicial review, including whether these are proportionate. Further information is therefore required in order for the committee to fully assess whether the measures are compatible with the right to a fair hearing.

Committee comment

1.213 The preceding analysis raises questions as to the compatibility of the measures with the right to a fair hearing.

76 SOC, p. 24.

77 SOC, p. 24.

1.214 The committee therefore seeks the advice of the minister as to the compatibility of the measures with the right to a fair hearing, including:

- **whether the measures pursue a legitimate objective for the purposes of international human rights law (including any reasoning or evidence that establishes the stated objective addresses a substantial and pressing concern);**
- **how the measures are effective to achieve (that is, rationally connected to) the stated objective; and**
- **whether the measures are proportionate to achieve the stated objective (including whether they are necessary, whether they are sufficiently circumscribed, whether they are the least rights restrictive approach and whether there are adequate safeguards in place in relation to their operation).**

Fair Work Amendment (Casual Loading Offset) Regulations 2018 [F2018L01770]

Purpose	Seeks to allow an employer to make a claim to have casual employment loading taken into account in determining any amount payable by the employer to the person in lieu of one or more of the National Employment Standards entitlements
Portfolio	Jobs and Industrial Relations
Authorising legislation	*Fair Work Act 2009*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 12 February 2019)
Rights	Just and favourable conditions of work
Status	Seeking additional information

Casual loading offset

1.215 The regulations amend the *Fair Work Regulations 2009* to provide that, to avoid doubt, an employer may make a claim to have 'casual employment loading' taken into account in determining any amount payable by the employer to the person in lieu of one or more of the relevant National Employment Standards (NES)[1] entitlements.

1.216 The regulations will apply if:

- the person is employed by an employer on the basis that the person is a casual employee; and
- the employer pays the person an amount (casual employment loading) that is clearly identifiable[2] as an amount paid to compensate the person for not having one or more relevant NES entitlements during the employment period; and
- during all or some of the employment period, the person was in fact an employee other than a casual employee for the purposes of the NES; and

1 The National Employment Standards are minimum employment entitlements that must be provided to all employees, for example relating to maximum weekly hours, personal/carer's leave and annual leave: see Part 2-2 of the *Fair Work Act 2009*.

2 The regulations state that examples of where it may be 'clearly identifiable' that an amount is to be paid to compensate the person for not having one or more relevant NES entitlements include where it is clearly identifiable in correspondence, pay slips, contracts and relevant industrial agreements: Note 2 of Regulation 2.03A of the regulations.

- the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements.[3]

1.217 The regulations are intended to apply where a person has been incorrectly classified as a casual employee during all or some of the employment period,[4] and is therefore entitled to claim certain NES entitlements (as NES entitlements are more limited for casual employees).[5] The regulations seek to ensure that, in determining the amount of such entitlements, any 'casual employment loading' that was paid to compensate the casual employee for not having relevant NES entitlements is taken into account.

Compatibility of the measure with the right to just and favourable conditions of work

1.218 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 rest, leisure and reasonable limitation of working hours and periodic holidays with pay.[6]

1.219 The statement of compatibility states that the regulations are 'declaratory in nature and do not engage any of the applicable rights or freedoms'.[7] The statement of compatibility also explains that the amendments 'do not affect existing rights of an employer to make a claim to have a payment taken into account, or the factors that a court must take into account in determining whether a payment that an employer has paid an employee in compensation for relevant NES entitlements may be taken into account'.[8] Instead, the amendments 'are intended to address circumstances whereby an employee can 'double dip' by being paid a loading in lieu of NES entitlements and subsequently being awarded payment for those NES entitlements'.[9] The explanatory statement provides the following information as to the rationale for the measure:

> On 16 August 2018, the Full Court of the Federal Court of Australia handed down its decision in *Workpac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*). The Full Federal Court decided that engaging an employee as a casual and paying a casual loading does not mean that an employee will necessarily

3 Regulation 2.03A of the regulations.

4 Note 1 of Regulation 2.03A of the regulations.

5 For an overview of the NES entitlements for casual employees, see Fair Work Ombudsman, 'National Employment Standards' at: https://www.fairwork.gov.au/employee-entitlements/national-employment-standards.

6 International Covenant on Economic and Social Rights, article 7.

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

8 SOC, p. 5.

9 SOC, pp. 5-6.

> be a casual employee for the purposes of the NES in the [*Fair Work Act 2009*].
>
> A key concern following the *Skene* decision is the potential for 'double-dipping' of entitlements. This may occur where an employee has been employed on the basis that the person is a casual employee (including having received a casual loading that compensates for the non-accrual and payment of NES entitlements), but during all or some of the employment period, the person was an employee other than a casual employee for the purposes of the NES, and thus entitled to the NES entitlements for which casual leave loading was previously paid to compensate.
>
> Where such an employee has clearly received an identifiable loading in lieu of any NES entitlement, an employer could generally be expected to seek to have that loading taken into account against any subsequently claimed NES entitlement. It will then be a matter for a court to determine whether the payment may be taken into account in any particular case.[10]

1.220 However, to the extent the regulations relate to an employee's entitlement to paid leave (for example, paid personal leave or annual leave), the measure engages and may limit the right to just and favourable conditions of work. In relation to the right to paid annual leave, for example, the UN Committee on Economic, Social and Cultural Rights has stated:

> All workers, including part-time and temporary workers, must have paid annual leave…The timing for taking paid annual leave should be subject to a negotiated decision between the employer and the worker; however, legislation should set a minimum period of ideally two weeks of uninterrupted paid annual leave. Workers may not relinquish such leave, including in exchange for compensation. Upon termination of employment, workers should receive the period of annual leave outstanding or alternative compensation amounting to the same level of pay entitlement or holiday credit.[11]

1.221 Limitations on the right to just and favourable conditions of work will be permissible where those limitations pursue a legitimate objective, are rationally connected to that objective and are proportionate to that objective. As the statement of compatibility does not acknowledge that the measure may engage human rights, it does not provide an analysis of the extent to which the right to just and favourable conditions is engaged and limited by the measure, and whether any such limitations are permissible.

1.222 For example, in relation to proportionality, further information is required in order to determine whether any limitation on the right to just and favourable

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10 Explanatory Statement, p. 1.

11 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 23 on the right to just and favourable conditions of work* (2016) [40]-[44].

conditions of work that arises from the measure is proportionate. It is not clear based on the information provided, for example, whether taking a person's casual loading into account in circumstances where that person has been misclassified as a casual employee for the purposes of the NES is proportionate. Further, while the regulations provide some information as to what constitutes a 'clearly identifiable' casual employment loading, some ambiguities remain. For example, where a person's casual loading is said to be 'clearly identifiable' from an employee's correspondence or payslips, it is not clear whether this requirement could be satisfied where a letter was sent advising a person that the salary which they had previously been receiving included casual loading (where that was not previously identifiable), or where payslips could be amended to reflect a casual loading. In those circumstances, it is not clear whether the ability to offset casual loading could operate retrospectively in relation to an existing employee (such as from the date of the commencement of the person's employment). Further information from the minister as to these matters would assist in determining whether the measure is proportionate.

Committee comment

1.223 The preceding analysis indicates that the measure engages and may limit the right to just and favourable conditions of work.

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

- **the legitimate objective the measure seeks to address;**
- **whether the measure is rationally connected to that objective; and**
- **whether the measure is proportionate to the legitimate objective of the measure.**

National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019

Purpose	Establishes a national database of information relating to worker screening for the purposes of the National Disability Insurance Scheme
Portfolio	Families and Social Services
Introduced	House of Representatives, 13 February 2019
Rights	Privacy; work
Status	Seeking additional information

Background

1.225 Under the National Disability Insurance Scheme (NDIS), persons who provide support and services through NDIS providers, and who have more than incidental contact with participants in the scheme, are required to undergo worker screening to assess their suitability as support workers. National policy on worker screening is set out in the *Intergovernmental Agreement on Nationally Consistent Worker Screening*.[1]

1.226 The committee has previously considered the human rights implications of both the NDIS worker screening process and the disclosure of protected information relating to the NDIS. Relevantly, in *Report 3 of 2018*, *Report 4 of 2018* and *Report 5 of 2018,* the committee considered the human rights compatibility of enabling spent and quashed convictions, and convictions for which a person had been pardoned, to be disclosed and taken into account for the purposes of NDIS worker screening.[2] The committee concluded that the measures were likely to be compatible with human rights. However, it also noted that much would depend on the manner in which the states and territories operationalise the worker screening scheme, and recommended that the scheme be monitored by the Commonwealth to ensure it is implemented in a manner compatible with human rights.

1.227 In in its *Report 7 of 2017,* the committee considered the human rights implications of measures which would allow the NDIS Quality and Safeguards Commissioner (the Commissioner) to disclose information to any person, provided

1 *Intergovernmental Agreement on Nationally Consistent Worker Screening* at: https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-nationally-consistent-worker-screening.

2 Parliamentary Joint Committee on Human Rights, Crimes Legislation Amendment (National Disability Insurance Scheme – Worker Screening) Bill 2018, *Report 3 of 2018* (27 March 2018) pp. 6-11; *Report 4 of 2018* (8 May 2018) pp. 38-46; *Report 5 of 2018* (19 June 2018) pp. 64-76.

the Commissioner is satisfied that it is in the public interest to do so.[3] The committee noted that the provision would confer a broad discretion on the Commissioner to disclose protected information, which would only be constrained by rules made under section 67F of the *National Disability Insurance Scheme Act 2013* (NDIS Act). The committee raised questions regarding the proportionality of this limitation on the right to privacy in light of the broad disclosure power of the commissioner. However, the committee noted that it would revisit the matter when reviewing any rules when they were made.

1.228 The committee then further considered the human rights implications of the public interest disclosure power in the National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018 (Disclosure Rules)[4] in its *Report 7 of 2018* and *Report 9 of 2018*.[5] Following correspondence from the relevant minister, the committee concluded that the measures were likely to be compatible with the right to privacy.

Establishment of the NDIS Worker Screening Database

1.229 The bill seeks to establish a database (Worker Screening Database) to facilitate nationally consistent worker screening for the purposes of the NDIS. The database would be established, operated and maintained by the NDIS Quality and Safeguards Commissioner (Commissioner), and would be kept in electronic form.[6]

1.230 The Worker Screening Database will contain a record of decisions made under NDIS worker screening laws, and information on the database can be shared with certain persons or bodies for the purposes of the NDIS.[7] The database may include the following information:

- information relating to persons (screening applicants) who have made applications (screening applications) for an NDIS worker screening check, and information relating to those applications;
- information relating to each screening applicant in respect of whom a screening application is no longer being considered and the reasons for this;

3 Parliamentary Joint Committee on Human Rights, National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, *Report 7 of 2017* (8 August 2017) pp. 27-29.

4 [F2018L00635]. The Disclosure Rules were made pursuant to section 67F of the NDIS Act.

5 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018* (14 August 2018) pp. 32-38; *Report 9 of 2018* (11 September 2018) pp. 37-45.

6 Proposed sections 181Y(1) and (2).

7 Proposed section 181Y(3). 'NDIS worker screening law' is defined in proposed section 9 as a law of a state or territory determined by the minister by legislative instrument.

- information relating to each screening applicant in respect of whom a decision (clearance decision) is in force to the effect that the person does not pose a risk to people with disability, and information relating to the decision;
- information relating to decisions made under an NDIS worker screening law, in relation to a screening applicant, while the person's application is pending;
- information relating to each screening applicant in respect of whom a decision (exclusion decision) is in force, to the effect that the person poses a risk to people with disability, and information relating to the decision;
- if a clearance decision or an exclusion decision specifies the period for which the decision is in force – information setting out that period;
- information relating to each person in respect of whom a decision under an NDIS worker screening law has been made suspending a clearance decision, and information relating to the suspension;
- information relating to each person in respect of whom a decision under an NDIS worker screening law has been made revoking a clearance or exclusion decision, and information relating to the revocation;
- information relating to employers or potential employers of persons who have made screening applications; and
- any other information determined by the minister by legislative instrument.[8]

1.231 The bill specifies that the Worker Screening Database may include personal information within the meaning of the *Privacy Act 1988* (Privacy Act).[9]

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

1.232 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use, and sharing of personal information. By providing for the collection, use and disclosure of information (including personal information) about persons who have made an application for an NDIS worker screening check, including any previous, current or pending decisions in relation to such applications, the measure engages and limits the right to privacy.

1.233 The right to work in the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone must be able to freely accept and choose their work, and includes a right not to be unfairly deprived of work. The right to work further requires that State parties to the ICESCR provide a system of

8 Proposed section 181Y(5). Proposed section 181Y(8) would allow the minister, by legislative instrument, to determine additional purposes for the Worker Screening Database, and to determine additional information that may be included in the database.

9 Proposed section 181Y(7).

protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[10] To the extent that the collection, use and disclosure of information in the Worker Screening Database may result in the exclusion of a person from employment, the measure engages and limits the right to work.

1.234 The right to privacy and the right to work 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.

1.235 The statement of compatibility acknowledges that the measure engages and limits the right to privacy and the right to work. However, it argues that the limitations are permissible as they are reasonable to protect people with disability.[11]

1.236 In relation to the objectives of the measure, the statement of compatibility states that 'the paramount objective of the bill is to protect people with disability from experiencing harm arising as a result of unsafe supports or services provided under the NDIS'.[12] This is likely to be a legitimate objective for the purposes of international human rights law. It is also noted that the measure is directed at promoting the rights of people with disability. The statement of compatibility explains that the measure seeks to:

> …ensure that information about whether a person who works, or seeks to work, with people with disability poses a risk to such people is current, accurate, and available to all States and Territories, and to employers engaging workers in the NDIS.[13]

1.237 Collecting and consolidating information relating to NDIS worker screening checks may assist employers and service providers to make more informed and accurate assessments as to a person's suitability as a disability support worker. In this respect, the measure appears to be rationally connected to the objectives of the bill.

1.238 As to the proportionality of the measure, the statement of compatibility identifies a number of relevant limitations on the information that may be included in the Worker Screening Database and on the persons and bodies to whom access to the database may be granted. For example, in relation to the information that may be included in the database, the statement of compatibility states that:

> The range of information that may be contained in the database is limited to information necessary for the performance of the Commissioner's functions and for the purposes of the database set out in the Bill. The database will not contain information about a person's criminal history,

10 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

11 Statement of compatibility (SOC), p. 13.

12 SOC, p. 11.

13 SOC, p. 12.

> including convictions and charges and any other information relied on to support a decision that is made under NDIS worker screening law, or information about a person's sexual identify or preferences.[14]

1.239 This information assists the proportionality of the measure. However, it is unclear whether the identified limitations are enshrined in legislation (and if so, the specific provisions that apply) or are matters of policy. Further information in relation to these matters would assist in assessing whether the measure is proportionate. It is also noted that while the minister would be permitted to determine additional information to be included in the database,[15] no information is provided in the statement of compatibility as to the matters the minister may consider before making such a determination.

1.240 In relation to the persons and entities who may access the database, the statement of compatibility states that:

> States and Territories will have full access to the database as required to effectively implement the national policy, including the ongoing monitoring of people who hold clearances, and the identification of fraudulent or duplicate applications, such as where a person has made multiple attempts to gain a worker screening clearance in a different jurisdiction or under a different name.
>
> By comparison, employers will have access to a more limited subset of information…This is expected to include information about a worker's identity, so that an employer can verify that the person who holds the clearance is the same person that they have engaged or intend to engage. Employers will also have access to information related to whether or not a person they have engaged is cleared to work in certain roles.[16]

1.241 The statement of compatibility also clarifies that employers will not be permitted to access the details of a worker's other employers, and will not be permitted to access sensitive information relating to a worker's disability status, Aboriginal and Torres Strait Islander status or cultural and linguistic diversity status.[17] The explanatory memorandum provides some additional information, noting that 'it

14 SOC, p. 12.

15 Proposed section 181Y(8).

16 SOC, p. 13.

17 SOC, p. 13.

is intended that the information in the database may be shared…at varying levels of detail' with particular persons and bodies.[18]

1.242 These are important safeguards and assist the proportionality of the measure. However, the statement of compatibility does not identify whether these safeguards are enshrined in legislation (and if so, the specific provisions that apply) or are matters of policy. Moreover, no specific legal or administrative limits on using the information in the database (for example, procedures for de-identifying information where it is used for policy development or research)[19] are identified in the statement of compatibility. Further information as to the specific safeguards in the bill, the NDIS Act or other legislation relating to the limitations on access to information in the database would assist in assessing the proportionality of the measure.

1.243 Finally, in relation to the handling of personal information, the statement of compatibility explains that personal information on the Worker Screening Database is 'protected Commission information' and accordingly:

> …will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions, or as otherwise permitted under section 67A of the [NDIS] Act. The penalty provisions in sections 67B to 67D of the Act will also apply to any unauthorised disclosure of information.[20]

1.244 This information is important and relevant to the proportionality of the measure. In particular, the offences in sections 67B, 67C and 67D of the NDIS Act are significant safeguards against the unauthorised disclosure of personal information. However, it is noted that these provisions are subject to certain exemptions for authorised disclosure, including a broad power to record, use and disclose protected Commission information 'for the purposes of the NDIS Act'[21] and the public interest disclosure power in section 67E. As noted in the committee's *Report 7 of 2017,*

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18 The examples provided in the Explanatory Memorandum (EM) (p. 4) include state and territory worker screening units, disability service providers and their subcontractors, the National Disability Insurance Agency and its contractors, persons providing services under Chapter 2 of the NDIS Act, self-managed participants and plan nominees, the NDIS Quality and Safeguards Commission, and the Department of Social Services.

19 In this respect, it is noted that the EM (p. 7) indicates that 'sensitive information', including information about a person's disability status, Aboriginal and Torres Strait Islander status and cultural and linguistic diversity status may be used for 'policy development, evaluation and research purposes'.

20 SOC, p. 13.

21 See, in particular, section 67A(1)(d)(i) of the NDIS Act.

section 67E provides a wide discretion for the Commissioner to disclose protected information in the public interest. While this disclosure power is constrained by the Disclosure Rules,[22] it would have been of assistance if the statement of compatibility had addressed the committee's previous analysis of the disclosure provisions in the NDIS Act and Disclosure Rules.

Committee comment

1.245 The preceding analysis raises questions as to the compatibility of the measure with the right to privacy and the right to work.

1.246 Accordingly, the committee requests the minister's advice as to whether the limitations on those rights are a proportionate means of achieving their stated objectives, including:

- **whether the type and extent of the information on the Worker Screening Database will be appropriately circumscribed, including whether limitations on the type of information in the database will be set out in legislation (and if so, the specific provisions that apply), or will be matters of policy;**
- **whether access to the Worker Screening Database will be appropriately circumscribed, including whether limitations on access to the database will be set out in legislation (and if so, the specific provisions that apply), or will be matters of policy; and**
- **any other information that may be relevant to the proportionality of the measure.**

22 As noted earlier, the committee has previously considered that the Disclosure Rules are likely to be compatible with the right to privacy.

Native Title Legislation Amendment Bill 2019

Purpose	Seeks to amend the process of applicant decision-making under the *Native Title Act 1993* (NTA) so that the applicant may act by majority as the default position for all things that the applicant is required or permitted to do under the NTA. Also seeks to retrospectively validate 'section 31 agreements' in light of *McGlade* and establish a public record of section 31 agreements.
Portfolio	Attorney-General
Introduced	House of Representatives, 21 February 2019
Rights	Culture; self-determination; privacy
Status	Seeking additional information

Applicant decision-making under the *Native Title Act*

1.247 The 'applicant' to a native title claim is the person or group of people authorised by a native title claim group[1] to make or manage a native title claim on their behalf.[2] Once a claim has been made and has been accepted for registration by the National Native Title Tribunal (NNTA), the names of the people who make up the applicant appear on the Register of Native Title Claims (Register). The person or persons whose names appear as the applicant on the Register are then also collectively known as the 'registered native title claimant' (RNTC). The applicant is also the 'native title party' for the purpose of the process through which agreements are made under section 31 of the *Native Title Act 1993* (NTA).[3]

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1 A native title claim group is defined in section 253 of the *Native Title Act 1993* (NTA) to mean (a) in relation to a claim in an application for a determination of native title made to the Federal Court—the native title claim group mentioned in relation to the application in the table in subsection 61(1); or (b) in relation to a claim in an application for an approved determination of native title made to a recognised State/Territory body—the person or persons making the claim, or on whose behalf the claim is made. Section 61(1) in turn refers to 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'.

2 See Explanatory Memorandum (EM) p. 27; section 61(2) of the NTA. The definition of 'applicant' also covers applications for compensation made by a person or persons authorised to make the application by a compensation claim group: section 61(2)(b).

3 See EM, p. 27 and section 253 of the NTA. Section 31 of the NTA provides an agreement-making mechanism in the form of a right to negotiate in good faith with a view to obtaining the agreement with native title parties relating to the grant of mining and exploration rights over land which may be subject to native title. These agreements are not publicly registered.

1.248 Currently, the default rule under the NTA is that the applicant is required to act jointly or unanimously when carrying out duties or performing functions under the NTA.[4] In *McGlade v Native Title Registrar & Ors* (*McGlade*),[5] the Full Court of the Federal Court held that all members of the applicant – or the RNTC for the purpose of Indigenous Land Use Agreements (ILUAs)[6] – must be party to an area ILUA[7] before the ILUA can be registered and come into effect (including deceased members of the applicant).

1.249 The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (2017 Act) reversed the effect of *McGlade* by changing the default position for future area ILUAs so that a majority of members of the RNTC may be party to the agreement unless otherwise determined by the group.[8] That Act also retrospectively validated area ILUAs that were invalidated by *McGlade*. The committee considered the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 in its *Report 2 of 2017* and *Report 4 of 2017* and considered the measures may be compatible with the right to culture and were likely to promote the right to self-determination.[9]

Majority default rule in applicant decision-making

1.250 Schedule 1 of the bill seeks to expand the effect of the 2017 Act so that the applicant may act by majority as the default position for all things that the applicant is required or permitted to do under the NTA.[10] This includes making ILUAs, making applications for native title determinations or compensation applications, and section 31 agreements.

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4 EM, p. 32.

5 [2017] FCAFC 10 (*McGlade*).

6 ILUAs are voluntary agreements in relation to the use of land and waters which may cover a number of matters including how native title rights coexist with the rights of other people, who may have access to an area, native title holders agreeing to a future development or future acts, extinguishment of native title, compensation for any past or future act, employment and economic opportunities for native title groups, issues of cultural heritage, and mining: see NTA section 24CB.

7 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists.

8 EM, p. 32.

9 Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) pp. 18-25; Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 112-124.

10 See the general rule in proposed section 62C(2). The bill also includes a number of specific amendments to give effect to this general rule as it applies to specific types of agreement-making by the applicant. In doing so it repeals and replaces aspects of the NTA as amended by the 2017 Act: see EM pp. 37-38.

1.251 The bill provides that the default rule may be displaced by conditions imposed on the authority of the applicant under proposed section 251BA, such that where there is a process of decision-making that must be complied with under the traditional laws and customs of the persons who authorise the applicant,[11] it must be in accordance with that process.[12] Where there is no such decision-making process, the persons can agree to and adopt a process of decision-making.[13] A similar safeguard applies in relation to section 31 agreements.[14]

1.252 The bill also provides more broadly that the applicant's power to deal with all matters to do with an application is subject to conditions of the authority of the applicant under proposed section 251BA,[15] and further that the Registrar must be satisfied not only that the applicant is authorised by the claim group but also that any conditions on the authority of the applicant have been satisfied when registering a claim on the Register.[16] The bill also introduces some amendments to the ability of claim groups to replace individual members of the applicant where a member of the applicant is deceased, such that one or more members of the claim group may apply to the Federal Court under section 66B for an order that certain persons replace the current applicant without needing to go through an authorisation process under section 251B.[17]

Compatibility of the measures with the right to culture[18]

1.253 The right to culture is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR).

1.254 All individuals have the right to culture under article 15 ICESCR. However, article 27 ICCPR and related provisions provide individuals belonging to minority groups, including Indigenous peoples, with additional protections to enjoy their own

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11 Section 251A of the NTA sets out the authorisation process for the making of indigenous land use agreements, and section 251B sets out the process for authorising the making of applications for a native title determination or compensation application.

12 Proposed section 251BA(2)(a).

13 Proposed section 251BA(2)(b).

14 Proposed section 31(1C), EM p. 35.

15 Proposed section 62A(2).

16 Proposed section 190C.

17 Proposed section 66B(2A).

18 It is noted that some aspects of the bill appear to promote the right to culture and right to self-determination, including the provisions in Schedule 2 which would allow body corporate ILUAs to be made over areas where native title has been extinguished, and the amendments in Schedule 2 which expands the circumstances in which past extinguishment of native title may be disregarded (such as over national parks).

culture, religion and language. The rights conferred under article 27 have both an individual and a group dimension: while the right is conferred on individuals, it must be exercised within the minority group. Thus article 27 provides that 'persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture'. (This differentiates the right to culture from the separate, additional right to self-determination, which is a right that is conferred only on groups.) In the context of Indigenous peoples, this collective dimension of the right to culture may assume particular importance, such as with respect to the right of members of the community to enjoy their own culture or use their own language in community with other members of their group.[19] In the context of Indigenous peoples, the right to culture includes the right for Indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands. The state is prohibited from denying individuals the right to enjoy their culture, and may be required to take positive steps to protect the identity of a minority and the rights of its members to enjoy and develop their culture.[20]

1.255 The statement of compatibility acknowledges that introducing a majority default rule for applicant decision-making engages and may limit the right to culture. This is because the amendments 'may limit the influence of individual members of the applicant and any sub-groups of native title holders that they represent'.[21] In other words, there may be a conflict between an individual's right to culture, and the interests of the group as a whole.

1.256 In such cases, where there is a conflict between the wishes of individual members of the group and the group as a whole, the international jurisprudence indicates that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.[22] In other words, a limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and is a proportionate means of achieving this objective.

1.257 The statement of compatibility states that the objective of the measures is to promote 'efficient determinations of native title and native title agreement making,

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19 See, *Käkkäläjärvi et al.v Finland*, UN Human Rights Committee Communication No.2950/2017 (2 November 2018) [9.8]-[9.10].

20 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994); UN Human Rights Committee, C*oncluding Observations of the Human Rights Committee: Australia*, A/55/40 (2000) and UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009).

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

22 *Kitok v Sweden,* UN Human Rights Committee Communication No.197/1985 (1988) [9.8].

to assist Indigenous Australians to realise the social and economic benefits of native title'.[23] It is likely that this would be considered a legitimate objective for the purposes of international human rights law. Allowing for applicant decision-making by majority would also appear to be rationally connected to this objective.

1.258 The statement of compatibility further states that the limitation on the individual's right to culture is proportionate 'to achieving the broader group's right to enjoy and benefit culture'.[24] It states that the measures 'provide balance between promoting the rights of individuals to be consulted in relation to their cultural rights, but not to frustrate decision-making processes in a way that would deny these rights to other individuals, or to prevent the collective enjoyment of the right to culture'.[25] It also states that:

> The measure also received support from native title representative groups, including the National Native Title Council, although some Indigenous stakeholders expressed concerns that allowing majority decision-making promotes outcomes at the expense of collective decision-making.
>
> To address this concern, the amendment will also operate in conjunction with the amendment to allow the claim to impose conditions on the authority of the applicant…This will allow the default rule to be displaced, and for a condition to be placed on the authority of the applicant requiring unanimous action, or any other threshold.
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> Commencement of this provision will be delayed by six months to allow the native title claim group an opportunity to place any conditions on the authority of the applicant and to change the composition of the applicant if they so wish. This is an appropriate response that will give the claim group control over how the applicant should act on their behalf.[26]

1.259 The safeguards identified in the statement of compatibility, in particular the safeguard for members of the applicant to determine an authorisation process that differs from the majority-default position, are important and assist in determining the proportionality of the measures. It is acknowledged that processes such as native title claims, ILUAs and section 31 agreements may cover a range of serious matters. For example, matters that may be covered by ILUAs include the extinguishment of native title rights and interests. Accordingly, where the terms of an agreement are a matter of dispute within the claim group, majority decision-making may profoundly affect the interests of certain individuals in relation to the right to culture.

1.260 However, in light of the relevant international jurisprudence, which indicates that individual rights to culture can generally be restricted when to do so is in the

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23 SOC, p. 9.

24 SOC, pp. 9-10.

25 SOC, p. 8.

26 SOC, pp. 9-10.

interests of the minority group as a whole, the measures appear likely to be compatible with the right to culture.[27] This is particularly the case in light of the fact that allowing for decision-making in accordance with traditional laws and customs or (where there is no such process) in accordance with a process agreed to and adopted would appear to allow scope to be afforded to minority views. (It is noted that this safeguard does not necessarily guarantee that minority views would be accommodated in all circumstances – for example, the group may agree to a process that does not require unanimity or a higher threshold, or the traditional laws and customs may not require unanimity or a higher threshold. However, it is also acknowledged that requiring unanimity for all applicant decision-making may undermine the process of agreement-making under the NTA and to that extent may impact on the enjoyment of the right to culture for the majority of the group.[28] Much may depend on how the proposed amendments operate in practice.

Committee comment

1.261 The preceding analysis indicates that the measures engage and may limit the right to culture.

1.262 The committee reiterates its previous view expressed in *Report 4 of 2017* that while noting that the effect of the measures on certain individuals' enjoyment of their right to culture, the measures on balance may be compatible with this right.

Compatibility of the measures with the right to self-determination

1.263 The right to self-determination is protected by article 1 of the ICCPR and article 1 of the ICESCR. The right to self-determination, which is a right of 'peoples' rather than individuals, includes the right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development. The United Nations (UN) Committee on the Elimination of Racial Discrimination has stated that this includes 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'.[29]

1.264 The principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. The Declaration provides context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. The Declaration affirms

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27 *Apirana Mahuika v New Zealand,* UN Human Rights Committee Communication No. 547/1993 (2000); *Kitok v Sweden,* UN Human Rights Committee Communication No. 197/1985 (1988) [9.8].

28 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 120-121.

29 See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

the right of Indigenous peoples to self-determination.[30] While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011,* it provides clarification as to how human rights standards under international law, including under the ICCPR and ICESCR, apply to the particular situation of Indigenous peoples.[31]

1.265 The proposed amendments to allow for default majority decision-making, with a safeguard to allow traditional processes or alternative arrangements to prevail where agreed by the group, appear to engage and seem likely to promote the collective right to self-determination, as a minority of members would not be able to prevent decisions being made unless the authorisation process allowed for this. The statement of compatibility acknowledges that the measures engage the right to self-determination, stating that the right is promoted by changes to allow the applicant to act by the majority as the default because:

> This change will facilitate native title groups' ability to collectively pursue the determination of their native title rights and their economic, social and cultural development. It will also promote the efficient negotiation and settlement of native title determinations, to assess the potential and economic benefits of native title.[32]

1.266 While it is acknowledged that the measures in general promote the collective right to self-determination, the statement of compatibility also acknowledges that the measures will reduce the influence of members of the applicant who are in the minority, and any sub-groups of native title holders they represent.[33] Therefore, enabling the reasonable expression of minority views as part of ensuring genuine agreement is reached is important. The statement of compatibility addresses this issue directly when it states:

> Although this measure will reduce the influence of members of the applicant who are in the minority, and any sub-groups of native title holders they represent, this limitation is necessary and proportionate to meeting the objective. As discussed in the context of the right to culture, the nature of the authorisation process (emphasises traditional decision-making), the new ability of the claim group to place limitations on the applicant's authority and the delayed commencement of the provision will allow claim groups to ameliorate the effect of the limitation. The reform is also broadly supported by stakeholders.[34]

30 UN Declaration on the Rights of Indigenous Peoples, article 3.

31 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 122-123.

32 SOC, pp. 16-17.

33 SOC, p. 17.

34 SOC, p. 17.

1.267 As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with Indigenous peoples in relation to actions which may affect them.[35] In relation to the feedback from stakeholders, the statement of compatibility explains that the measures in the bill were informed by feedback from stakeholders following consultation on an options paper for native title reform released in November 2017 and exposure draft legislation released in October 2018, in addition to the recommendations from the Australian Law Reform Commission and other inquiries.[36] It also explains that an Expert Technical Advisory Group – comprised of nominated representatives from the National Native Title Council, states and territories, industry peaks and the National Native Title Tribunal – advised the government on the development of the measures in the bill.[37]

1.268 That this consultation was undertaken and representations were able to be made by native title bodies and others affected by the bill is welcome. However, noting the importance of the obligation of consultation with Indigenous peoples under international human rights law, further information as to the extent and scope of consultation with Indigenous Australians in relation to the measures in this bill would be of assistance. In this respect, the UN Human Rights Council has recently provided guidance on the right to be consulted, as part of its Expert Mechanism on the Rights of Indigenous Peoples, stating that 'states' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up'.[38] The process is intended to protect the right of indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.[39]

1.269 A related issue is the requirement for indigenous peoples' 'free, prior and informed consent' in relation to decisions that may affect Indigenous peoples

35 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) p.122-123.

36 SOC, p. 6. See also EM, p. 2.

37 SOC, p. 6.

38 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [15]-[16].

39 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [15]-[16].

contained within the Declaration.[40] As noted in *Report 4 of 2017,* there is uncertainty about the requirement of 'free, prior and informed consent' as a matter of international human rights law. A number of governments (including Australia) have previously not accepted that aspects of the provisions which require 'free, prior and informed consent' (rather than 'consultation') have yet attained the status of customary international law which is binding on Australia.[41]

1.270 However, the UN Human Rights Committee Expert Mechanism on the Rights of Indigenous Peoples has also recently stated that the right to self-determination is the fundamental human right upon which free, prior and informed consent is grounded,[42] and has stated:

> Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples…[43]

1.271 Thus while not in itself legally binding, the Declaration may nonetheless articulate binding obligations to the extent that it interprets existing obligations of States under binding international agreements. More generally, it is an important instrument that articulates a range of principles, standards and guidance to

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40 See, in particular, article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

41 See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/HRC/12/34 (2009) [38]; see, also Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) p. 16.

42 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [6].

43 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [3].

governments for the treatment of Indigenous peoples,[44] and may signify future developments in international law which may become legally binding. The principle of 'free, prior and informed consent' should therefore be considered in the context of developing and amending native title legislation. It is also noted that the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights have recommended that Australia ensure the principle of free, prior and informed consent is incorporated into the NTA and fully implemented in practice.[45]

1.272 This analysis does not comprehensively address whether the measures comply with this principle. However, it is noted that included within the concept of 'free, prior and informed consent' is the principle that Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols.[46] Therefore, the safeguards in the bill that allow for traditional decision-making processes to prevail over the default position are important. In this respect, it is relevant to note that in the context of the amendments introduced by the 2017 bill and the *McGlade* decision, the UN Special Rapporteur on the Rights of Indigenous Peoples stated also that 'the principle of free, informed and prior consent does not require the consent of all'.[47]

Committee comment

1.273 The committee notes that the measures are likely to promote the right to self-determination.

1.274 The committee reiterates its view outlined in *Report 4 of 2017* of the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

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44 See, for example, Trevor Buck, *International Child Law* (Routledge, 2014) pp. 437 – 438; Brenda L Gunn, 'Self-Determination as the Basis for Recognition: Implementing the UN Declaration on the Rights of Indigenous Peoples' 7(30) (May/June 2012) *Indigenous Law Bulletin* p. 22; Kanchana Kariyawasam, 'The significance of the UN Declaration on the rights of Indigenous Peoples: The Australian Perspectives' 11(2) (2010) *Asia-Pacific Journal on Human Rights and the Law* pp. 1-17; Elvira Pulitano (ed) *Indigenous Rights In the Age of the UN Declaration* (Cambridge University Press, 2012).

45 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the eighteenth to twentieth periodic reports of Australia,* CERD/C/AUS/CO/18-20 (2017) [21]-[22]; Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (2017) [15(e)].

46 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples,* A/HRC/39/62 (2018) [20].

47 UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (2017) [101].

Retrospective validation of section 31 agreements

1.275 As noted earlier, section 31 of the NTA provides an agreement-making mechanism in the form of a right to negotiate in good faith with a view to obtaining the agreement with native title parties relating to the grant of mining and exploration rights over land which may be subject to native title.

1.276 Schedule 9 of the bill seeks to confirm the validity of section 31 agreements that may potentially be affected by *McGlade*. The effect of this is that section 31 agreements where at least one member of the registered native title claimant was party to the agreement are retrospectively validated.

Compatibility of the measure with the right to culture

1.277 The right to culture is summarised above. The statement of compatibility acknowledges that the right to culture is engaged and may be limited by retrospectively validating section 31 agreements 'by providing certainty around the benefits that flow to native title holders from these agreements, which can include compensation in return for the grant of mining or exploration tenements over land'.[48] However, it states that any limitation is permissible as it will provide certainty for all parties to agreements.[49]

1.278 The statement of compatibility explains the objective of validating section 31 agreements as providing certainty in light of *McGlade*. As to the pressing and substantial concern the measure seeks to address, it states that:

> The Full Federal Court's decision in *McGlade* held that a particular kind of native title agreement under the Native Title Act - area Indigenous Land Use Agreements - are invalid where not all members of the applicant were party to the agreement. The reasoning in *McGlade* could similarly affect section 31 agreements, which primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights. The Bill confirms the validity of section 31 agreements potentially affected by the flaw identified in *McGlade*.
>
> Information obtained from the NNTT indicates that several thousand section 31 agreements have been made across the country. As with area ILUAs, stakeholders have indicated that a practice often used for making section 31 agreements prior to *McGlade* was to rely on the decision in *QGC Pty Ltd v Bygrave and Others (No 2)* (2010) 189 FCR 412 (*Bygrave*). Bygrave provided that if at least one member of the native title party (as the 'applicant' or 'registered native title claimant' is referred to in the context of section 31 agreements) was a party to the agreement, then the agreement was validly made.

48 SOC, p. 14.

49 SOC, p. 14.

> This means there are likely a significant number of section 31 agreements where not all members of the native title party have signed or entered into the agreement, and subsequently potentially affected by *McGlade*. The State of Western Australia, for example, in its submission to the options paper for native title reform indicated it was aware of 306 mining leases, 11 land tenure grants, and 4 petroleum titles which had section 31 agreements potentially affected by *McGlade*.
>
> Section 31 agreements underpin commercial operations and provide benefits for affected native title groups. The uncertainty created by their potential invalidity poses a significant risk to both those commercial operations and the benefits flowing to native title groups. Potential challenges to section 31 agreements may also to [sic] divert resources away from finalising native title claims to litigate affected agreements and re-negotiate agreements that are already significantly resource-intensive.[50]

1.279 The detailed information provided in the statement of compatibility indicates that the measure pursues a legitimate objective for the purposes of international human rights law, and appears to be rationally connected to this objective.

1.280 While acknowledging that the measure will provide certainty in relation to section 31 agreements that have been entered into in good faith, it is noted that section 31 agreements may cover potentially very serious matters including mining rights over Indigenous land. However, while acknowledging that the effect of validation of section 31 agreements may be to significantly affect the right to culture of certain individuals within the group, on balance the measure may be a proportionate limitation on the right to culture noting that it respects the collective enjoyment of the right to culture by providing certainty relating to agreements already entered into in good faith.

Committee comment

1.281 The preceding analysis indicates that the measure engages and may limit the right to culture.

1.282 The committee reiterates its previous view expressed in *Report 4 of 2017* that while noting that the effect of retrospective validation may affect certain individuals' enjoyment of their right to culture, the measure is likely to be a reasonable and proportionate limit on the individual right to culture and accordingly may be compatible with the right to culture.

Compatibility of the measure with the right to self-determination

1.283 The right to self-determination is summarised above. The statement of compatibility acknowledges that validating section 31 agreements that may be

50 SOC, pp. 14-15.

affected by the decision in *McGlade* engages the right to self-determination.[51] However, it does not otherwise provide an assessment of how this right is engaged in relation to this specific measure.

1.284 It would appear that validation of agreements already entered into may promote the right to self-determination insofar as it respects a group's decision to collectively pursue aspects of their native title rights and their economic, social and cultural development. It also ensures that those parties to section 31 agreements are able to access benefits flowing from the agreement. However, it is noted that the statement of compatibility provides more detail as to the potential risks to commercial operations (such as the impact on mining leases) than the impact on native title holders. It would have been of assistance if the statement of compatibility had addressed how the retrospective validation of section 31 agreements would promote the right to self-determination.

1.285 In relation to the obligation to consult, the statement of compatibility provides information as to the level of community support for the retrospective validation of section 31 agreements:

> There is strong stakeholder support for the retrospective validation of section 31 agreements. The proposal to retrospectively validate section 31 agreements affected by the *McGlade* decision was consulted on as part of the options paper and exposure draft consultation processes. Those processes received 52 and 37 submissions respectively, and the vast majority of those (from native title representative bodies, Indigenous groups, governments and industry) favoured the retrospective validation of agreements.
>
> The Expert Technical Advisory Group also extensively considered this proposal, and agreed that section 31 agreements should be retrospectively validated, and that the validation should apply to all agreements made up to the commencement of the Bill.[52]

1.286 It appears from this information that there was significant consultation in relation to this amendment and that a majority of stakeholders supported the retrospective validation of section 31 agreements. However, for the reasons discussed above in relation to the applicant decision-making measures at [1.268] to [1.272], further information as to the extent and scope of consultation with Indigenous Australians would have been of assistance in assessing human rights compatibility.

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51 SOC, p. 16.

52 SOC, pp. 15.

Committee comment

1.287 The preceding analysis indicates that the retrospective validation of section 31 agreements engages and may promote the right to self-determination. However, the committee notes that the statement of compatibility acknowledges that the right to self-determination is engaged by this amendment but does not provide an analysis as to how this right is promoted.

1.288 The committee reiterates its view outlined in *Report 4 of 2017* of the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

Creation of a record of section 31 agreements

1.289 Currently, section 31 agreements are not publicly registered. Schedule 6 of the bill introduces an amendment to require the Native Title Registrar to create and maintain a public record of section 31 agreements.[53] This record must include certain information, including a description of the area of land or waters to which the agreement relates, and the name of each party to the agreement and the address at which the party can be contacted.[54] The registrar must make the information available on request, however if a party to the agreement notifies the registrar that the party does not want some or all of the information to be made available, the registrar must not make available the information concerned.[55]

Compatibility of the measure with the right to privacy

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

1.291 Creating a record of section 31 agreements, including the names of the parties, their contact details and a description of the land or waters to which the agreement relates, may involve the recording and sharing of significant personal information, as well as information that is culturally sensitive. The measure therefore engages and limits the right to privacy.

1.292 The statement of compatibility does not acknowledge that the right to privacy is engaged by the measure and so does not provide an assessment as to whether the limitation is permissible under international human rights law.

1.293 Limitations on the right to privacy will be permissible where they are not arbitrary, they pursue a legitimate objective, are rationally connected to that

53 Proposed section 41B. The registrar is not required to keep a record or provide information in relation to agreements that have expired: proposed section 41B(8).

54 Proposed section 41B(2).

55 Proposed section 41B(5)-(6).

objective and are a proportionate means of achieving that objective. Information that establishes that the measure is no more extensive than is strictly necessary to achieve the legitimate objective of the measure, and information as to the safeguards in place are relevant to the question of proportionality. It is noted here that a party may request some or all information not be made available and the registrar must not make the information available if such information is received,[56] which is an important safeguard. However, it is also noted that the registrar must make information available 'on request' and there does not appear to be any limitation on persons who may request such information (such as those persons who may have an interest in the matter) or requirement for the request to be reasonable. Further information would therefore assist in determining whether the measure is compatible with the right to privacy.

Committee comment

1.294 The preceding analysis indicates that the creation of a record of section 31 agreements engages and limits the right to privacy. The statement of compatibility does not acknowledge that the right to privacy is engaged by the measure.

1.295 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the measure with this right, including:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law;**
- **whether the measure is rationally connected to (that is, effective to achieve) this objective; and**
- **whether the measure is a proportionate means of achieving the legitimate objective.**

56 Proposed section 41B(6).

Social Security (Assurances of Support) Amendment Determination 2018 (No. 2) [F2018L01831]

Purpose	Increases the assurance of support period for certain visas in line with changes to the newly arrived resident's waiting periods under the *Social Security Act 1991*
Portfolio	Families and Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled Senate and House of Representatives 12 February 2019)
Rights	Protection of the family; social security; adequate standard of living; children's rights
Status	Seeking additional information

Background

1.296 The committee has previously considered the human rights compatibility of the 'assurance of support' scheme in its *Report 5 of 2018* and *Report 7 of 2018.*[1] An assurance of support is a legally binding commitment by an individual or body (assurer) to financially support a migrant seeking to enter Australia on certain visa subclasses (assuree) for the duration of the assurance period (discussed below), including assuming responsibility for repayment of any recoverable social security payments received by the assuree during the assurance period.[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).

1 See Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support) Determination 2018 and Social Security (Assurances of Support) Amendment Determination 2018, *Report 7 of 2018* (14 August 2018) pp.126-133; *Report 5 of 2018* (19 June 2018) pp.41-46.

2 *Social Security Act 1991,* section 1061ZZGA(a). Recoverable social security payments for the purpose of assurances of support include widow allowance, parenting payment, youth allowance, austudy payment, newstart allowance, mature age allowance, sickness allowance, special benefit and partner allowance.

1.297 The committee's analysis of the assurance of support scheme noted that the scheme engages the right to protection of the family insofar as it requires certain individuals (including, relevantly, family members) to meet certain income requirements in order to sponsor family members to come to Australia, and to that extent may create a financial barrier for family members to join others in a country and therefore may limit the right to protection of the family.[3] Following correspondence from the minister, the committee concluded the measure may be compatible with the right to protection of the family, noting the flexibility in the scheme to allow for joint assurance arrangements where a potential assurer does not meet income requirements.

1.298 The committee has also previously considered the human rights compatibility of the increase to the waiting period for newly arrived migrants to access social security payments introduced by the *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018*.[4] In its analysis, the committee noted that extending the waiting period for access to social security engaged and limited the right to social security, the right to an adequate standard of living and the right to health. These rights were engaged because extending the waiting period to three years[5] further restricted access to social security (including health care cards) for newly arrived residents. Accordingly, the measure constituted a retrogressive measure, a type of limitation, in the realisation of the right to social security, the right to an adequate standard of living and the right to health.[6] Following correspondence from the minister, the committee considered that the measure appeared likely to be compatible with these rights in light of the availability

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3 Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support) Determination 2018 and Social Security (Assurances of Support) Amendment Determination 2018, *Report 7 of 2018* (14 August 2018) p.130.

4 At the time of the committee's consideration, the Act was named the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018. See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, *Report 4 of 2018* (8 May 2018) pp.145-159; *Report 3 of 2018* (27 March 2018) pp.70-78.The committee has also considered the human rights implications of waiting periods for newly arrived residents to access social security payments on a number of occasions: Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 2- 11; *Report 8 of 2016* (9 November 2016) pp. 57-61; *Report 2 of 2017* (21 March 2017) pp. 41-43; *Report 4 of 2017* (9 May 2017) pp. 149-154.

5 Following the committee's consideration of the bill, some of these waiting periods were extended to four years, but some other visas had the waiting period decreased to one year or two years. See Supplementary Explanatory Memorandum to the Social Services Legislation Amendment (Encouraging Self-Sufficiency for Newly Arrived Migrants) Bill 2018, p.6.

6 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, *Report 4 of 2018* (8 May 2018) p.146.

of safeguards, including the Special Benefit which provided a payment of last resort to persons who suffered financial hardship.[7]

Increasing the assurance of support period

1.299 The determination increases the assurance of support period for certain classes of visa so that the periods align with the changes to the newly arrived resident's waiting period introduced by the *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018.* It provides that the assurance period is now four years (increased from two years) for classes of visas that are not otherwise specified to be subject to a different assurance period.[8] This would appear to include classes of visas such as subclass 101 (child), subclass 102 (adoption), subclass 103 (parent) and subclass 151 (former resident).

Compatibility of the measure with the right to protection of the family and the rights of the child

1.300 The right to protection of the family is protected by articles 17 and 23 of the International Covenant on Civil and Political 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.

1.301 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. This 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.[9] Under article 10 of the CRC, Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. The UN Committee on the Rights of the Child has held that:

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7 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, *Report 4 of 2018* (8 May 2018) pp.152-153.

8 Other types of visas are subject to shorter or longer periods which are unchanged from the previous determination: for example for certain types of visas, including the contributory parent visa, the assurance period continues to be 10 years, and for entrants entering pursuant to a community support program the assurance period continues to be 12 months. The determination provides that for remaining relative and orphan relative visas, the assurance period continues to be two years.

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

> ..in assessing the preservation of the family environment and the maintenance of ties as factors that need taking into account when considering the child's best interests, the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.[10]

1.302 As noted in the committee's previous analysis of the assurances of support scheme, 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.[11] Insofar as the visa classes affected by the increased assurance period include child visas and adoption visas, the measures also engage the rights of children.

1.303 Limitations on the right to protection of the family and the rights of children relating to their best interests and family reunification may be permissible where the limitation is in pursuit of a legitimate objective, and is rationally connected and proportionate to the pursuit of that objective.

1.304 The statement of compatibility does not acknowledge that these rights are engaged and may be limited by the determination and therefore does not provide an assessment of whether the limitation on these rights is permissible. However, the statement of compatibility does state that the objective of the assurance of support scheme 'is to protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia'.[12] This was the same objective stated in the committee's previous analysis of the assurance of support scheme.[13] In that analysis, the committee noted that further information as to why the measure is needed from a fiscal perspective or how the proposed measure will ensure the sustainability of the social welfare system was required. However, to the extent the measures may also pursue the objective of assisting to ensure an adequate standard of living for newly arrived migrants, this may be capable of constituting a legitimate objective. As with the previous analysis, further information and evidence as to the objective of the measures would assist in assessing whether the measure pursues a legitimate objective for the purposes of

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10 *YB and NS v Belgium,* UN Committee on the Rights of the Child Application No.12.2017 (5 November 2018) [8.11].

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

12 Statement of compatibility (SOC) p.1.

13 Parliamentary Joint Committee on Human Rights, Social Security (Assurances of Support) Determination 2018 and Social Security (Assurances of Support) Amendment Determination 2018, *Report 7 of 2018* (14 August 2018) pp.126-133; *Report 5 of 2018* (19 June 2018) pp.41-46.

human rights law, and whether the measures are rationally connected to that objective. Further information from the minister as to the proportionality of extending the assurance of support period for the visas affected would also be of assistance.

Committee comment

1.305 The preceding analysis indicates the measures engage and may limit the right to protection of the family and the rights of the child. These matters were not addressed in the statement of compatibility.

1.306 The committee draws the minister's attention to the committee's previous analysis of the assurances of support scheme in *Report 7 of 2018* and *Report 5 of 2018*.

1.307 The committee seeks the advice of the minister as to the compatibility of the measure with these rights, including:

- **whether the measure pursues 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 the stated objective.**

Compatibility of the measure with the right to an adequate standard of living

1.308 The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.[14]

1.309 Australia has obligations to progressively realise this right and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.[15] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.310 Insofar as assurers undertake to cover the basic necessities of assurees, the right to an adequate standard of living is engaged by the measures. For the reasons discussed below, the right to an adequate standard of living of the assurers is also engaged and may be limited by the measures. The statement of compatibility acknowledges the right to an adequate standard of living is engaged by the relevant measures, but states that the right is not limited by the measures because:

14 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 11.

15 ICESCR, article 2.

> An assurance of support is a legally binding commitment by the assurer to support the visa entrants for the duration of the assurance period. This commitment may be secured by a bond, which is used to repay any recoverable social security payments made to the visa entrants during this period. If the assurer is not able to provide adequate support to the visa entrants during the assurance period, the visa entrants may be eligible for a social security payment. The assurer is responsible for repayment of any recoverable social security payments received by the visa entrants during the assurance period.[16]

1.311 To the extent that measures may assist to ensure an adequate standard of living for newly arrived migrants because persons will have their basic necessities covered during the assurance period, the measure may positively engage the right to an adequate standard of living. However, in circumstances where an assurer becomes liable for unforeseen expenses of the assuree (including recoverable social security payments, where applicable), extending the period of assurance may limit the right to an adequate standard of living of assurers. In its analysis of the newly arrived migrant waiting period, the committee noted that an important safeguard was the ability of migrants to receive a Special Benefit where migrants were unable to support themselves in certain circumstances, for example where the persons are victims of domestic violence.[17] Based on the information provided by the minister in the determination, it appears that an assurer would be responsible for repayment of any Special Benefit if such a benefit was provided during the assurance period. Further information from the minister as to whether this is the case and, if so, the safeguards that would apply to ensure that assurers would not suffer financial hardship as a result of having to repay such expenses, would be of assistance in determining the extent to which the right to an adequate standard of living is limited (that is, whether the measures are a retrogressive measure) and whether any limitation is permissible.

Committee comment

1.312 The preceding analysis indicates the measures engage and may limit the right to an adequate standard of living.

1.313 The committee draws the minister's attention to the committee's previous analysis of the human rights compatibility of the newly arrived migrant waiting period in *Report 4 of 2018* and *Report 3 of 2018*.

1.314 The committee seeks the advice of the minister as to compatibility of the measure with the right to an adequate standard of living, including whether

16 SOC, p.1-2.

17 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, *Report 4 of 2018* (8 May 2018) pp.148, 150-152.

assurers would be liable for the payment of any Special Benefit paid to an assuree and, if so:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law;**
- **whether the measure is rationally connected to that objective; and**
- **whether the measure is proportionate (including whether there are safeguards to ensure that assurers would not be subject to financial hardship if required to repay unforeseen social security payments of the assuree).**

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills[1]

Purpose	Establish a new Commonwealth business registry regime, by modernising Commonwealth registers and establishing a framework for director identification numbers
Portfolio	Treasury
Introduced	House of Representatives, 13 February 2019
Right	Privacy
Status	Seeking additional information

Background

1.315 The Commonwealth Registers Bill 2019, Treasury Laws Amendment (Modernisation and Other Measures) Bill 2019, Business Names Registration (Fees) Amendment (Registries Modernisation) Bill, Corporations (Fees) Amendment (Registries Modernisation) Bill 2019 and the National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019 constitute a legislative package designed to establish a new business registry regime.[2]

1.316 The first element of the package seeks to modernise Commonwealth business registers by consolidating the business registers administered by the Australian Securities and Investments Commission (ASIC) and Australian Business Registry and providing for the appointment and functions of a registrar who would be responsible for administering the new registers regime.[3]

1.317 The second element of the package seeks to establish a legal framework for director identification numbers (DINs). The framework would require all directors of bodies corporate registered under the *Corporations Act 2001* (Corporations Act) or *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) to apply for, and hold, a permanent unique DIN. To administer the scheme, the new registrar would be required to issue a director with a DIN, where they are satisfied the

1 Commonwealth Registers Bill 2019; Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; Corporations (Fees) Amendment (Registries Modernisation) Bill 2019; and National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019.

2 Commonwealth Registers Bill 2019, Statement of compatibility (SOC), p 63.

3 Commonwealth Registers Bill 2019, Explanatory Memorandum (EM), p. 6.

director's identity has been established, and keep a record of the DINs issued to directors.[4]

Collection and disclosure of personal information

1.318 The bills confer a range of powers and functions on the new registrar, some of which relate to the collection and disclosure of personal information.

Collection of personal information

1.319 Section 13(1) of the Commonwealth Registers Bill provides that the registrar may make data standards on matters relating to the performance of their functions and exercise of their powers. Section 13(2) relevantly provides that the data standards may address a range of issues relating to the collection and disclosure of information, including:

- the type of information which may be collected by the registrar to perform their functions and exercise their powers;
- how such information may be collected;
- the manner and form in which such information is given to the registrar;
- what information is given to the registrar;
- how information held by the registrar is to be stored; and
- the integration or linking of information held by the registrar.[5]

Disclosure of personal information

1.320 Part 4 of the Commonwealth Registers Bill regulates the disclosure of 'protected information' by the registrar. 'Protected information' is defined broadly by section 5 of the bill to mean information which is:

- obtained by a person in the course of the person's official employment; and
- disclosed to the person or another person, or obtained by the person or another person:
  - under, or in relation to, this Act; or
  - under another law of the Commonwealth in connection with particular functions or powers of the Registrar.[6]

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4 *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, proposed section 308-5; *Corporations Act 2001* (Corporations Act), proposed section 1272.

5 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 inserts equivalent provisions into the *National Consumer Credit Protection Act 2009* (NCCP Act) (proposed section 212H), the *Business Names Registration Act 2011* (Business Names Registration Act) (proposed section 62H), and the Corporations Act (proposed section 1270G).

1.321 Section 16 of the Commonwealth Registers Bill empowers the registrar to make a disclosure framework relating to disclosing protected information. Section 16(2) provides that the framework may set out the circumstances in which:

- protected information must not be disclosed without the consent of the person to whom the information relates;
- de-identified personal information may be disclosed;
- protected information may be disclosed to the general public; and
- confidentiality agreements are required for that disclosure of protected information.

1.322 Section 16(2) also provides that the framework may impose conditions on the disclosure of protected information.

1.323 Section 16(5) of the Commonwealth Registers Bill provides that the disclosure framework must not permit the disclosure of protected information unless the registrar is satisfied that the benefits of disclosure outweigh the risks of disclosure, taking into account any mitigation of those risks in accordance with the disclosure framework.

1.324 In addition to the power to make a disclosure framework, section 17 of the Commonwealth Registers Bill makes it an offence for a person who is, or has been, in official employment to make a record of information or disclose information to another person, where they obtained that information in the course of their official employment.

1.325 Section 17(2) creates an exemption to this offence where the disclosed information is authorised by subsection 17(3), namely where:

- the recording or disclosure is for the purposes of the Act;
- the recording or disclosure happens in the course of the performance of the duties of the person's official employment;
- the disclosure is to another person to use in the course of their official employment and performance or exercise of the functions or powers of a government entity;
- each person to whom the information relates consents to the disclosure; or
- the disclosure is in accordance with the disclosure framework.

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6 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to insert the same definition of 'protected information' outlined at paragraph [1.320] into the following Acts: Corporations Act, section 9; Business Names Registration Act, section 3; and the NCCP Act, section 5(1).

Compatibility of the measures with the right to privacy

1.326 The right to privacy encompasses respect for informational privacy, including 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.[7]

1.327 As acknowledged by the statement of compatibility,[8] the powers and functions of the registrar may engage and limit the right to privacy, by providing for the collection and disclosure of personal information,[9] and the creation of data standards and disclosure frameworks which in turn may authorise the circumstances in which personal information may be collected, stored and disclosed.[10]

1.328 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.

1.329 The statement of compatibility explains that the collection of personal information by the registrar in accordance with data standards 'is required for the effective operation of the registry regime'.[11] However, this does not specifically address whether the collection of personal information pursues a legitimate objective for the purposes of international human rights law. 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.[12]

1.330 In relation to the disclosure of information by the registrar in accordance with disclosure frameworks, the statement of compatibility explains:

> These disclosures achieve a number of legitimate objectives, and ensure that the new registry regime can be effectively administered.
>
> In relation to disclosure within Government, registry information that is required for the administration of other Australian laws is made available for that purpose. Disclosure with consent achieves the benefit of allowing data to be used for other purposes with a public benefit so long as each person to whom the data relates consents to the disclosure.

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7 International Covenant on Civil and Political Rights, article 17.

8 Commonwealth Registers Bill 2019, SOC, p. 70.

9 See, for example, Commonwealth Registries Bill 2019, section 17(3).

10 Commonwealth Registers Bill 2019, section 13.

11 Commonwealth Registers Bill, SOC, p. 70.

12 See Parliamentary Joint Committee on Human Rights, *Guidance Note 1 – Drafting Statements of Compatibility* at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

> Disclosure in accordance with the disclosure framework is intended to provide the registrar with flexibility that will provide broader public benefits in the future. It is envisaged that the ability to make a disclosure framework will provide the registrar with flexibility regarding the release of registry information. For example, the framework could allow a trusted user (for instance a university whose IT systems, processes and staff have been vetted) to access information that may not be appropriate for wider dissemination where a social benefit exists and appropriate undertakings are made.[13]

1.331 The disclosure of information to administer other Australian laws, and the consensual disclosure of personal information for a public benefit, may be capable of constituting legitimate objectives under human rights law and may also be rationally connected to those objectives. However, regarding the disclosure of information in accordance with disclosure frameworks, it is unclear what is meant by the term 'public benefits' referred to in the statement of compatibility. Consequently, further information is necessary to determine whether the measure pursues a legitimate objective for the purposes of international human rights law and is rationally connected to that objective.

1.332 The ability to collect information pursuant to data standards or disclose information pursuant to a disclosure framework raises questions 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. This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.[14] Further information, including the rationale for providing for collection and disclosure to be regulated by way of proposed standards and frameworks rather than by way of primary legislation, would assist with this analysis.

1.333 Concerns also arise with respect to the scope of information which may potentially be collected and disclosed. In relation to the collection of information by the registrar, the statement of compatibility explains that:

> While the making of the data standards is a matter for the registrar, it is likely that personal information about company officers, financial service licensees and other persons on the current business registers will be

13 Commonwealth Registers Bill, SOC, p. 72.

14 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hanson and Chaush v Bulgaria*, European Court of Human Rights Application no. 30985/96 (26 October 2000) [84].

> collected. This is because such information is required for the effective operation of the registry regime.[15]

1.334 This indicates that, in practice, the type of information which may be collected by the registrar may be restricted to the relevant business context. However, as noted above at [1.321], the type of information which may be disclosed under the proposed disclosure framework appears to be quite broad, extending to any information obtained and disclosed by a person in the course of their official employment under the relevant Act, or under another Commonwealth law in connection with the functions or powers of the registrar. This raises concerns as to whether the measures are sufficiently circumscribed. Further information about the nature and scope of the personal information which is likely to be collected and disclosed under the new regime is therefore necessary to determine whether these measures constitute a proportionate limitation on the right to privacy.

1.335 The availability of adequate safeguards to protect the right to privacy is relevant to assessing the proportionality of a measure that engages and limits that right. In this regard, it is noted that there are penalties in place for persons who engage in unauthorised recording, disclosure or use of protected information.[16]

1.336 In addition, the disclosure framework enabled by section 16 of the Commonwealth Registers Bill could potentially contain additional safeguards on the disclosure of protected information. For example, the framework might require that protected information only be disclosed in circumstances where the person to whom the information relates has consented to the disclosure,[17] and the intended recipient is subject to the Australian Privacy Principles and has entered into a confidentiality agreement.[18] However, whether the disclosure framework contains sufficient safeguards to protect the right to privacy will ultimately depend on how the framework is drafted.

1.337 In this regard, it is noted that subsection 16(5) of the Commonwealth Registers Bill provides that the disclosure framework must not permit the disclosure of protected information unless the registrar is satisfied that the benefits of disclosure outweigh the risks of disclosure, taking into account any mitigation of those risks in accordance with the disclosure framework. This is a relevant potential safeguard on the right to privacy. However, it is noted that there is no mandatory requirement that the registrar expressly consider the right to privacy in making such an assessment, and so whether this safeguard is effective will depend on the content of the disclosure framework and how the measure operates in practice. In light of

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15 Commonwealth Registers Bill, SOC, p. 70.

16 Commonwealth Registers Bill, section 17(1).

17 Commonwealth Registers Bill, section 16(2)(a).

18 Commonwealth Registers Bill, section 16(2)(e)-(f).

the preceding analysis, questions remain as to the likely content of the disclosure frameworks and the capacity of specific measures relating to data collection, storage, linkage and disclosure within those frameworks to limit the right to privacy.

Committee comment

1.338 The preceding analysis raises questions as to the compatibility of the measure with the right to privacy.

1.339 The committee therefore seeks the advice of the minister as to the compatibility of the information collection and disclosure powers with the right to privacy, including:

- **whether the provisions enabling the collection and disclosure of protected information in accordance with a data standard or disclosure framework pursue a legitimate objective;**
- **whether the measures are rationally connected to (that is, effective to achieve) that objective; and**
- **whether the limitation on the right to privacy imposed by the power to collect and disclose protected information is proportionate to the stated objective of the measure (including whether there are adequate safeguards in place in relation to the capacity of the registrar to use a data standard or disclosure framework to introduce new circumstances in which protected information could be disclosed, and, if possible the proposed content of any data standards and disclosure frameworks regarding the collection, storage, use, linking and disclosure of protected information).**

Further response required

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

Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018

Purpose	Seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*, including to require prospective candidates in federal elections to provide information to demonstrate their eligibility to be elected under section 44 of the Constitution
Portfolio	Special Minister of State
Introduced	House of Representatives, 29 November 2018
Rights	Privacy; right to take part in public affairs
Previous report	Report 1 of 2019
Status	Further response required

Background

1.341 The committee first reported on the bill in its *Report 1 of 2019*, and requested a response from the minister by 4 March 2019.[1]

1.342 No response was received to the committee's request before the bill passed both Houses of Parliament and received Royal Assent or at the time of finalising this report.[2]

Collection and publication of information relating to a person's eligibility for election under section 44 of the Constitution

1.343 The bill amended the *Commonwealth Electoral Act 1918* (Electoral Act) to provide that a person must complete all mandatory questions on a qualification checklist in order to validly nominate for a federal election.[3] It also requires the

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 24-28.

2 The bill passed both Houses of Parliament on 18 February 2019 and received Royal Assent on 1 March 2019.

3 Section 170(1)(d) of the Electoral Act. 'Mandatory question' defined in section 4 of the Electoral Act as a question to which the answer is 'Yes' or 'No', or (if applicable) 'Unknown' or 'N/A'.

Electoral Commissioner to publish the completed qualification checklist, along with any supporting documents provided by the nominee, on the website of the Australian Electoral Commission (AEC).[4]

Compatibility of the measures with the right to privacy and the right to take part in public affairs

1.344 The right to privacy protects against arbitrary and unlawful interference with an individual's privacy and attacks on reputation. It also includes respect for information privacy, including the right to control the storing, use and sharing of personal information. The initial analysis noted that the publication and disclosure requirements relating to the qualifications checklist engage and limit the right to privacy. This is also acknowledged in the statement of compatibility.[5]

1.345 The right to take part in public affairs guarantees the right of citizens to stand for public office, and requires that any administrative and legal requirements imposed on persons standing for office be reasonable and non-discriminatory. The initial analysis noted that, by imposing additional eligibility requirements on persons nominating for election, the measures engage and limit the right to take part in public affairs. The statement of compatibility also acknowledges that the measures engage this right.[6]

1.346 The right to privacy and the right to take part in public affairs may be subject to permissible limitations under international human rights law. In order to be permissible, any limitation must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.347 The statement of compatibility indicates that the purpose of publishing the qualifications checklist and supporting documents is to ensure the eligibility of political candidates and to encourage prospective candidates to consider their eligibility before nominating for election.[7] The initial analysis noted that these are likely to be legitimate objectives for the purposes of international human rights law. However, the analysis also noted that further information would be useful in relation to how mandating the publication of the information would be effective to achieve (that is, rationally connected to) the stated objectives of the measures.

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4 Section 181A of the Electoral Act. The qualification checklist includes questions concerning the nominee's birthplace and citizenship, and other matters relevant to their eligibility for election (for example, the nominee's criminal history). It also includes questions concerning the birthplace and citizenship of related third parties, such as the nominee's biological and adoptive parents and grandparents, and current and former spouses: See Form DB, in particular questions 1 to 9.

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

6 SOC, p. 14.

7 SOC, p. 12.

1.348 The initial analysis also raised concerns as to the proportionality of the measures. In particular, the analysis noted that the measures may go beyond what is strictly necessary to achieve their stated objectives. For example, it was not clear why it is strictly necessary for the Commissioner to publish the qualification checklist and supporting documents on the AEC website. There were also concerns about whether the measures are accompanied by adequate safeguards. The analysis noted that the safeguards identified in the statement of compatibility appeared to rely largely on the discretion of the Commissioner and the relevant nominee, and did not appear to give third parties sufficient control over the publication of their personal information.[8] On the basis of the information in the statement of compatibility, it was not clear that the safeguards would, in practice, be sufficient to ensure that the measures would impose only proportionate limitations on human rights.

1.349 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 24-28.[9]

1.350 The committee therefore sought the advice of the minister as to:

- how the measures would be effective to achieve (that is, rationally connected to) their stated objectives; and
- whether the measures are proportionate to achieving their stated objectives, including:
  - whether the measures are the least rights-restrictive means of achieving their stated objectives (including whether publishing the qualifications checklist and supporting documents online is strictly necessary);
  - how the identified safeguards would ensure that the measures would, in practice, constitute a proportionate limitation on the right to take part in public affairs and the right to privacy (including safeguards to protect the rights of third parties whose personal information may be publicly disclosed, and any information as to how the Electoral Commission would determine whether a matter is 'unacceptable, inappropriate, offensive or unreasonable'); and
  - any other information that may be relevant to the proportionality of the measures.

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8 For example, the statement of compatibility states that a nominee, or the Commissioner would be permitted (but not required) to redact, omit or delete information from the qualification checklist or supporting documents.

9 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 24-28 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

Committee comment

1.351 The committee notes that the minister did not respond to the committee's inquiries in relation to the compatibility of the measures with the right to privacy and the right to take part in public affairs.

1.352 The committee is unable to conclude its analysis of human rights compatibility in the absence of a response from the minister. Accordingly, the committee requests the minister's further advice as to:

- **how the measures would be effective to achieve (that is, rationally connected to) their stated objectives; and**
- **whether the measures are proportionate to achieving their stated objectives, including:**
  - **whether the measures are the least rights-restrictive means of achieving their stated objectives (including whether publishing the qualifications checklist and supporting documents online is strictly necessary);**
  - **how the identified safeguards would ensure that the measures would, in practice, constitute a proportionate limitation on the right to take part in public affairs and the right to privacy (including safeguards to protect the rights of third parties whose personal information may be publicly disclosed, and any information as to how the Electoral Commission would determine whether a matter is 'unacceptable, inappropriate, offensive or unreasonable'); and**
  - **any other information that may be relevant to the proportionality of the measures.**

Intelligence Services Amendment Bill 2018

Purpose	Enables the minister to specify additional persons outside Australia who may be protected by an Australian Secret Intelligence Service (ASIS) staff member or agent, and to provide that an ASIS staff member or agent performing specified activities outside Australia will be able to use force in the performance of an ASIS function
Portfolio	Foreign Affairs
Introduced	House of Representatives, 29 November 2018
Rights	Life; liberty; torture, cruel, inhuman and degrading treatment or punishment
Previous reports	Report 1 of 2019
Status	Further response required

Background

1.353 The committee first reported on the bill in its *Report 1 of 2019*, and requested a response from the minister by 4 March 2019.[1]

1.354 The bill passed both Houses of Parliament on 5 December 2018 and received Royal Assent on 10 December 2018. No response was received to the committee's request at the time of finalising this report.

Use of force by ASIS staff members overseas

1.355 Prior to the amendments, section 6(4) of the *Intelligence Services Act 2001* (IS Act) provided that the Australian Secret Intelligence Service (ASIS) must not plan for or undertake activities that involve paramilitary activities, violence against the person, or the use of weapons, by staff members or agents of ASIS. This was subject to certain limited exceptions relating to the provision of weapons, training relating to the use of weapons, and the use of weapons or self-defence techniques, where it was provided to or used by a staff member of ASIS for the purpose of enabling the person to protect themselves, to protect a staff member or ASIS agent, to protect a

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 29-34.

person cooperating with ASIS under section 13 of the IS Act, or to provide training to ASIS staff members and agents.[2]

1.356 The bill amended the IS Act to provide that the minister may specify additional persons outside Australia who may be protected by an ASIS staff member or agent.[3]

1.357 The bill also amended the IS Act to introduce new subsection 6(5A) and new Schedule 3 to expand the circumstances in which ASIS staff and agents overseas may use force. Section 6(5A) provides that the general prohibition on activities in section 6(4) of the IS Act does not prevent provision of weapons or training in the use of force, or the use of force or threat of force against a person in the course of activities undertaken by ASIS outside Australia in accordance with new Schedule 3 of the IS Act.

1.358 Schedule 3 provides that the use of force (including the use of a weapon) against a person, or the threat of use of force against a person, in the course of activities undertaken by ASIS outside Australia is not prevented by the general prohibition on activities set out in section 6(4) of the IS Act if:

- the conduct is by a staff member or agent of ASIS; and
- the conduct is for the purpose of preventing, mitigating or removing:
  - a significant risk to a person's safety; or
  - a significant threat to security;[4] or
  - a significant risk to the operational security of ASIS from interference by a foreign person or entity; and
- the conduct is in accordance with ministerial approval; and
- guidelines have been issued by the Director-General of ASIS;[5] and

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2 See section 6(5) and Schedule 2 of the IS Act. The provision of a weapon, or training in the use of a weapon or in self-defence techniques must be in accordance with ministerial approval: section 1(1)(c) of Schedule 2 of the IS Act. For the use of a weapon or self-defence techniques, guidelines must have been issued by the Director-General of ASIS and the weapon or techniques must be used in accordance with those guidelines: section 1(2) of Schedule 2 of the IS Act.

3 See new section 1(1)(b)(iiia) and section 1(1A)(iv) of Schedule 2 of the IS Act.

4 'Security' is defined by reference to sections 4(a) and (aa) of the *Australian Security Intelligence Organisation Act 1979* to mean the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, or acts of foreign interference, whether directed from, or committed within, Australia or not; and the protection of Australia's territorial and border integrity from serious threats.

- the conduct is in compliance with those guidelines.[6]

1.359 Similar requirements are imposed in relation to the provision of a weapon, or training in the use of force, however, for such activities there is no requirement for guidelines to be issued by the Director-General of ASIS.[7]

1.360 The minister must not give approval for the use of force or threat of use of force unless the minister has consulted with the Prime Minister, the Attorney-General, the Defence minister and any other minister who has responsibility for a matter that is likely to be significantly affected by the act that is to be approved.[8] The approving minister must also be satisfied, having regard to the purposes for which the approval is given, that there are satisfactory arrangements in place to ensure that nothing will be done pursuant to the approval beyond what is necessary; and that there are satisfactory arrangements in place to ensure that the nature and consequence of acts done under the approval will be reasonable.[9]

1.361 The bill also introduced section 6(5B) which provides that these new exceptions do not permit conduct by a person that:

- would constitute torture; or
- would subject a person to cruel, inhuman or degrading treatment; or
- would involve the commission of a sexual offence against any person; or
- is likely to cause the death of, or grievous bodily harm to, a person, unless the actor believes on reasonable grounds that the conduct is necessary to protect life or to prevent serious injury to another person.

1.362 The safeguards in section 6(5B) may be sufficient so as to ensure that any use of force would be compatible with Australia's obligations relating to torture, cruel, inhuman and degrading treatment or punishment (TCIDT), and the right to life. However, there were questions as to compatibility of the measure with the right to liberty and security of the person, discussed below.

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5 Section 2 of Schedule 3 sets out the requirements for guidelines issued by the Director-General of ASIS relating to the use or threat of use of force. Section 2 requires that a copy of the guidelines must be provided to the Inspector-General of Intelligence and Security, and that the Inspector-General of Intelligence and Security must brief the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on the content and the effect of the guidelines if so requested by the Committee or if the guidelines change.

6 Section 1(2) of Schedule 3 to the IS Act.

7 Section 1(1) of Schedule 3 to the IS Act.

8 Section 1(3)(b) and (4)(a) of Schedule 3 to the IS Act.

9 Section 1(4)(b) of Schedule 3 to the IS Act.

Compatibility of the measure with the right to liberty and security of the person: initial analysis

1.363 The initial analysis raised concerns about the compatibility of the measure with the right to liberty and security of the person. The committee noted that protecting the right to life and liberty of ASIS staff members is likely to be a legitimate objective for the purposes of international human rights law and that the use of force in such circumstances, including the ability to temporarily restrain persons, appears also to be rationally connected to this objective.

1.364 The initial analysis raised questions in relation to the proportionality of the measure. As noted above, the circumstances in which force can be used or threatened to be used are limited to where there is a 'significant risk' to a person's safety or a 'significant threat' to 'security' or 'operational security of ASIS from interference by a foreign person or entity'. While 'security' is defined and the threshold of 'significant' risk or threat provides an important safeguard, the initial analysis noted that it is not clear from the bill or the statement of compatibility what is meant by the term 'operational security' and what would constitute 'interference' so as to enliven the use of force power.

1.365 Further, the statement of compatibility states that guidelines would be issued by the Director-General in relation to the use of weapons and self-defence techniques and application of force which ASIS must comply with.[10] However, the initial analysis noted that in the absence of the committee receiving a copy of those guidelines or further information as to the proposed content of those guidelines, it was not possible to conclude whether the guidelines would be sufficient for the purposes of international human rights law.

1.366 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 31-34.[11]

1.367 The committee therefore sought the advice of the minister as to the compatibility of the measure with the right to liberty and security of the person, in particular:

- whether the measure is sufficiently circumscribed for the purposes of proportionality, including the meaning of 'operational security' and what would constitute 'interference' so as to enliven to use of force power in section 1(2) of Schedule 3;

10 Statement of compatibility (SOC), [23].

11 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 31-34 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

- in relation to the guidelines to be issued by the Director-General of ASIS, a copy of those guidelines or information, including in relation to what safeguards will be included in the guidelines to ensure that any use of force is compatible with the right to liberty (for example, information as to time limits for which a person may be restrained); and
- any other safeguards that may be relevant to the proportionality of the measure.

Committee response

1.368 The committee notes that the minister did not respond to the committee's inquiries in relation to the compatibility of the measures with the right to liberty and security of the person.

1.369 The committee is unable to conclude its analysis of human rights compatibility in the absence of a response from the minister. The committee therefore seeks the further advice of the minister as to:

- **whether the measure is sufficiently circumscribed for the purposes of proportionality, including the meaning of 'operational security' and what would constitute 'interference' so as to enliven to use of force power in section 1(2) of Schedule 3;**
- **in relation to the guidelines to be issued by the Director-General of ASIS, a copy of those guidelines or information, including in relation to what safeguards will be included in the guidelines to ensure that any use of force is compatible with the right to liberty (for example, information as to time limits for which a person may be restrained); and**
- **any other safeguards that may be relevant to the proportionality of the measure.**

Advice only

1.370 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. 4) 2018-2019

Appropriation Bill (No. 3) 2018-2019

Appropriation (Parliamentary Departments) Bill (No. 2) 2018-2019

Purpose	Seeks to appropriate money from the Consolidated Revenue for services
Portfolio	Finance
Introduced	House of Representatives, 14 February 2019
Rights	Multiple rights; economic, social and cultural; civil and political; equality and non-discrimination
Status	Advice only

Background

1.371 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] In its *Report 5 of 2018* the committee recommended that departmental officials meet with the committee secretariat on behalf of the committee to develop workable approaches to statements of

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) pp. 5 and 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; *Report 5 of 2018* (19 June 2018) pp. 49-52.

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.

compatibility for appropriations bills and sought the advice of the minister as to this course of action. Departmental officials met with the committee secretariat on 30 October 2018.

Potential engagement and limitation of human rights by appropriations Acts

1.372 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]

1.373 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

1.374 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. 4) 2018-2019 (Bill No. 4): explanatory memorandum (EM), statement of compatibility (SOC), p. 4; Appropriation Bill (No. 3) 2018-2019: EM, SOC, p. 4 (Bill No. 3); Appropriation (Parliamentary Departments) Bill (No. 2) 2018-2019 (Parliamentary Departments): EM, SOC, p. 4.

7 Bill No. 4, EM, SOC, p. 4; Bill No. 3, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4.

8 Bill No. 4, EM, SOC, p. 4; Bill No. 3, EM, SOC, p. 4; Parliamentary Departments, EM, SOC, p. 4.

1.375 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.

1.376 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*. The statements of compatibility therefore do not meet the standards outlined in the committee's *Guidance Note 1* and the requirement that a statement of compatibility contain an *assessment*.

1.377 As previously stated, while such bills present some 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 questions of compatibility. The statement of compatibility could contain an assessment of:

- overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);
- the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (women, Aboriginal and Torres Strait Islander Peoples, persons with disabilities and children);[11] and

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

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

11 Spending or reduction of spending may have disproportionate impacts on such groups and accordingly may engage the right to equality and non-discrimination.

- key individual measures which engage human rights including a brief assessment of their human rights compatibility.

1.378 In relation to overall trends and Australia's obligations to progressively realise economic, social and cultural rights, relevant questions to guide analysis include:

- Do funding trends indicate the progressive realisation of human rights using the maximum of resources available (such as the right to health, education, housing or social security)? Is there an increase in funding over time in real terms?
- Are there any trends that increase expenditure in such a way that would benefit vulnerable groups (see further below)?
- Are there are any trends towards a reduction in the allocation of funding that may impact on the realisation of human rights (such as the right to health, education, housing or social security)?
- If so, is this reduction a backward step, that is, a retrogressive trend, in the realisation of such human rights, or is there another explanation?
- If this reduction is a backward step, is the retrogressive trend permissible under international human rights law?

1.379 In relation to the impact of spending or reduction in spending on vulnerable groups, some relevant considerations may include:

- Are there any specific budget measures that may disproportionately impact upon this group in particular (either directly or indirectly)?
- Are there any budget measures or trends in spending over time that seek to fulfil the right to equality and non-discrimination for this group?

1.380 As noted above, since the committee last reported on appropriations bills, at the committee's request, Department of Finance officials met with secretariat staff on behalf of the committee about improving statements of compatibility for

appropriations bills.[12] A number of resources were provided to the Department of Finance to assist in preparing statements of compatibility for appropriations bills including operationalised examples. Departmental officials indicated that they would continue to engage further about improving statements of compatibility for appropriations bills. The committee welcomes further engagement about this issue.

Committee comment

1.381 The committee notes that, as with previous appropriations bills, the statements of compatibility for the current bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights.

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

1.383 The committee requests that statements of compatibility for future appropriations bills contain an assessment of human rights compatibility which meets the standards outlined in the committee's *Guidance Note 1*. The committee recommends that the statement of compatibility contain an assessment of:

- **overall trends in the progressive realisation of economic, social and cultural rights (including any retrogressive trends or measures);**
- **the impact of budget measures (such as spending or reduction in spending) on vulnerable groups (including women, Aboriginal and Torres Strait Islander Peoples, persons with disabilities and children); and**
- **key individual measures which engage human rights including a brief assessment of their human rights compatibility.**

1.384 The committee thanks the minister and departmental officials for their constructive engagement with these issues and welcomes continued engagement

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12 There are a range of resources to assist in the preparation of human rights assessments of budgets: See, for example, UN Office of the High Commissioner for Human Rights, *Realising Human Rights through Government Budgets* (2017) at: https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf; South African Human Rights Commission, *Budget Analysis for Advancing Socio-Economic Rights* (2016) at: http://spii.org.za/wp-content/uploads/2018/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socio-Economic-Rights.pdf; Ann Blyberg and Helena Hofbauer, *Article 2 and Governments' Budgets* (2014) at: https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf; Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (UNIFEM, 2006) at: https://www.internationalbudget.org/wp-content/uploads/Budgeting-for-Women%E2%80%99s-Rights-Monitoring-Government-Budgets-for-Compliance-with-CEDAW.pdf; 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).

as part of its project to improve statements of compatibility. It recommends that departmental officials and the committee secretariat on behalf of the committee continue to liaise regarding workable approaches to statements of compatibility for appropriations bills.

Charter of the United Nations (Sanctions—Mali) Regulations 2018 [F2018L01614]

Purpose	Imposes sanctions in relation to Mali in accordance with United Nations Security Council Resolution 2374
Portfolio	Foreign Affairs
Authorising legislation	*Charter of the United Nations Act 1945*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 28 November 2018, tabled Senate 29 November 2018)
Rights	Privacy; fair hearing; adequate standard of living; equality and non-discrimination
Status	Advice only

Background

1.385 The *Charter of the United Nations Act 1945* (Charter of United Nations Act), in conjunction with various instruments made under that Act, gives the Australian government the power to apply sanctions to give effect to decisions of the United Nations (UN) Security Council.

1.386 Sanctions under the UN Charter sanctions regime can:

- prohibit dealings with designated or listed persons or entities and their assets, the effect of which is that the assets of the designated person or entity are frozen, and declare that a person is prevented from traveling to, entering or remaining in Australia; and
- restrict or prevent the supply, sale or transfer or procurement of goods or services.

1.387 Under the UN Charter sanctions regime, as established under Australian law, one of the methods by which a person can be designated is by automatic designation by the UN Security Council Committee. The other method by which a person can be designated is by listing by the minister if he or she is satisfied that the person is a person mentioned in UN Security Council Resolution 1373.[1]

1.388 The committee has considered the human rights compatibility of the UN Charter sanctions regime, the sanctions regime under the *Autonomous Sanctions Act 2011,* and instruments enacted pursuant to those regimes on a number of

1 See *Charter of United Nations Act 1945*, Part 3 and Part 4; Charter of the United Nations (Dealing with Assets) Regulations 2008 [F2014C00689], section 20.

occasions.[2] These analyses explained that, to the extent the sanctions regime may affect individuals within Australia's jurisdiction, sanctions regimes engage and may limit a number of human rights for individuals who may be subject to sanctions, including the right to privacy, the right to a fair hearing, the right to protection of the family, the right to an adequate standard of living, the right to freedom of movement, the prohibition against non-refoulement, and the right to equality and non-discrimination.[3]

Freezing of a designated person's assets

1.389 The regulations implement the decision of the United Nations Security Council Resolution 2374 (2017) to impose sanctions in relation to Mali. The UN Mali Sanctions Committee designated persons or entities who are responsible for, or complicit in, or who have engaged in, actions or policies that threaten the peace, security or stability of Mali.

1.390 In particular, the regulations impose financial sanctions in relation to persons or entities designated by the Mali Sanctions Committee. This includes a prohibition in relation to 'dealings' with designated persons or entities, such that a person must not directly or indirectly make an asset available to, or for the benefit of, a designated person or entity unless such conduct is authorised by a permit.[4] A person must not hold a controlled asset[5] or deal with or use such asset unless authorised by a permit.[6] The regulations also set out the requirements for applying for a permit and conditions that may be imposed on the permits.[7] The minister may grant a permit

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2 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104-131. See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104-131. See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third Report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth Report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.

4 Regulations, section 5. Strict liability applies to the circumstance that the making available of the asset is not authorised by a permit and the offence has extraterritorial application.

5 'Controlled asset' is defined in section 4 of the regulations to mean an asset that is owned or controlled, directly or indirectly, by (a) a designated person or entity; or (b) a person or entity acting on behalf of, or at the direction of, a designated person or entity; or (c) an entity owned or controlled by a designated person or entity.

6 Regulations, section 6.

7 Regulations, sections 7-9.

authorising the making available of certain assets to a designated person.[8] An application for a permit can only be made for basic expenses, to satisfy a legal judgment or where a payment is contractually required.[9] A basic expense includes foodstuffs; rent or mortgage; medicines or medical treatment; public utility charges; insurance; taxes; legal fees and reasonable professional fees.[10]

Compatibility of the measures with the right to privacy, right to a fair hearing and right to an adequate standard of living

1.391 As noted in the previous analysis of sanctions regimes, this analysis is undertaken in relation to the human rights obligations owed to individuals located in Australia. The committee is unaware whether any of the designations made under the regulations has affected individuals living in Australia. However, it is noted that the prohibition relating to dealings with designated persons and the prohibition on dealing with controlled assets are offences that have extraterritorial operation.[11] The analysis below therefore provides an assessment of whether the amendments to the UN Charter sanctions regime introduced by the regulations could breach the human rights of persons to whom Australia owes such obligations, irrespective of whether there have already been instances of individuals within Australia's jurisdiction affected by these measures.

1.392 The regulations do not implement the travel ban pursuant to the Security Council resolution because that ban is implemented separately through the Migration (United Nations Security Council Resolutions) Regulations 2007. In light of this, a number of the human rights that are ordinarily assessed as being engaged by the sanctions regime due to the travel bans are not engaged by the present regulations, including freedom of movement, right to protection of the family and non-refoulement.

Right to a fair hearing

1.393 The right to a fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies both to criminal and civil proceedings, to cases before both courts and tribunals. The right applies where rights and obligations, such as personal property and other private rights, are to be determined. In order to constitute a fair hearing, the hearing must be conducted by an independent and impartial court or tribunal, before which all parties are equal, and have a reasonable opportunity to present their case. Ordinarily, the hearing

8 Regulations, sections 7-9.

9 Regulations, section 7. See also Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

10 Charter of the United Nations (Dealing with Assets) Regulations 2008, section 5.

11 Regulations, section 5(3) and section 6(3); *Charter of the United Nations Act 1945*, section 27.

must be public, but in certain circumstances, a fair hearing may be conducted in private.

1.394 The committee has previously considered that sanctions regimes limit the right to a fair hearing as there is no review, or limited review, of designations before a court or tribunal.[12] The statement of compatibility acknowledges that the right to a fair hearing is engaged, but states that while there is no merits review available 'there are clear procedures for requesting the revocation of designations, and judicial review is available under the *Administrative Decisions (Judicial Review) Act 1976* [sic]'.[13] However, the procedures relating to revocation referred to in the statement of compatibility appear to refer to listings of persons under Security Council Resolution 1373.[14] For persons automatically designated by the UN Security Council (including those subject to the present regulations), there does not appear to be a process under Australian law for review of such a designation,[15] and the statement of compatibility does not provide any further information as to how such designations could be revoked under domestic law or other mechanisms for substantive review that would be available. The committee has previously stated that the automatic designation procedures by the UN Security Council and consequentially under the UN Charter sanctions regime may limit the right to a fair hearing because they do not appear to satisfy the requirement for a full hearing before an independent and impartial court or tribunal.[16] In future, it would be useful if the statement of compatibility accompanying UN Charter sanctions regulations could provide more detailed and specific information as to any review mechanisms that are available.

1.395 The statement of compatibility explains that the purpose of the regulations is:

> …to respond to actions and policies arising in Mali which threaten Mali's peace, security and stability and constitute a threat to international peace and security in the region, and demonstrate the international community's

12 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 86, in the context of the autonomous sanctions regimes. See also, in relation to the UN Charter sanctions regime, Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 51; *Twenty-Eighth Report of the 44th Parliament* (17 September 2015) pp. 32-33.

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

14 See *Charter of the United Nations Act 1945*, sections 16 and 17.

15 Parliamentary Joint Committee on Human Rights, *Twenty-Eighth Report of the 44th Parliament* (17 September 2015) pp. 32-33; See further below and Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) p. 51. Instead, there is a process for persons to be de-listed through the UN Focal Point for Delisting. See United Nations Security Council, *Focal Point for De-listing*, https://www.un.org/securitycouncil/sanctions/delisting.

16 Parliamentary Joint Committee on Human Rights, *Twenty-Eighth Report of the 44th Parliament* (17 September 2015) pp. 32-33.

> condemnation of those involved in such actions by enabling the imposition of targeted financial sanctions on them.[17]

1.396 The committee has previously accepted that the use of sanctions to apply pressure to regimes and individuals in order to end the repression of human rights may be regarded as a legitimate objective for the purposes of international human rights law.[18] It is also acknowledged that, under international law, Australia is bound by the UN Charter to implement UN Security Council decisions,[19] and that obligations under the UN Charter prevail over Australia's obligations under other international agreements (including international human rights treaties).[20]

1.397 However, the previous analysis of sanctions regimes noted that the European Court of Human Rights decision in *Al-Dulimi and Montana Management Inc. v Switzerland* provides further useful guidance on the interaction between UN Security Council sanctions and international human rights law.[21] This case confirmed the presumption that UN Security Council Resolutions are to be interpreted on the basis that they are compatible with human rights.[22] The European Court of Human Rights found that domestic courts should have the ability to exercise scrutiny so that arbitrariness can be avoided. This case also indicated that, even in circumstances where an individual is specifically listed by the UN Security Council Committee, individuals should be afforded a genuine opportunity to submit evidence to a domestic court to seek to show that their inclusion on the UN Security Council list was arbitrary. That is, the state is still required to afford fair hearing rights in these circumstances.[23] The previous analysis raised concerns that the current Australian model of UN Charter sanctions regimes may not have sufficient safeguards so as to comply with Australia's obligations in relation to the right to a fair hearing.[24]

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17 SOC, p. 7.

18 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104-131.

19 See *Charter of the United Nations Act 1945*, article 2(2) and article 41; see UN Charter, article 25.

20 See UN Charter, article 103.

21 *Al-Dulimi and Montana Management Inc. v Switzerland,* European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016).

22 *Al-Dulimi and Montana Management Inc. v Switzerland,* European Court of Human Rights (Grand Chamber) Application No.5809/08 (2016) [140].

23 See also, *Sayadi and Vinck v Belgium,* UN Human Rights Committee Communication No.1472/2006 (2008) [10.9].

24 Parliamentary Joint Committee on Human Rights, *Twenty-Eighth Report of the 44th Parliament* (17 September 2015) p. 34.

Right to privacy

1.398 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interference with an individual's privacy, family, correspondence or home. The freezing of a person's assets and the requirement for a designated person to seek the permission of the minister to access their funds for basic expenses imposes a limit on that person's right to a private life, free from interference by the State. The measures may also limit the right to privacy of close family members of a designated person. Once a person is designated under the sanctions regime, the effect of designation is that it is an offence for a person to directly or indirectly make any asset available to, or for the benefit of, a designated person (unless it is authorised under a permit to do so). This could mean that close family members who live with a designated person will not be able to access their own funds without needing to account for all expenditure, on the basis that any of their funds may indirectly benefit a designated person (for example, if a spouse's funds are used to buy food or public utilities for the household that the designated person lives in).

1.399 Limitations on the right to privacy are permissible provided the measures seek to achieve a legitimate objective, are rationally connected to that objective and are proportionate to that objective. The statement of compatibility acknowledges that the right to privacy is engaged and limited by the regulations. As noted above, it is acknowledged that the sanctions regime pursues a legitimate objective for the purposes of international human rights law.

1.400 The statement of compatibility states that the regulations constitute a permissible limitation on the right to privacy on the following bases:

> The imposition of targeted financial sanctions under the Regulations constitutes a reasonable limitation on the right to privacy. Pursuant to section 4 of the Regulations, the United Nations Committee established under paragraph 9 of resolution 2374 (the Committee) is responsible for designating people for the imposition of targeted financial sanctions. The Committee uses predictable, publicly available criteria when designating a person as being subjected to such measures. These criteria capture only those persons who the Committee is satisfied are responsible for, or complicit in, or have engaged in, directly or indirectly, actions or policies that threaten the peace, security, and stability of Mali.
>
> The imposition of targeted financial sanctions under the Regulations is necessary and proportionate. They are only imposed, pursuant to the Charter, in response to actions and policies arising in Mali which threaten Mali's peace, security, and stability, as outlined in UNSCR 2374. Noting the seriousness of this situation, which includes serious human rights abuses and violations of international humanitarian law, the Government

considers that the targeting of specific individuals for financial sanctions is the least rights-restrictive way to respond.[25]

1.401 Previous human rights analysis of the sanctions regime has acknowledged in an individual case, when accompanied by sufficient safeguards, the imposition of sanctions on an individual may constitute a proportionate limitation on a person's right to a private and home life. For example, in *Bouchra Al Assad v Council of the European Union*, the General Court of the European Union held that the freezing of a person's funds pursuant to targeted sanctions did not constitute a disproportionate impact on a person's private life, having regard to the 'primary importance of protecting the civilian populations in Syria', the availability of periodic review, and the possibility of authorising funds in order to meet basic needs or certain commitments.[26]

1.402 By contrast, before the European Court of Human Rights in *Nada v Switzerland,* the complainant was subject to a travel ban pursuant to UN sanctions and was restricted from accessing Swiss territory, the effect of which was that he was confined to an Italian enclave within Swiss territory. The Court considered that preventing the applicant from leaving the confined area affected his ability to exercise his right to maintain contact with family which was an interference with the applicant's right to respect for his private life. The Court found that, notwithstanding the legitimate aims pursued by the sanctions, the state's failure to take 'all possible measures to adapt the sanctions regime to the applicant's individual situation' meant that the interference was not proportionate.[27]

1.403 To that end, whether the imposition of sanctions on an individual constitutes a proportionate limitation on the right to a private life will depend on the availability of other safeguards, including the availability of review. As noted above, there are serious concerns as to whether the current mechanisms for review of decisions relating to the sanctions regime are sufficient from the perspective of the right to a fair hearing. There is a risk, therefore, that the absence of sufficient safeguards may result in the UN charter sanctions regime also being incompatible with the right to privacy.

1.404 The statement of compatibility does not address the impact of the UN charter sanctions on the right to privacy of close family members of a designated person who may not be able to access their own funds without needing to account for all expenditure (due to the possibility that use of their funds may indirectly

25 SOC, p. 8.

26 *Bouchra Al Assad v Council of the European Union,* Judgment of the General Court of the European Union (Sixth Chamber) Case No.T-202/12 (2014) [107]-[121].

27 *Nada v Switzerland,* European Court of Human Rights (Grand Chamber) Application No.10592/08 (2012) [167]-[199].

benefit a designated person, which would be an offence). This remains a concern with respect to the personal autonomy of family members of designated persons.

1.405 It is noted that UN Human Rights Committee jurisprudence confirms the risk that the domestic implementation of sanctions regimes may breach the right to privacy. In *Sayadi and Vinck v Belgium,* the UN Human Rights Committee found a violation of article 17 of the ICCPR in circumstances where the complainants' names were on a UN sanctions list notwithstanding the dismissal of criminal investigations against them and attempts by the State party to request removal of the names from the list. The UN Human Rights Committee found that Belgium (as the state party responsible for the presence of the authors' names on the list) violated article 17, due in part to the fact that 'the dissemination of personal information about the authors constitutes an attack on their honour and reputation, in view of the negative association that some persons could make between the authors' name and the title of the sanctions list'.[28]

Right to an adequate standard of living

1.406 The right to an adequate standard of living is guaranteed by article 11 of the International Covenant on Economic, Social and Cultural Rights and requires State parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. The imposition of economic sanctions on a person engages and limits this right, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.

1.407 The statement of compatibility acknowledges this right is engaged but states that any limitation is permissible:

> The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. The Regulations state that the Minister may grant a permit for the payment of basic expenses (among others) in certain circumstances. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer its sanctions regimes in a manner compatible with relevant human rights standards.
>
> The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).[29]

1.408 The ability of the minister to grant a permit for the payment of basic expenses is an important safeguard. However, this safeguard is qualified by the

28 *Sayadi and Vinck v Belgium,* UN Human Rights Committee Communication No.1472/2006 (2008) [10.12].

29 SOC, p. 13.

requirement that the minister must give the Mali Sanctions Committee notice of the application and may grant the permit only if the committee does not make a negative decision in relation to the application within 5 working days after the notice is given.[30] The minister may also make the permit subject to conditions.[31] Further, the minister is not *required* to grant the permit for the basic expenses. The committee has previously concluded that limitations on the minister being able to authorise funds to be made available for basic expenses may not be least rights-restrictive way of achieving the legitimate objective.[32]

Right to equality and non-discrimination

1.409 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. Unlawful discrimination may be direct (that is, having the purpose of discriminating on a prohibited ground), or indirect (that is, having the effect of discriminating on a prohibited ground, even if this is not the intent of the measure). One of the prohibited grounds of discrimination under international human rights law is discrimination on the grounds of national origin and nationality.

1.410 Previous human rights analysis of sanctions regimes has considered that applying sanctions to persons designated in relation to specified countries may limit the right to equality and non-discrimination.[33] This is because designations in relation to specified countries (in this case, Mali) may have a disproportionate impact on persons on the basis of national origin or nationality.

1.411 Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination. A disproportionate effect on a particular group may be justifiable such that the measure does not constitute unlawful indirect 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. Information to justify the rationale for differential treatment will be relevant to this proportionality analysis.

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30 Regulations, section 8(2).

31 Regulations, section 9.

32 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 126, in the context of the autonomous sanctions regimes.

33 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 129, in the context of the autonomous sanctions regimes. See also, in relation to the UN Charter sanctions regime, Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 53-54; *Twenty-Eighth Report of the 44th Parliament* (17 September 2015) p. 37.

1.412 The statement of compatibility states that any differential treatment of people as a consequence of the application of the regulations does not amount to discrimination pursuant to article 26 of the ICCPR because:

> The objective of the Regulations is to respond to actions and policies arising in Mali which threaten Mali's peace, security, and stability and constitute a threat to international peace and security in the region, and demonstrate the international community's condemnation of those involved in such actions and policies by enabling the imposition of targeted financial sanctions on them.
>
> On the basis that the Regulations relate to actions and policies which threaten Mali's peace, security, and stability, it is possible that the Committee may be more likely to designate people with Malian nationality or of Malian national origin. Any such difference in treatment on the basis of nationality or national origin would have an objective and justifiable basis and would be reasonable and proportionate in the circumstances of each case.
>
> The designation criteria contained in paragraph 8 of UNSCR 2374 are reasonable and objective. They are reasonable insofar as they relate only to the situation in Mali and actions and policies which the UNSC has specifically determined threaten Mali's peace, security, and stability, including serious human rights abuses and violations of international humanitarian law. The criteria are also objective, as they provide a clear, consistent and objectively-verifiable reference point by which the UNSC is able to make a designation. The Regulations serve a legitimate objective, as discussed above.
>
> Finally, the Regulations are proportionate. As discussed above, the Government's view is that the imposition of targeted financial sanctions is a justified and less rights-restrictive means of achieving the aims of the Regulations. The Government does not have information that supports the view that affected groups are vulnerable; rather, they are people the Committee has specifically determined, on the basis of the criteria established by the UNSC, are involved in actions and policies that threaten Mali's peace, security, and stability. Further, there are several safeguards, such as the availability of judicial review, in place to ensure that any limitation is proportionate to the objective being sought.[34]

1.413 The information provided indicates that there may be an objective and justifiable basis for a difference in treatment on the basis of national origin or nationality. However, insofar as the statement of compatibility relies on existing safeguards under the sanctions regime, for the reasons discussed above and noted in the committee's previous analysis, there are questions as to whether those safeguards are sufficient for the purposes of international human rights law. For

34 SOC, pp. 14-15.

these reasons the committee has previously been unable to conclude that designations in relation to specified countries are compatible with the right to equality and non-discrimination.[35]

Committee comment

1.414 In *Report 6 of 2018,* the committee noted that the information provided in the minister's correspondence to the committee would be useful to include in future statements of compatibility relating to sanctions regimes. The statement of compatibility accompanying the regulations contains a detailed assessment of the human rights compatibility of the UN Charter Sanctions Regime. The committee thanks the minister for including this further information in the statement of compatibility.

1.415 The committee reiterates its previous comments that the sanctions regime pursuant to the UN Charter raises a number of human rights concerns, including relevantly in relation to compatibility with the right to a fair hearing, the right to privacy, the right to an adequate standard of living, and the right to equality and non-discrimination.

1.416 The committee draws the above analysis and the committee's previous comments on sanctions regimes in *Report 6 of 2018* and *Report 9 of 2016* to the attention of the parliament.

35 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 130, in the context of the autonomous sanctions regimes. See also, in relation to the UN Charter sanctions regime Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) pp. 53-55.

Foreign Influence Transparency Scheme Amendment Bill 2019

Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018 [F2018L01701]

Purpose	The Foreign Influence Transparency Scheme Amendment Bill 2019 seeks to amend the definition of 'communications activity' under the *Foreign Influence Transparency Scheme Act 2018* and extend disclosure obligations in relation to such activities. The Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018 prescribe the circumstances, form and content of disclosures in relation to communications activities under the foreign influence transparency scheme.
Portfolio	Attorney-General
Introduced	House of Representatives, 20 February 2019
Last day to disallow	[F2018L01701]: 15 sitting days after tabling (tabled House of Representatives and Senate 12 February 2019)
Rights	Freedom of expression; freedom of association; to take part in public affairs; equality and non-discrimination; privacy
Status	Advice only

Background

1.417 The committee previously examined the Foreign Influence Transparency Scheme Bill 2017 (the FITS Bill) in its *Report 1 of 2018* and *Report 3 of 2018*.[1] The FITS Bill established a scheme requiring persons to register where those persons undertook certain activities 'on behalf of' a 'foreign principal', including activities 'for the purpose of political or governmental influence'.

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp.34-44; *Report 3 of 2018* (27 March 2018) pp 189-206. As discussed further below, the committee concluded the measures may be incompatible with the right to freedom of expression, freedom of association, and the right to take part in public affairs. In relation to the right to privacy, the committee considered that there may be human rights concerns in relation to the operation of the proposed power in section 43(1)(c) of the bill. The committee was unable to conclude whether the measures were compatible with the right to equality and non-discrimination.

1.418 After the committee's consideration of the FITS Bill, the bill was the subject of a number of amendments which narrowed the scope of the registration scheme. In *Report 1 of 2019,* the committee noted that the amendments included in the *Foreign Influence Transparency Scheme Act 2018* (FITS Act) partially addressed a number of the committee's concerns as to the human rights compatibility of the legislation.[2]

'Communications activities' under the Foreign Influence Transparency Scheme

1.419 Under the FITS Act, persons who are registered under the scheme who undertake 'communications activities' on behalf of a foreign principal are required to make disclosures about the foreign principal in accordance with prescribed rules.[3]

1.420 Currently, section 13 of the FITS Act provides that a person undertakes a 'communications activity' if 'the person communicates or distributes information or material to the public or a section of the public'. The Foreign Influence Transparency Scheme Amendment Bill 2019 (the bill) seeks to amend this definition so that it additionally provides that a person undertakes a communications activity if the person 'produces information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public'.[4] 'Produce' is not defined in the bill or the FITS Act.

1.421 The bill also proposes to extend the obligation to make prescribed disclosures in communications activities to any person who undertakes registrable communications activity on behalf of a foreign principal, including persons who are not registered under the scheme.[5] This expands the scheme from its current scope where the obligation to make disclosures is limited to those persons who are registered under the scheme.

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2 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) 54. The analysis of the FITS Bill also raised concerns in relation to the power in the bill for the Secretary to make available to the public 'any other information prescribed by the rules'. The committee considered that this power may give rise to privacy concerns in relation to its operation, because the scope was such that it could be used in ways that may risk being incompatible with the right to privacy. In its *Report 1 of 2019,* the committee considered amendments that extended the operation of the registration scheme to allow publication of historical information and noted that the privacy concerns raised in the initial analysis applied equally to the bill there under consideration: Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 52-55.

3 *Foreign Influence Transparency Scheme Act 2018,* section 38.

4 See Foreign Influence Transparency Scheme Amendment Bill 2019, item 2 (proposed section 13(1)(b)).

5 See Foreign Influence Transparency Scheme Amendment Bill 2019, items 19-20.

1.422 The Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules (the rules) prescribe instances of communications activity, how disclosures in communications activities are to be made and the content of those disclosures. For example, the rules provide that the communication or distribution of printed material on behalf of a foreign principal requires disclosure at the end of each page of: the identity of the person undertaking the communications activity, the foreign principal on whose behalf the person undertakes the activity, a statement that the communications activity is undertaken on behalf of a foreign principal and a statement that the disclosure is made under the FITS Act.[6]

Compatibility of the measures with multiple rights

1.423 As noted in the initial analysis of the FITS Bill, the obligation to publicly disclose, by way of registration, information about a person's relationship with a foreign principal and activities undertaken pursuant to that relationship engages the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs, the right to equality and non-discrimination and the right to privacy.[7]

1.424 In its initial analysis of the FITS bill, the committee raised concerns as to the compatibility of the measures with these rights. This was because the definitions in the bill of 'on behalf of'[8], 'foreign principal'[9] and 'for the purpose of political and governmental influence'[10] did not appear to be sufficiently circumscribed to

6 Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules, section 5.

7 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44; *Report 3 of 2018* (27 March 2018) pp. 189-206.

8 At the time of the committee's consideration of the FITS Bill, 'on behalf of' a foreign principal was defined in section 11 to mean undertaking activity: (a) under the arrangement with the foreign principal; or (b) in the service of the foreign principal; or (c) on the order or at the request of the foreign principal; or (d) under the control or direction of the foreign principal; or (e) with the funding or supervision by the foreign principal; or (f) in collaboration with the foreign principal.

9 At the time of the committee's consideration of the FITS Bill, 'foreign principal' was defined in section 10 of the bill to mean: (a) a foreign government; (b) a foreign public enterprise; (c) a foreign political organisation; (d) a foreign business; (e) an individual who is neither an Australian citizen nor a permanent Australian resident.

10 At the time of the committee's consideration of the FITS Bill, section 12 provided that a person would undertake an activity for the purpose of political or governmental influence if (1)….a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of any one or more of the following: (a) a process in relation to a federal election or a designated vote; (b) a process in relation to a federal government decision; (c) proceedings of a House of the Parliament; (d) a process in relation to a registered political party; (e) a process in relation to a member of the Parliament who is not a member of a registered political party; (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

constitute a proportionate limitation on these rights.[11] The committee was also unable to conclude as to the compatibility of the FITS bill with the right to equality and non-discrimination. This was because the registration requirements may have a disproportionate negative effect on persons or entities that have a foreign membership base and as such the scheme may amount to indirect discrimination on the basis of nationality or national origin.[12]

1.425 In the FITS Act, the definition of 'on behalf of' was amended to remove from its scope activities undertaken 'with the funding or supervision by the foreign principal' and activities undertaken 'in collaboration with the foreign principal'.[13] The definition of 'for the purpose of political or governmental influence' was also narrowed such that only activities which were undertaken for the 'sole or primary purpose, or a substantial purpose' of political or governmental influence would fall within the definition.[14] A number of additional exemptions from registration, including for registered charities, were also introduced.[15] These narrower definitions are significant insofar as the underlying concerns raised by the committee in its analysis of the FITS bill related to the broad and potentially uncertain scope of the foreign influence transparency scheme. As noted in *Report 1 of 2019,* the FITS Act as passed significantly narrowed the scope of the scheme and to that extent partially addressed a number of the committee's concerns as to the human rights

11 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) p. 203.

12 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 203-206.

13 Section 11 of the *Foreign Influence Transparency Scheme Act 2018* now provides that a person undertakes an activity 'on behalf of' a foreign principal if: (a) the person undertakes the activity in any of the following circumstances: (i) under an arrangement with the foreign principal; (ii) in the service of the foreign principal; (iii) on the order or at the request of the foreign principal; (iv) under the direction of the foreign principal; and (b) at the time the arrangement or service is entered into, or the order, request or direction made, both the person and the foreign principal knew or expected that: (i) the person would or might undertake the activity; and (ii) the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme).

14 Section 12(1) of the *Foreign Influence Transparency Scheme Act 2018* now provides that a person undertakes an activity for the purpose of political or governmental influence if the sole or primary purpose, or a substantial purpose, of the activity is to influence one or more of the following: (a) a process in relation to a federal election or a designated vote; (b) a process in relation to a federal government decision; (c) proceedings of a House of the Parliament; (d) a process in relation to a registered political party; (e) a process in relation to a member of the Parliament who is not a member of a registered political party; (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party. A person also undertakes an activity for the purposes of political or governmental influence if the sole or primary purpose, or a substantial purpose, of the activity is to influence the public, or a section of the public, in relation to a process or proceedings mentioned in subsection (1).

15 *Foreign Influence Transparency Scheme Act 2018,* sections 24-30.

compatibility of the scheme such that it may, in practice, be compatible with human rights. However, much will depend on how the scheme operates in practice.

1.426 An expansion to the scope of the operation of the FITS Act requires consideration of whether such expansion is compatible with human rights. The statement of compatibility accompanying the bill acknowledges that the right to privacy is engaged by the measures, but does not acknowledge that any other rights may be engaged or limited by the bill. In contrast, the statement of compatibility accompanying the rules acknowledges that the right to freedom of expression, the right to take part in the conduct of public affairs and the right to privacy are engaged by the rules. To the extent the amendments in the bill and the rules have not examined the compatibility of the measures in light of all of the relevant human rights that are engaged by the foreign influence transparency scheme, the statements of compatibility do not provide a complete assessment of whether any limitations on these rights are permissible.

1.427 For each of the rights engaged, limitations on these rights are permissible to the extent they pursue a legitimate objective, are rationally connected to that objective and are proportionate.

1.428 The initial analysis of the FITS Bill stated that the objective of the foreign influence transparency scheme, namely enhancing transparency of the extent to which foreign sources may influence Australian politics and policy making, was likely to be a legitimate objective for the purposes of international human rights law.[16] Facilitating transparency of the forms and sources of foreign influence in Australian political and governmental processes is also stated to be the objective of the bill and the rules.[17] For example, in relation to the expanded definition of 'communications activity' in the bill, the statement of compatibility states that the amendments aim to ensure that:

> …producers of relevant information or material will be required to register and will be subject to the same reporting and disclosure obligations as those entities that communicate or distribute equivalent information or material. This will ensure that there is appropriate transparency in relation to persons who produce such information or material on behalf of a foreign principal.[18]

1.429 As with the FITS bill, on balance the objective of transparency in this context is likely to be a legitimate objective for the purposes of international human rights law. However, in relation to the bill it would have been of assistance if the statement

16 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) p. 194.

17 Statement of compatibility (SOC) to the Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules, p.2-3; SOC to the Foreign Influence Transparency Amendment Scheme Amendment Bill, [11].

18 SOC to the Foreign Influence Transparency Amendment Scheme Amendment Bill, [3].

of compatibility had provided more detailed information as to the pressing and substantial concern the measures seek to address in relation to producers of information being included within the scope of the scheme, and the measures requiring persons to make disclosures who are not registered or liable to register under the scheme.

1.430 To the extent the measures clarify the scope (in the case of the rules) and expand (in the case of the bill) the disclosure obligations in relation to communications activity, the measures appear to be rationally connected to this objective.

1.431 As to proportionality, it is noted that the statement of compatibility accompanying the rules identifies several safeguards to protect the freedom of expression and right to take part in public affairs by reference to jurisprudence of the UN Human Rights Committee:

> In General Comment No. 25 (CCPR/C/21/Rev. 1/Add. 7) the UN Human Rights Committee also stressed the importance of voter education to ensure the effective exercise of Article 25 rights by an informed community. The scheme will support voter education by informing the public of foreign influence in political and governmental processes, including in relation to federal elections, referendums and other votes. This will enable the community to make informed judgments and decisions about all of the influences that are brought to bear over a particular vote.
>
> The form, manner and content of the disclosure as prescribed by the Rules is tailored to ensure that it is appropriate in each specific circumstance. For example, in some instances, where the content is too long to be included in the communication, there is the option of providing the disclosure in a website accessible from the communication instead. Similarly, the Rules accommodate the particular time restraints applying in the context of radio advertisements, particularly advertisements of less than 15 seconds, by providing for alternative abridged disclosure requirements.
>
> The Rules also accommodate the practicalities of complying with the disclosure requirements under section 38 of the Act, in addition to matters required to be notified under any of the following laws:
>
> - Part XXA of the Commonwealth Electoral Act 1918
> - Part IX of the Referendum (Machinery Provisions) Act 1984, and
> - Subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992.*
>
> In the event that a communications activity is subject to the disclosure requirements under the Act as well as any of these laws, the Rules

> prescribe an alternative, abridged disclosure requirement that is less onerous and duplicative.[19]

1.432 This approach of identifying the safeguards by reference to Australia's human rights obligations is welcome and assists the committee in its task of assessing the proportionality of the rules.

1.433 However, in relation to the bill, limited information is provided in the statement of compatibility in relation to the proportionality of the proposed expansion of the FITS Act. The statement of compatibility to the bill explains that the collection and retention of the information in relation to the scheme is 'carefully regulated' and that there are provisions in the FITS Acts limiting disclosure. However, it is not clear whether the safeguards relating to limiting disclosure would be sufficient. In particular, in its analysis of the FITS Bill and in *Report 1 of 2019,* the committee raised concerns as to compatibility of the broad power of the Secretary to make available to the public 'any other information prescribed by the rules' in the FITS Act with the right to privacy.[20] However, the statement of compatibility also refers to the ability of individuals to request corrections to incorrect information and to access merits review, which are important safeguards that are relevant in assessing proportionality.

1.434 Ultimately, it remains unclear from the statement of compatibility accompanying the bill why it is strictly necessary for producers of information to be included within the scope of the scheme, and why persons who are not registered or liable to register under the scheme are required to make disclosures in relation to communications activities. While the scope of the FITS Act may be sufficiently circumscribed to mean that these amendments, in practice, may be compatible with human rights, further information in the statement of compatibility would have assisted the committee in undertaking this analysis. In this respect, it is noted that the explanatory memorandum to the bill provides some more detailed analysis of the purpose and intended effect of the expanded definition and disclosure obligations relating to communications activities. However, as noted in the Committee's *Guidance Note 1*, the committee's expectation is that statements 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.

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19 SOC to the Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules, pp. 4-5.

20 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 52-55; Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp.34-44; *Report 3 of 2018* (27 March 2018) pp. 189-206.

Committee comment

1.435 The committee reiterates its view from its *Report 1 of 2019*, that the Foreign Influence Transparency Scheme Act 2018 (Cth) as passed partially addressed a number of the committee's concerns as to human rights compatibility of the foreign influence transparency scheme outlined in its analysis of the Foreign Influence Transparency Scheme Bill 2017 in its *Report 1 of 2018* and *Report 3 of 2018*. The committee recommends that the implementation of the scheme be monitored so as to ensure that the scheme operates in a manner that is compatible with human rights in practice.

1.436 The committee notes that the proposed expansion of the foreign influence transparency scheme introduced by the bill also engages and may limit the freedom of expression, freedom of association, the right to take part in the conduct of public affairs, the right to equality and non-discrimination and the right to privacy. The committee notes that the statement of compatibility accompanying the bill did not provide a sufficient assessment of the compatibility of the bill with these rights.

1.437 The committee welcomes the fact that the statement of compatibility accompanying the rules includes a detailed assessment of the compatibility of the rules with the right to freedom of expression and the right to take part in public affairs.

1.438 Noting the committee's previous analysis of the foreign influence transparency scheme in *Report 1 of 2018, Report 3 of 2018* and *Report 1 of 2019,* the committee otherwise draws the human rights implications of the bill and the rules to the attention of the parliament.

Murray-Darling Basin Commission of Inquiry Bill 2019

Purpose	Seeks to establish a commission of inquiry into the Murray-Darling Basin
Legislation proponent	Senator Hanson-Young
Introduced	Senate, 13 February 2019
Rights	Privacy; not to incriminate oneself; liberty; freedom of expression; freedom of assembly; fair hearing
Status	Advice only

Background

1.439 The Murray-Darling Basin Commission of Inquiry Bill 2019 (the bill) seeks to establish a commission of inquiry (the Commission) into the Murray-Darling Basin that reports to Parliament. The bill would invest the Commission with the full powers of a royal commission, as set out in the *Royal Commissions Act 1902* (the RC Act).[1]

1.440 The committee has previously commented on the human rights compatibility of measures in the RC Act on a number of occasions.[2]

Coercive information gathering powers

1.441 As noted above, the bill would invest the commission with the full powers of a royal commission under the RC Act.[3] The RC Act provides for extensive coercive information gathering powers including the power to summon witnesses and take evidence and creates an offence for failure to appear as a witness and answer

1 Murray-Darling Basin Commission of Inquiry Bill 2019, proposed section 11.

2 See, for example, Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], *Thirty-sixth Report of the 44th Parliament* (16 March 2016) pp. 14-18; *Thirty-eighth Report of the 44th Parliament* (3 May 2016) pp. 21-26; Royal Commissions Amendment Bill 2013, *Third Report of 2013* (13 March 2013) pp. 42-48, *Seventh Report of 2013* (5 June 2013) pp. 91-92. See, also, the committee's previous analysis of Commissions of Inquiry and Royal Commissions: Parliamentary Joint Committee on Human Rights, Defence (Inquiry) Regulations 2018 [F2018L00316], *Report 5 of 2018* (19 June 2018) pp. 2-10; *Report 7 of 2018* (14 August 2018) pp. 91-110; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 49-53; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 28-34, *Report 6 of 2017* (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-45; People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 66-69.

3 Proposed section 11.

questions.[4] A person appearing as a witness for a commission is not excused from answering a question on the ground that the answer might tend to incriminate that person. Section 6P of the RC Act permits a commission to disclose evidence relating to a contravention of a law to certain persons and bodies, including the police and the Director of Public Prosecutions.

Compatibility of the measure with the right to privacy

1.442 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. The right to privacy includes respect for informational privacy, including 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.

1.443 By applying the RC Act offence for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy. The right to privacy is also limited, in this context, by the commission's power to disclose evidence relating to a contravention of a law to certain persons and bodies, including the police and the Director of Public Prosecutions.

1.444 While the right to privacy may be subject to permissible limitations in a range of circumstances, the statement of compatibility only notes that 'all the relevant protections afforded to witnesses in Royal Commissions are replicated by this Bill'.[5] However, on a number of occasions, the committee has previously outlined human rights concerns in relation to the powers of royal commissions and the adequacy of safeguards they afford. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

Compatibility of the measure with the right not to incriminate oneself

1.445 Article 14 of the ICCPR guarantees the right to a fair trial in the determination of a criminal charge and includes the right not to incriminate oneself (article 14(3)(g)).

1.446 This right is directly relevant where a person is required to give information to a commission of inquiry which may incriminate them and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Adopting the powers of a royal commission, which include a power to require a witness to answer questions even if it may incriminate

4 Sections 2 and 3 of the *Royal Commissions Act 1902*.

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

them, engages and limits the right not to incriminate oneself. In this context, the power to disclose such evidence to the police and the Director of Public Prosecutions also engages and limits this right. The right not to incriminate oneself may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to and proportionate to achieving that objective. However, the statement of compatibility does not address this right and accordingly does not provide an assessment as to whether the limitation is permissible. In the absence of this information it is difficult for the committee to conclude that the measure is compatible with this right.

1.447 In relation to the proportionality of the limitation, while section 6A of the RC Act provides a 'use' immunity for witnesses compelled to answer questions, the bill does not appear to provide a 'derivative use' immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness. While the inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself, they are not the only factors that may be relevant to whether the limitation is the least rights restrictive approach to achieving a legitimate objective.

Issue of arrest warrants by the Commission

1.448 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act. Section 6B of the RC Act provides that if a person served with a summons to attend before the Royal Commission as a witness fails to attend in accordance with the summons, a Commissioner may issue a warrant to arrest the person.

1.449 The warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of a Commissioner.

Compatibility of the measure with the right to liberty

1.450 The right to liberty under article 9(1) of the ICCPR, which prohibits arbitrary detention, requires that the State should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.451 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty. While the right to liberty may be subject to permissible limitations in particular circumstances, the statement of compatibility does not acknowledge that the right to liberty is engaged or provide an assessment of whether this measure is a proportionate limitation. Without this information it is difficult to conclude that the measure is compatible with this right.

Contempt of Commission

1.452 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act. Section 6O(1) of the RC Act provides that a person commits an offence if they:

- intentionally insult or disturb a hearing of the Commission;
- use any insulting language towards a Commission;
- interrupt the proceedings of a Commission;
- make any statement that is false or defamatory of the Commission; or
- commit any intentional contempt of the Commission.

1.453 The penalty for the offence is two penalty units (currently $420) or imprisonment for three months.

Compatibility of the measure with the right to freedom of expression and the right to freedom of assembly

1.454 Article 19(2) of the ICCPR protects the right to freedom of expression. It requires the State not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.455 On a number of occasions previously, the committee has outlined potential human rights concerns in relation to the contempt of commission powers.[6] As applied by the bill, prohibiting any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. The right to freedom of expression and freedom of assembly may be subject to permissible limitations in particular circumstances. However, the statement of compatibility does not provide an assessment of these limitations. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of, or objection to, the Commission and its activities and may be overly broad. In the absence of further information it is difficult for the committee to conclude that the measure is compatible with this right.

6 See, for example, Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 14-18; *Thirty-Eighth Report of the 44th Parliament* (3 May 2016) pp. 21-26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 28-34, *Report 6 of 2017* (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-45.

Committee comment

1.456 The Murray-Darling Basin Commission of Inquiry Bill 2019 (the bill) seeks to apply the provisions of the *Royal Commissions Act 1902* (RC Act). The committee has previously commented on the human rights compatibility of the RC Act on a number of occasions.

1.457 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the parliament.

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

National Integrity Commission Bill 2018

National Integrity Commission Bill 2018 (No. 2)

National Integrity (Parliamentary Standards) Bill 2018

Purpose	National Integrity Commission Bill 2018 and National Integrity Commission Bill 2018 (No. 2): establishes the Australian National Integrity Commission as an independent public sector anti-corruption commission for the Commonwealth National Integrity (Parliamentary Standards) Bill 2018: creates mechanisms for the Commonwealth parliament to prevent, manage and resolve its own integrity issues where possible, and provide for investigation and resolution of serious corruption issues
Legislation proponents	Cathy McGowan MP (National Integrity Commission Bill 2018) and National Integrity (Parliamentary Standards) Bill 2018); Senator Larissa Waters (National Integrity Commission Bill 2018 (No. 2)
Introduced	National Integrity Commission Bill 2018 and National Integrity Commission Bill 2018 (No. 2): House of Representatives, 29 November 2018 National Integrity (Parliamentary Standards) Bill 2018: House of Representatives, 3 December 2018
Rights	Privacy and reputation; right not to incriminate oneself; freedom of expression and assembly; liberty; freedom of movement
Status	Advice only

Background

1.459 The National Integrity Commission Bill 2018 (2018 McGowan bill) reintroduces a number of measures from the National Integrity Commission Bill 2017 (2017 bill) as well as additional measures. The 2018 McGowan bill is substantially the same as the National Integrity Commission Bill 2018 (No. 2) (2018 Waters bill no. 2) and they are therefore considered together below (the 2018 bills).

1.460 The committee previously examined the 2017 bill in its *Report 12 of 2017* and the National Integrity Commission Bill 2013, which was substantially similar to

the 2017 bill, in its *First Report of the 44th Parliament* and *Report 8 of 2016*.[1] The committee has also previously raised human rights concerns in relation to Commission of inquiry related powers in Royal Commissions on a number of occasions.[2]

1.461 The 2018 bills establish the Australian National Integrity Commission (the Commission), consisting of the National Integrity Commissioner, the Law Enforcement Integrity Commissioner and the Whistleblower Protection Commissioner. The 2018 bills also establish the appointment of the Parliamentary Joint Committee on the Australian National Integrity Commission and the Parliamentary Inspector of the National Integrity Commission, as an independent officer of the Parliament. The purpose of the Commission is to promote integrity and accountability and investigate corruption in relation to Commonwealth public administration.[3]

1.462 The 2018 McGowan bill operates alongside the National Integrity (Parliamentary Standards) Bill 2018 which proposes to create statutory codes of conduct for members of parliament and their staff, a statutory basis for parliamentarians' registers of interests, a Parliamentary Integrity Advisor and a Parliamentary Standards Commissioner.[4]

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1 Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017); National Integrity Commission Bill 2013, *First Report of the 44th Parliament* (10 December 2013), *Report 8 of 2016* (9 November 2016).

2 See the committee's previous analysis of Commissions of inquiry and Royal Commissions: Parliamentary Joint Committee on Human Rights, Defence (Inquiry) Regulations 2018 [F2018L00316], *Report 5 of 2018* (19 June 2018) pp. 2-10; *Report 7 of 2018* (14 August 2018) pp. 91-110; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 49-53; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 28-34, *Report 6 of 2017* (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-45; People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 66-69; Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 14-18; *Thirty-eighth report of the 44th Parliament* (3 May 2016) pp. 21-26; Royal Commissions Amendment Bill 2013, *Third Report of 2013* (13 March 2013) pp. 42-48, *Seventh Report of 2013* (5 June 2013) pp. 91-92.

3 Statement of compatibility (SOC) of the 2018 McGowan bill, p. 86, and the 2018 Waters bill no. 2, p. 88.

4 The explanatory memorandum to the National Integrity (Parliamentary Standards) Bill 2018, p. 1, explains that it will operate alongside the National Integrity Commission Bill 2018, together creating a nationally coordinated integrity framework, promoting public trust and confidence in the integrity of parliament, the public sector and the system of government.

Broad coercive evidence gathering powers

1.463 The 2018 bills propose to confer wide-ranging coercive powers on the National Integrity Commissioner to inquire into and report on matters relating to alleged or suspected corruption involving a public official or a Commonwealth agency.[5] The Commissioner may undertake an inquiry on their own initiative or at the request of a member of parliament.[6] An inquiry may relate to the integrity of public officials, corruption or prevention of corruption generally in Commonwealth agencies, or corruption generally, or the prevention of corruption, in or affecting Australia.[7]

1.464 The Commission's powers would include the power to compel a person to provide information or to produce documents or things;[8] the power to summon a person to attend hearings and require them to produce documents;[9] powers for information sharing between the Commission and head of a Commonwealth agency;[10] the power to order an individual deliver their passport in certain circumstances;[11] the power to apply for warrants to enter premises and seize materials;[12] and compulsory assistance powers.[13] The Commission also has public

5 Proposed sections 12 and 24 of the 2018 bills.

6 Proposed section 24 of the 2018 bills.

7 Proposed section 25(1) of the 2018 bills. 'Corrupt conduct' is defined in proposed section 9 of the 2018 bills to mean: (a) any conduct of any person that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by the Parliament, a Commonwealth agency, any public official or any group or body of public officials; or(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or (c) any conduct of a public official that constitutes or involves, or of a former public official that constituted or involved, a breach of public trust; or (d) any conduct of a public official that involves, or that is engaged in for the purpose of, the public official abusing his or her office as a public official; or (e) any conduct of a public official that involves, or of a former public official that involved, the misuse of information or material that he or she acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person. The 2018 bills list types of conduct that is capable of amounting to corrupt conduct. The 2018 McGowan bill provides a more extensive list. The 2018 McGowan bill also provides that conduct may amount to corrupt conduct even though it occurred before the commencement of this section, while the 2018 Waters bill no. 2 limits this to 10 years retrospective operation.

8 Proposed section 72 of the 2018 bills.

9 Proposed section 82 of the 2018 bills.

10 Proposed sections 57, 58 and 61 of the 2018 bills.

11 Proposed section 103 of the 2018 bills.

12 Proposed sections 113 and 114 of the 2018 bills.

13 Proposed section 130 of the 2018 bills.

reporting obligations at the end of investigations and public inquiries,[14] with the Commissioner having discretion to exclude sensitive information from the report.[15] Offences for non-compliance with Commission orders range from 6 months imprisonment[16] to two years imprisonment or 120 penalty units (currently $25,200) or both.[17]

1.465 The 2018 bills provide that a person is not excused from giving information, answering a question or producing a document or thing when given a notice under section 72 or summonsed under section 82 on the ground that to do so might tend to incriminate that person.[18] A partial 'use immunity' is provided to persons compelled to provide self-incriminating information, meaning that no information or documents provided are admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty.[19] However, no 'derivative use immunity' would be provided which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person. The penalty for non-compliance with a notice under section 72 or summons under section 82 is imprisonment for 2 years.[20]

1.466 The Commissioner and the Parliamentary Standards Commissioner must generally provide a reasonable opportunity to be heard or make submissions when reporting on an investigation that is critical of a Commonwealth agency or a person.[21] However, this opportunity does not have to be provided where the Commissioner or Parliamentary Standards Commissioner is satisfied that a person may have committed a criminal offence, contravened a civil penalty provision or engaged in conduct which could be the subject of disciplinary proceedings or termination of appointment or employment, and that an investigation or any related action would be compromised by giving the person the opportunity to make submissions.[22]

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14 Proposed sections 64, 70 and 233 of the 2018 bills.

15 Proposed sections 64(4) and 156(9) of the 2018 bills.

16 Proposed section 130(3) of the 2018 bills.

17 Proposed section 76(1) of the 2018 bills.

18 Proposed sections 79(1) and 102 of the 2018 bills.

19 Proposed section 79(3) and 102(4) of the 2018 bills.

20 Proposed sections 77(1) and 92 (3) of the 2018 bills.

21 Proposed section 62(1) of the 2018 bills and section 47(1) of the National Integrity (Parliamentary Standards) Bill 2018.

22 Proposed section 62(2) of the 2018 bills and section 47(2) of the National Integrity (Parliamentary Standards) Bill 2018.

Compatibility of the measure with the right to privacy and reputation

1.467 The right to privacy protects against arbitrary and unlawful interference with an individual's privacy and reputation.[23]

1.468 The collection, storing and use of a person's private and confidential information under the Commission's proposed coercive evidence gathering powers engages and limits the right to privacy. More generally, investigation of, and reporting on, individuals may impact on the right to privacy and reputation of these individuals. The right to privacy and reputation is also engaged where a critical finding is made without the person against whom the finding is made against first having the opportunity to respond.

1.469 Limitations on the right to privacy and reputation will be permissible where they are not arbitrary such that they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.470 The statements of compatibility identify that the measures engage and limit the right to privacy but state that safeguards incorporated in the bills mean that the right to privacy has been permissibly limited.

1.471 The statements of compatibility identify the objective of the 2018 bills as being to 'prevent, investigate, expose and address corruption issues involving or affecting Commonwealth public administration'.[24] This appears to be a legitimate objective for the purposes of international human rights law. Powers to enable the Commission to investigate particular matters, collect evidence and report on its findings would also appear to be rationally connected to this objective.

1.472 However, in order to be a proportionate limitation on the right to privacy, measures that permit the collection and disclosure of personal information need to be sufficiently circumscribed to ensure that they are only as extensive as is strictly necessary to achieve their objective. In this respect, the measures in the bills allow for broad powers to conduct investigations and broad inquiry powers and it is unclear whether the safeguards in place are adequate.

1.473 For example, the power of the Commission to issue search and entry warrants under proposed section 114 raises concerns as to the proportionality of the measures. The statements of compatibility for the 2018 bills state that applications for warrants are 'protected by strict controls to an applicant for a warrant'.[25] However, it is noted that by contrast the *Royal Commissions Act 1902* does not contain a power equivalent to that in proposed section 114 of the 2018 bills to issue

23 International Covenant on Civil and Political Rights (ICCPR), article 17.

24 SOC of 2018 McGowan bill, p. 86, and SOC of 2018 Waters bill no. 2, p. 88.

25 SOC of 2018 McGowan bill, p. 87, and SOC of 2018 Waters bill no. 2, p. 89.

search warrants. Instead, royal commissions or their members may apply to a judge of a prescribed court for the issue of a search warrant.[26] The fact that this safeguard is absent in the 2018 bills raises concerns that they may contain insufficient safeguards. The absence of this safeguard was not addressed in the statements of compatibility.

1.474 The 2018 bills allow for the investigation of corruption. However 'corrupt conduct' is defined broadly to cover a number of offences and also extends to conduct that occurred before the commencement of the 2018 bills.[27] The broad range of conduct that is covered, as well as its retrospective application, is relevant to the proportionality of the measure. The statements of compatibility for the 2018 McGowan bill and the Waters bill no. 2 do not explain why it is necessary for the scope of the powers to extend to conduct that has occurred in the past.

1.475 The right to reputation is also engaged where a critical finding is made without the person against whom the finding is made first having the opportunity to respond. The statements of compatibility for the 2018 bills note that the 'right to due process and procedural fairness is maintained in this bill to ensure that no opinions or findings that are critical of a person or agency are publicly released unless they have been given an opportunity to appear and make submissions to the Commission.'[28] However, as noted above at [1.466], there are circumstances in which the commissioner or the Parliamentary Standards Commissioner do not have to provide a person with an opportunity to be heard. As such, it is unclear whether the Commission would have the ability to make findings critical of a person without the person first having had the opportunity to respond to the issue. If this were the case, this raises questions as to whether the limitation on a person's right to reputation is proportionate.

1.476 These issues were not fully addressed in the statements of compatibility and without further information it is therefore difficult for the committee to conclude that the measure is compatible with this right. It is noted that the committee has previously raised concerns as to the compatibility of substantially similar measures in

26 *Royal Commission Act 1902*, section 4(1).

27 Proposed section 9 of the 2018 bills.

28 SOC of 2018 McGowan bill, p. 87, and SOC of 2018 Waters bill no. 2, p. 89.

the 2017 bill and previous commission of inquiry bills with the right to privacy and reputation.[29]

Compatibility of the measure with the right not to incriminate oneself

1.477 Specific guarantees of the right to a fair trial in relation to a criminal charge include the right not to incriminate oneself.[30] These are directly relevant where a person is required to give information to a commission of inquiry which may incriminate them, and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Requiring a person to answer questions, provide information or produce documents, even if it may incriminate them, engages and limits the right not to incriminate oneself.

1.478 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 way of achieving that objective.

1.479 The statements of compatibility state that the privilege against self-incrimination is limited in the 2018 bills to achieve the legitimate objective of ensuring 'that the public interest is served by not having crucial and relevant material relating to corruption withheld'.[31] The aim of serving the public interest by investigating corruption in public administration is likely to be a legitimate objective for the purposes of international human rights law. Partially removing the privilege against self-incrimination and therefore allowing access to more material in an investigation is likely to be rationally connected to (that is, effective to achieve) this objective.

1.480 In relation to the proportionality of the measure, the existence of immunities is one relevant factor in determining whether such measures impose a proportionate limitation on the right not to incriminate oneself. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness. In this case, as noted at [1.465], a partial 'use immunity' would be provided to persons compelled to provide self-incriminating information,[32] however

29 See, for example, Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017) pp. 93-94; Defence (Inquiry) Regulations 2018 [F2018L00316], *Report 7 of 2018* (14 August 2018) pp. 96-106; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 50-51; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 37-39; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 43 and 45; People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017, *Report 4 of 2017* (9 May 2017) p. 67.

30 ICCPR, article 14(3)(g).

31 SOC of 2018 McGowan bill, p. 87, and SOC of 2018 Waters bill no. 2, p. 89.

32 Proposed section 79(3) and 102(4) of the bill.

no 'derivative use immunity' would be provided to prevent information or evidence indirectly obtained from being used in criminal proceedings against the person. While the inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself, they are not the only factors that may be relevant to whether the limitation is the least rights restrictive approach to achieving a legitimate objective. The committee has previously raised concerns as to the compatibility of substantially similar measures in the 2017 bill and previous commission of inquiry bills with the right not to incriminate oneself.[33]

Contempt of Commission

1.481 Proposed section 93(1)(d) of the 2018 bills provide that a person commits an offence if they knowingly insult, disturb or use insulting language towards the commissioner while the commissioner is exercising his or her powers. Proposed section 93(1)(e) provides that a person commits an offence if they knowingly create a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry.

1.482 Proposed section 96 provides that a person may be detained for the purpose of bringing the person before the relevant court for the hearing of an application to deal with contempt. The court may impose a condition on release including, for example, that the person surrenders any travel document or passport.[34]

Compatibility of the measure with the right to freedom of expression and freedom of assembly

1.483 The right to freedom of expression in article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice. The right to freedom of assembly is guaranteed by article 21 of the ICCPR. The right protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.

1.484 Prohibiting insulting language or communication, or any wilful disturbance or disruption of a hearing of the Commission, engages and may limit the right to

33 See, for example, Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017) p. 95; Defence (Inquiry) Regulations 2018 [F2018L00316], *Report 7 of 2018* (14 August 2018) pp. 92-96; Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 49-50; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, *Report 6 of 2017* (20 June 2017) pp. 36-37; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 42-43; People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 66-67.

34 Proposed section 97(4)(a).

freedom of expression and the right to freedom of assembly. Freedom of assembly and freedom of expression may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to that objective.

1.485 The statements of compatibility for the 2018 bills do not address whether the rights to freedom of assembly and expression are engaged or permissibly limited by the measures. Without further information it is therefore difficult for the committee to conclude that the measure is compatible with these rights. As noted in the previous human rights analysis of the 2017 bill, there may be a danger that the provisions may limit legitimate criticism of, or objection to, the Commission and its activities.[35] The committee has also previously raised concerns about such powers in relation to Commissions of inquiry and Royal Commissions.[36] Accordingly it is unclear whether the provisions impose a proportionate limitation on these rights. While the protection of the Commission's office and holding of hearings may be a legitimate objective for the purposes of the ICCPR, it is not clear whether the terms 'insults, disturbs or uses insulting language' towards the Commissioner are drawn so broadly that they may limit legitimate criticism of, or objection to, the Commission and its activities.

Compatibility of the measure with the right to liberty

1.486 The right to liberty, which prohibits arbitrary detention, requires that the State should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.[37]

1.487 Empowering the Commission to authorise the detention of a witness, without requiring an application to a court, engages and limits the right to liberty.

1.488 While the right to liberty may be subject to permissible limitations in particular circumstances, the statements of compatibility do not acknowledge that the right to liberty is engaged and have not provided an assessment of whether the limitation is permissible. Without this information it is difficult for the committee to conclude that the measure is compatible with the right to liberty.

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35 Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2017, *Report 12 of 2017* (28 November 2017) p. 95.

36 See, for example, Commission of Inquiry (Coal Seam Gas) Bill 2017, *Report 11 of 2017* (17 October 2017) pp. 51-52; Banking and Financial Services Commission of Inquiry Bill 2017, *Report 4 of 2017* (9 May 2017) pp. 43-44; People of Australia's Commission of Inquiry (Banking and Financial Services) Bill 2017, *Report 4 of 2017* (9 May 2017) p. 68.

37 ICCPR, article 9.

Order for a witness to deliver passport

1.489 Proposed section 103 of the 2018 bills provides that the Commissioner may apply to a judge of the Federal Court for an order that a person deliver their passport to the Commissioner in some circumstances. These include where a person has appeared at, or been summoned to attend a hearing, and there are reasonable grounds to believe that the person may be able to give evidence or produce documents or things relevant to the inquiry, and there are reasonable grounds for suspecting that the person has a passport and intends to leave Australia.[38]

Compatibility of the measure with the right to freedom of movement

1.490 Article 12 of the ICCPR protects freedom of movement. The right to freedom of movement includes the right to leave a country. This right is engaged and limited where a person is required to surrender their passport as they are restricted in their ability to leave the country. There can be limitations on the right to leave a country, including where it is rationally connected and proportionate to achieve the legitimate objectives of protecting the rights and freedoms of others, national security, public health or morals, and public order.

1.491 The right to freedom of movement is not addressed in the statements of compatibility for the 2018 bills and so no assessment is provided as to whether the measures constitute a permissible limitation on this right. It is therefore difficult for the committee to conclude that the measure is compatible with this right.

Committee comment

1.492 The preceding analysis indicates that the bills engage and limit the right to privacy and reputation; the right not to incriminate oneself; the right to freedom of expression and assembly; the right to liberty; and the right to freedom of movement.

1.493 Noting the human rights concerns raised by the bills, the committee draws the human rights implications of the bills to the attention of the legislation proponents and the parliament.

1.494 If the bills proceed to further stages of debate, the committee may request further information from the legislation proponents.

38 Proposed section 103 of the 2018 bills.

Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019[1]

Purpose	Extends the cashless debit card trial in all existing locations and the income management program in the Cape York Welfare Reform communities to 30 June 2020
Portfolio	Social Services
Introduced	House of Representatives, 13 February 2019
Rights	Social security; private life; family; equality and non-discrimination
Status	Advice only

Background

1.495 The committee has examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[2]

1.496 The committee has also previously specifically considered the income management regime in Cape York Welfare Reform communities.[3] This regime limits the amount of social security income support paid to certain recipients as unconditional cash transfers and imposes restrictions on how the remaining 'quarantined' funds can be spent. The Family Responsibilities Commission (FRC) may, in certain circumstances, refer a person receiving welfare in the Cape York Welfare Reform communities to compulsory income management.[4] Prior to being placed on income management, an individual must first be referred to the FRC by a relevant Queensland department, after having failed to meet certain pre-determined obligations. The FRC will then hold a conference with the person, and, as an alternative to placing a person on income management, the FRC can refer the person

1 The Social Security (Administration) (Declared child protection State or Territory – Western Australia) Determination 2019 [F2018L00068] raises similar issues and concerns in relation to compulsory income management. As such this report entry also deals with this Determination.

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

3 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48. The Cape York Welfare Reform communities are Aurukun, Coen, Hope Vale, Mossman Gorge and Doomadgee.

4 See *Social Security (Administration) Act 1999*, section 123UF.

to support services.[5] The income management regime is due to cease on 1 July 2019.[6]

1.497 The committee has also previously considered legislation which provided for the trial of cashless welfare arrangements in specified 'trial areas'[7] through the use of a cashless debit card.[8] Under these arrangements persons on working age welfare payments in the trial areas have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcohol or to conduct gambling. A person subject to the trial is prevented from accessing this portion of their social security payment in cash. Rather, payment is accessible through a debit card which cannot be used at 'excluded businesses' or 'excluded services'.[9] Since they were introduced in 2015, the cashless debit card trial arrangements have been

5 See, Family Responsibilities Commission, *How we work* at: https://www.frcq.org.au/how-we-work/; explanatory memorandum (EM), p. 2.

6 EM, p. 2.

7 'Trial areas' are the Ceduna area, the East Kimberley Area, the Goldfields, Bundaberg and Hervey Bay.

8 Parliamentary Joint Committee on Human Rights, Social Security Legislation Amendment (Debit Card Trial) Bill 2015, *Twenty-seventh report of the 44th Parliament* (8 September 2015) pp. 20-29 and *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36; Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], *Report 7 of 2016* (11 October 2016) pp. 58-61; Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 11 of 2017* (17 October 2017) pp. 126-137; Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251], *Report 6 of 2018* (26 June 2018) pp. 30-43 and *Report 8 of 2018* (21 August 2018) pp. 37-52.

9 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) p. 39.

extended on a number of occasions.[10] The cashless debit card trial is due to end on 30 June 2020 for the Bundaberg and Hervey Bay area and 30 June 2019 for all other 'trial areas' and include no more than 15,000 trial participants.[11]

Extension of the cashless debit card trial and income management program

1.498 The bill extends the cashless debit card trial in all existing locations and the income management program in Cape York to 30 June 2020.[12]

Compatibility of the measures with human rights

1.499 Both the cashless debit card trial and the income management program operate to compulsorily quarantine a person's welfare payments and restrict a person's agency and ability to spend their welfare payments at some businesses. As such, these measures engage and limit the following rights:

- the right to equality and non-discrimination;
- the right to social security; and
- the right to privacy and family.

1.500 Each of these rights is discussed in detail in the context of the income management regime more broadly in the committee's 2016 Review of Stronger Futures measures (2016 Review).[13] The statement of compatibility to the bill usefully notes the committee's view as to the rights engaged and limited by the measures.[14]

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10 Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]: see Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) p. 53; Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]: see Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 31-33 and *Report 8 of 2017* (15 August 2017) pp. 122-125; Social Security (Administration) (Trial Area) Amendment Determination (No. 2) 2017 [F2017L01170]: see Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) pp. 34-40; Social Services Legislation Amendment (Cashless Debit Card) Bill 2017: *Report 9 of 2017* (5 September 2017) pp. 34-40 and *Report 11 of 2017* (17 October 2017) pp. 126-137; Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251]: see Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 30-43 and *Report 8 of 2018* (21 August 2018) pp. 37-52.

11 *Social Security (Administration) Act 1999* (Social Security Administration Act), section 124PF.

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

13 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) pp. 43-63.

14 SOC, p. 4.

Extension of the cashless debit card trial

1.501 The extension of the cashless debit card trial to 30 June 2020 engages and limits these rights. These rights may be subject to permissible limitations where they pursue a legitimate objective, and are rationally connected to (that is, effective to achieve) and proportionate to that objective.

1.502 The statement of compatibility explains that the objectives of the cashless debit card trial include 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time'.[15] The committee has previously accepted that the cashless welfare trial measures may pursue a legitimate objective.[16] However, concerns have previously been raised as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to this objective.[17]

1.503 The statement of compatibility cites the final evaluation of the cashless debit card trial by ORIMA Research as evidence of the effectiveness of the trial.[18] The interim research undertaken by ORIMA had previously been relied upon for similar purposes in previous statements of compatibility for cashless welfare measures.[19] The statement of compatibility explains that the final evaluation found that the cashless debit card trial has had a 'considerable positive impact' in the communities in which it operated, and that the trial had been effective in reducing alcohol consumption and gambling in both of the trial sites reported on.[20] However, in relation to this research, the committee's previous reports on the measures noted that the ORIMA research also contains some more mixed findings on the operation of the scheme.[21] For instance, while the ORIMA report pointed to evidence of the

15 SOC, p. 5.

16 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

17 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 126-137.

18 SOC, pp. 5-6. See ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017).

19 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 36-37.

20 SOC, pp. 5-6.

21 Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251], *Report 6 of 2018* (26 June 2018) p. 35 and *Report 8 of 2018* (21 August 2018) pp. 42-46.

reduction in alcohol-related harm in the trial sites based on administrative data,[22] the ORIMA report states that 'with the exception of drug driving offense and apprehensions under the Public Intoxication Act (PIA) in Ceduna, crime statistics showed no improvement since the commencement of the trial'.[23] The ORIMA report also notes that 32 per cent of participants on average reported that the trial had made their lives worse;[24] 33 per cent of participants had experienced adverse complications and limitations from the trial, including difficulties transferring money to children that are away at boarding school and being unable to make small transactions at fundamentally cash-based settings (such as canteens);[25] 27 per cent of participants on average noticed more 'humbugging',[26] as did 29 per cent of non-participants;[27] and in the East Kimberley, a greater proportion of participants felt that violence had increased rather than had decreased.[28] These statistics are not cited in the statement of compatibility.[29] Such results raise concerns that the measure is not rationally connected to its stated objective. However, it is noted that the government is conducting a second evaluation of the cashless debit card to assess ongoing effectiveness which will be subject to an independent review process.[30]

1.504 It was also unclear that the extension of the trials is a proportionate limitation on human rights. The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, is relevant to assessing the

22 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) pp. 4-5.

23 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 4.

24 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 6.

25 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 7.

26 Defined as 'making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial* (February 2017) p. 6.

27 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 76.

28 ORIMA Research, *Cashless Debit Card Trial Evaluation: Final Evaluation Report* (August 2017) p. 64.

29 It is noted that the ORIMA report findings and methodology have also been criticised in a review by the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University: see J Hunt, *The Cashless Debit Card Evaluation: Does it really prove success?* (CAEPR Topical Issue No.2/2017).

30 SOC, p. 6.

proportionality of these limitations. Of particular concern, as has been discussed in previous reports, is that the cashless debit card trial would be imposed without an assessment of individuals' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

1.505 As the cashless debit card trial applies to anyone residing in the trial location who receives specified social security payments,[31] there are serious concerns as to whether the measures are the least rights restrictive way of achieving the objective. By comparison, the income management regime in Cape York Welfare Reform communities allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.[32]

1.506 The statement of compatibility notes that community consultation on the cashless debit card trial has been extensive. Consultation is relevant to the human rights compatibility of the measures. However, previous human rights assessments of the cashless debit card trial have noted that there is no requirement to undertake consultation and secure community agreement in legislation.[33]

1.507 Indeed, while there are some relevant safeguards in relation to the cashless debit card trial, the compulsory nature of the cashless debit card trial raises specific questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'.[34] The application of the cashless debit card scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial, would appear to be a less rights restrictive way to achieve the trial's objectives. As such, the committee has previously concluded that the measures may not be compatible with the right to social security, the rights to privacy and family, and the right to equality and non-discrimination.[35]

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31 Social Security Administration Act, sections 124PF-124PGC.

32 See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) pp. 45-48.

33 See, Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 135.

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

35 See, for example, Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Cashless Debit Card Trial Expansion) Bill 2018, Social Security (Administration) (Trial of Cashless Welfare Arrangements) Determination 2018 [F2018L00245], Social Security (Administration) (Trial – Declinable Transactions and Welfare Restricted Bank Account) Determination 2018 [F2018L00251], *Report 8 of 2018* (21 August 2018) p. 48.

Cape York Welfare Reform income management program

1.508 As noted above, the income management regime as applied in the Cape York Welfare Reform communities appears targeted at a more limited range of welfare recipients, and allows for individual assessments of the particular circumstances of the affected individuals and the management of their welfare payments. The committee has previously stated that this, as facilitated through the FRC, may be less rights restrictive than the blanket location-based scheme as applied in the cashless debit card trial areas.[36] However, while an individual assessment is required, the application of income management may be compulsory rather than voluntary. The concerns raised in the 2016 Review regarding compulsory income management therefore remain.[37]

Committee comment

1.509 The effect of the bill is to extend the cashless debit card trial in all existing locations and the income management program in the Cape York Welfare Reform communities to 30 June 2020.

1.510 The committee reiterates the human rights concerns regarding the cashless welfare card trial and income management identified in the committee's *2016 Review of Stronger Futures measures* and its subsequent reporting. The committee draws the human rights implications of the bill to the attention of the Parliament.

36 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) p. 47.

37 The Social Security (Administration) (Declared child protection State or Territory – Western Australia) Determination 2019 [F2018L00068] which allows a person to be subject to income compulsory management in particular circumstances raises similar concerns in this respect. See, also, Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Recognised State/Territory Authority – Northern Territory Department of Health) Determination 2017 [F2017L01371], *Report 2 of 2018* (13 February 2018) pp. 37-42.

Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019

Purpose	Seeks to amend the definition of 'interception agency' as introduced into the *Telecommunications Act 1997* by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* to include the Australian Commission for Law Enforcement Integrity, the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commissioner Against Corruption (SA) and the Corruption and Crime Commission (WA)
Portfolio	Home Affairs
Introduced	Senate, 13 February 2019
Rights	Privacy; freedom of expression; effective remedy
Status	Advice only

Background

1.511 The committee examined the human rights compatibility of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (the Assistance and Access Bill) in its *Report 11* and *Report 13 of 2018*.[1] Schedule 1 of that bill sought to amend the *Telecommunications Act 1997* to grant certain persons the power to give a 'designated communications provider'[2] (provider) technical assistance notices, technical assistance requests, and technical capability notices, for the purposes of assisting law enforcement and intelligence agencies with performing certain functions and discharging certain powers relevant to crime, national security and other objectives.

1.512 In broad terms, technical assistance notices allow the Director-General of Security (who leads the Australian Security Intelligence Organisation, ASIO) or chief

1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 24-73; Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 51-120.

2 At the time of the committee's consideration of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (the Assistance and Access Bill), section 317C in Schedule 1 of the bill defined 'designated communications providers' by reference to 15 circumstances in which a person is a designated communications provider.

officer of an 'interception agency' (defined further below) to require providers to do one or more specified 'acts or things'[3] to assist ASIO or those interception agencies.[4] Technical capability notices allow the Attorney-General to require a provider to do certain 'acts or things', which must be directed towards ensuring the provider is capable of giving 'listed help'[5] or be by way of giving help, to ASIO or an interception agency.[6] Technical assistance requests operate similarly to technical assistance notices and technical capability notices, except that compliance with a technical assistance request was voluntary.[7]

1.513 At the time of the committee's consideration of the Assistance and Access Bill, 'interception agency' was defined in section 317B of the bill to mean the Australian Federal Police, the Australian Commission for Law Enforcement Integrity, the Australian Crime Commission, the Police Force of a State or the Northern Territory; the Independent Commission Against Corruption of New South Wales; the New South Wales Crime Commission; the Law Enforcement Conduct Commission of New South Wales; the Independent Broad-based Anti-corruption Commission of Victoria; the Crime and Corruption Commission of Queensland; the Independent Commission Against Corruption (SA); or the Corruption and Crime Commission (WA).[8]

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3 At the time of the committee's consideration of the Assistance and Access Bill, the 'acts or things' that could be specified in a technical assistance notice, technical capability notice or technical assistance request included, but were not limited to, 'listed acts or things': sections 317L(3), 317T(4), 317T(7), and 317G(6) in Schedule 1 of the Assistance and Access Bill. Section 317E provided that 'listed acts or things' include, for example removing one or more forms of electronic protection; installing, maintaining, testing or using software or equipment; ensuring that information obtained in connection with the execution of a warrant or authorisation is given in a particular format; facilitating access to customer equipment, software or a service; assisting with the testing, modification, development or maintenance of a technology or capability. It also included an act or thing done to conceal the fact that any thing has been done covertly.

4 Assistance and Access Bill, section 317L.

5 At the time of the committee's consideration of the Assistance and Access Bill, help would constitute 'listed help' if it consisted of a listed act or thing, or one or more acts or things of a kind determined by legislative instrument: section 317T(4) in Schedule 1 of the Assistance and Access Bill.

6 Assistance and Access Bill, section 317T.

7 Assistance and Access Bill, section 317G.

8 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 52. As noted further below, the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (the Assistance and Access Act) included a narrower definition of 'interception agency' to limit the definition to state, territory and commonwealth police and the Australian Crime Commission.

1.514 In its analysis of the Assistance and Access Bill, the committee concluded that while the measures in Schedule 1 of that bill as drafted pursued a legitimate objective and were likely to be rationally connected to that objective, the regime was unlikely to constitute a proportionate limitation on the rights to privacy and freedom of expression, and was therefore likely to be incompatible with those rights.[9] The committee was also unable to conclude that the measures were compatible with the right to an effective remedy.[10] This will discussed in further detail below.

1.515 The Assistance and Access Bill passed both Houses on 6 December 2018. The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (the Assistance and Access Act) contained a number of amendments from the original bill, including relevantly a narrower definition of 'interception agency' to limit the definition to state, territory and commonwealth police and the Australian Crime Commission.[11]

Broadening the definition of 'interception agency'

1.516 The bill seeks to extend the definition of 'interception agency' so as to include those anti-corruption agencies that had previously been excluded from the Assistance and Access Act. These are, the Australian Commission for Law Enforcement Integrity, the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commission Against Corruption (SA), and the Corruption and Crime Commission (WA).[12]

Compatibility of the measure with the right to privacy, freedom of expression and the right to an effective remedy

1.517 The previous analysis of the Assistance and Access Bill considered that that bill engaged the rights to privacy, freedom of expression and the right to an effective remedy.[13] In relation to the right to privacy, this was because, as a consequence of the requests or notices, 'communications providers may facilitate law enforcement, security and intelligence agencies' access to private communications and data where an underlying warrant or authorisation is present'.[14] In relation to the right to

9 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 69.

10 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 71.

11 See the definition of 'interception agency' in section 317B of the Assistance and Access Act.

12 Proposed section 317B of the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019.

13 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 54-71.

14 Statement of compatibility (SOC) to the Assistance and Access Bill, p. 9 [8].

freedom of expression, this was because the measures may 'indirectly mak[e]some people more reluctant to use communications services'.[15] The right to an effective remedy was engaged insofar as an individual that was or would be detrimentally impacted by a provider's compliance with a notice or request did not appear to be able to seek judicial review, given the secrecy provisions in the Assistance and Access Bill would mean that they would be unaware a notice or request was given. The right was also engaged insofar as there was immunity from civil liability to providers, which may limit remedies available for persons detrimentally impacted by the provider's compliance with a request.

1.518 The right to freedom of expression may only be subject to restrictions which are rationally connected and proportionate to specific objectives: the protection of national security, public order, public health or morals. The right to privacy may also be subject to permissible limitations which are provided by law and are not arbitrary. That is, for each of these rights, the measures must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective. In relation to the right to an effective remedy, limitations may be placed on the nature of the remedy, but state parties must comply with the fundamental obligation to provide a remedy that is effective.

1.519 The statement of compatibility accompanying the present bill acknowledges that, by expanding the definition of 'interception agency', the bill engages the right to privacy, the right to freedom of expression and the right to an effective remedy.[16] However, it states that the bill is compatible with these rights, promotes a number of human rights and to the extent it limits a human right, those limitations are reasonable, necessary and proportionate.[17]

1.520 The statement of compatibility states that the purpose of expanding the definition of 'interception agency' to include investigative and anti-corruption agencies (collectively, integrity agencies) is:

> …to protect public safety and address crime and corruption. As with law enforcement agencies currently covered by the Assistance and Access Act, investigative agencies and anti-corruption agencies face the same investigative challenges in the modern communications environment caused by the use of encryption to protect personal, commercial and government information. Extending the technical assistance framework to investigate and anti-corruption agencies ensures that they have the same

15 SOC to the Assistance and Access Bill, p. 14 [40].

16 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, p. 3.

17 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, p. 10.

> powers to seek assistance in investigation of law enforcement misconduct in the public sector.[18]

1.521 In its previous analysis of the Assistance and Access Bill, the committee considered that, on balance, the measures in Schedule 1 of the bill appeared to pursue a legitimate objective for the purposes of international human rights law, namely protecting national security and public order.[19] The committee also considered that the measures were, on balance, rationally connected to that objective.[20]

1.522 However, in relation to the current measures, the purpose of the bill is broader and includes the protection of public safety and addressing 'crime and corruption'. While these may be capable of constituting legitimate objectives for the purposes of international human rights law, the pressing and substantial concern that the measures seek to address is not clear from the statement of compatibility. In particular, it is not clear why it is necessary to include the integrity agencies that were previously expressly excluded. Further information as to the rationale for including a previously excluded provision would have assisted the committee with its analysis of the objectives of the bill.

1.523 The committee's previous analysis of Schedule 1 of the Assistance and Access Bill identified a number of concerns in relation to the proportionality of the measures. Specifically in relation to the then definition of 'interception agency' (which, as noted above, included the integrity agencies at the time of the committee's consideration), the committee stated:

> The minister's response goes some way towards explaining why the measures are necessary, by reference to how technical barriers impede lawful access to information granted pursuant to a warrant or authorisation, and how obligations for industry to assist with overcoming those barriers are 'inadequate'. However, having explained why the measures are necessary, the minister's response does not address whether the measures are *no more extensive* than is necessary to achieve the objectives of the bill, that is, whether the measures adopt the least rights restrictive approach, in order to satisfy the requirements of proportionality for the purposes of justifying a restriction on rights under international human rights law.
>
> For example, some of the agencies designated as 'interception agencies' may have functions broader than addressing serious crime and terrorism,

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18 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, p. 3.

19 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 57-59.

20 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 59-61.

> such as state-based integrity commissions, which have functions that include, for example, promoting the integrity and accountability of public administration.[21] It remains unclear from the minister's response how the limitation on the rights to privacy and freedom of expression associated with strengthening such agencies' capacity to undertake these broader functions, which do not appear to be related to serious crime and terrorism, is proportionate to the [Assistance and Access Bill's] objectives of protecting national security and public order.[22]

1.524 Noting the previous concern expressed by the committee, the subsequent exclusion of these integrity agencies from the Assistance and Access Act addressed this aspect of the committee's human rights concerns relating to the scope of the scheme. The Parliamentary Joint Committee on Intelligence and Security also previously recommended the removal of these integrity agencies from the definition of 'interception agency'.[23]

1.525 The statement of compatibility to the present bill does provide some general information as to the operation of the Assistance and Access Act and provides an assessment of why the Act as amended by the bill constitutes a proportionate limitation on the right to privacy and freedom of expression.[24] It also provides some additional information as to the rationale for excluding the scheme from judicial review and merits review in light of the right to an effective remedy, discussed further below.[25]

1.526 However, beyond the statement quoted at [1.520] above, the statement of compatibility does not provide specific information as to why extending the scheme to these integrity agencies is strictly necessary to achieve the objectives of the current bill, or otherwise provide information as to why extending the scheme to these integrity agencies is proportionate. The information provided in the statement of compatibility does not address the committee's underlying concerns as to the

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21 See section 2A of the *Independent Commission against Corruption Act 1988* (NSW) (Act), which provides that the principal objects of the Act are 'to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body... to investigate, expose and prevent corruption involving or affecting public authorities and public officials'. Section 13 of the Act sets out the principal functions of the Commission, which are numerous but largely all relate to investigating and preventing 'corrupt conduct'.

22 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 62.

23 See Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (December 2018), recommendation 3.

24 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, pp. 6-9.

25 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, pp. 9-10.

broad scope of the definition of 'interception agency' outlined in *Report 11* and *Report 13 of 2018.* It would have assisted in the committee's analysis if the statement of compatibility had specifically addressed the committee's previously expressed concerns. In light of the committee's previous comments, those human rights concerns relating to the broad scope of the definition of 'interception agency' remain in relation to the present bill.

1.527 Further, while the broader Assistance and Access Act is not amended by the bill, this broader scheme is relevant to assessing the human rights compatibility of the amendments introduced by the bill. To that end, it is necessary to provide an overview of the human rights compatibility of the Assistance and Access Act as passed. The Assistance and Access Act included a number of amendments that related to some of the human rights concerns that the committee expressed in *Report 11* and *Report 13 of 2018.* These amendments relevantly included:

- a definition of 'systemic weakness'[26] and 'systemic vulnerability';[27]
- a technical assistance request must now not be given unless the decision-maker[28] is satisfied that the request is 'reasonable and proportionate' and that compliance with the request is practicable and technically feasible.[29] Similar criteria now apply when determining whether to vary a technical assistance request,[30] and a technical assistance request must be revoked if the request is not reasonable and proportionate or compliance with the request is not practicable or feasible.[31] The Assistance and Access Act also sets out the matters to which decision makers must have regard when assessing whether a technical assistance request is reasonable and proportionate, including the availability of other means to achieve the

26 'systemic weakness' is defined in section 317B of the Assistance and Access Act to mean 'a weakness that affects a whole class of technology, but does not include a weakness that is selectively introduced to one or more target technologies that are connected with a particular person. For this purpose, it is immaterial whether the person can be identified'.

27 'systemic vulnerability' is defined in section 317B of the Assistance and Access Act to mean ' a vulnerability that affects a whole class of technology, but does not include a vulnerability that is selectively introduced to one or more target technologies that are connected with a particular person. For this purpose, it is immaterial whether the person can be identified'.

28 Specifically, the Director-General of Security, the Director-General of the Australian Secret Intelligence Service, the Director-General of the Australian Signals Directorate and the chief officer of an interception agency.

29 Assistance and Access Act, section 317JAA(1)-(4).

30 Assistance and Access Act, section 317JA(11)-(14).

31 Assistance and Access Act, section 317JB(2A), (3A), (5).

objectives of the request and that the measures are the least intrusive form of industry assistance;[32]

- the 'acts or things' which a technical assistance notice and technical capability notice may require be undertaken by a provider are now exhaustively defined in the Assistance and Access Act;[33]
- technical assistance requests are now included within the scope of the general safeguard that requests and notices have no effect to the extent they require providers to build a systemic weakness or systemic vulnerability;[34]
- technical assistance requests are now included within the scope of the general safeguard that requests and notices have no effect to the extent they require a provider to provide any content of a communication or private telecommunications data without an existing warrant or authorisation;[35]
- the relevant objectives for which technical assistance requests may be given have been more clearly specified for the persons who can issue such requests. For example, the relevant objective for the Director-General of Security is 'safeguarding national security';[36]
- as part of the mandatory industry consultation required for 'technical capability notices' (described above at [1.512]), a provider may now give a notice to the Attorney-General requiring the carrying out of an assessment of whether the proposed technical capability notice should be given.[37] One of the assessors must be a former judge, and the assessors must consider a number of factors including whether the proposed notice would amount to a systemic weakness or vulnerability, whether the requirements are reasonable and proportionate, and whether the notice is the least intrusive measure.[38] The Attorney-General must have regard to this assessment when considering whether to give a technical capability notice;[39] and

32 Assistance and Access Act, section 317JC.

33 Assistance and Access Act, section 317L(3), 317T(4) and 317T(7).

34 Assistance and Access Act, section 317ZG.

35 Assistance and Access Act, section 317ZH.

36 Assistance Access Act, section 317ZG(5).

37 Assistance and Access Act, section 317W.

38 Assistance and Access Act, section 317WA(5) and 317WA(7).

39 Assistance and Access Act, section 317WA(11).

- technical capability notices must also require authorisation by the Minister for Communications and the Arts.[40]

1.528 These amendments are significant and some address concerns raised by the committee in its previous assessment of the Assistance and Access Bill. In particular, the committee had raised concerns that technical assistance requests did not fall within the scope of the prohibition on requiring providers to build systemic weaknesses or systemic vulnerabilities,[41] and also raised concerns that the Director-General or chief officer of an interception agency were not required to determine whether the requirements imposed by technical assistance requests were proportionate and reasonable.[42] These amendments are therefore important safeguards and assist in assessing the proportionality of the measures.

1.529 However, the amendments do not appear to fully address the concerns raised in the committee's analysis of the Assistance and Access Bill. For example, the definitions of systemic weakness and systemic vulnerability remain very broad. Further, while 'acts or things' are now exhaustively defined for compulsory technical capability notices and technical assistance notices, this is not the case for voluntary technical assistance requests. It remains the case that the 'acts or things' that may be specified in a technical assistance request include, *but are not limited to*, listed 'acts or things'.[43] Additionally, the list of 'acts or things' remains extensive and would include significant measures, for example, temporarily blocking internet messaging to force a device to send a message as unencrypted SMS messages.[44] There is also now an additional listed 'act or thing' for which a technical assistance request, technical assistance notice or technical capability notice may be given, namely an act or thing done to assist in, or facilitate, the giving effect to a warrant or authorisation or the effective receipt of information in connection with a warrant or authorisation.[45]

1.530 In relation to the amendments relating to technical capability notices, while the requirement for a former judge to assess the notice is an important safeguard, this process is only triggered on referral by the provider (that is, it is not automatic) and while the Attorney-General must have regard to any report that eventuates from the assessment, the Attorney-General does not appear to be bound to refuse to

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40 Assistance and Access Act, section 317TAAA.

41 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 67-69.

42 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 62-63.

43 Assistance and Access Act, section 317G(6).

44 See Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 60.

45 Assistance and Access Act, section 317E(1)(da).

issue the notice if the report states that the notice is not reasonable or proportionate.

1.531 In relation to the new 'relevant objectives' for which technical assistance requests may be given, in its analysis of the Assistance and Access Bill the committee raised concerns as to the ability to issue a request in relation to 'the interests of Australia's foreign relations or the interests of Australia's national economic well-being'.[46] The committee raised concerns as to whether this was sufficiently circumscribed, as well as additional concerns that issuing a technical assistance request for the purpose of economic wellbeing and foreign relations may fall outside the permissible grounds on which the freedom of expression can be restricted.[47] As noted above, the Assistance and Access Act now provides a more narrow list of objectives for which such requests may be given. However, it remains the case that the Director-General of the Australian Secret Intelligence Service may give a technical assistance request for the objectives of 'the interests of Australia's foreign relations or the interests of Australia's national economic well-being'.[48] Therefore, the amendments relating to this aspect of the measures do not fully address the committee's concerns.

1.532 As noted earlier, the Assistance and Access Act now includes technical assistance requests within the scope of the general safeguard that is intended to ensure that such requests cannot be used to request a provider to do an act or thing for which a warrant or authorisation would be required under an existing warrant regime.[49] This is an important safeguard. However it is noted that this does not address the committee's additional concerns in relation to this safeguard outlined in its analysis of the Assistance and Access Bill, namely, that the safeguard appears to place the burden on the provider receiving the request or notice to determine if the relevant request or notice seeks to compel the provider to do an act or thing for which a warrant was required. The previous analysis raised questions as to how a provider, especially smaller or unsophisticated providers, would be expected to know whether or not what has been requested or compelled requires a warrant, and therefore how to respond accordingly.[50] Concerns therefore remain as to whether this would function as an effective safeguard for the purposes of international human rights law.

1.533 Finally, while there are now additional oversight mechanisms, it remains the case that the power to give a technical assistance notice or request, or technical

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46 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 62.

47 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) p. 62.

48 Assistance and Access Act, section 317ZG(5)(b).

49 Assistance and Access Act, section 317ZH.

50 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 66-67.

capability notice, is not exercised by a judge, nor does a judge supervise its application (subject to the amendment relating to technical capability notices, discussed above). Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and merits review are also excluded. The statement of compatibility accompanying the bill explains the rationale for not having judicial (or merits) review in the context of the right to an effective remedy, stating:

> Australian courts will retain jurisdiction for judicial review of a decision of an agency head to issue a technical assistance notice or the Attorney-General's decision to issue a technical capability notice. This will ensure that an affected person, or a provider or behalf of an affected person, has an avenue to challenge unlawful decision making.
>
> The measures under the Assistance and Access Act do not provide for merits review of decision making and excludes judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). This approach to review is consistent with similar decisions made for national security and law enforcement purposes - for example those made under the IS Act, ASIO Act, *Inspector-General of Intelligence and Security 1986 Act* and the TIA Act. Decisions of a law enforcement nature were identified by the Administrative Review Council in its publication *What decisions should be subject to merits review?* as being unsuitable for merits review.
>
> Anti-corruption agencies may require a technical assistance notice in order to access appropriate electronic evidence for an investigation that is underway and evolving. It is imperative that a technical assistance notice can be issued and used quickly. It would not be appropriate for a decision to issue a technical assistance notice to be subject to merits review or judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, as review could adversely impact the effectiveness and outcomes of an investigation. Decisions by the Attorney-General and Minister for Communications to issue a technical capability notice are particularly unsuitable for review as they are ministerial decisions to develop law enforcement and national security capabilities.[51]

1.534 However, in its analysis of the Assistance and Access Bill, the committee noted the importance of providing for judicial oversight where surveillance measures or acquisition of communications are undertaken covertly, that is, without the knowledge of the individual affected by the measure. The committee stated:

> The European Court of Human Rights (ECHR) has explained:
>
> > [S]ince the individual will necessarily be prevented from seeking an effective remedy of his or her own accord or from taking a direct part in any review proceedings, it is essential that the procedures

51 SOC to the Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019, pp. 9-10.

> established should themselves provide adequate and equivalent guarantees safeguarding his or her rights.[52]
>
> In this respect, the ECHR has emphasised the importance of judicial oversight, noting that 'it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure'.[53] However, as noted earlier and in the initial analysis, the giving of a technical assistance notice or request, or technical capability notice, is not required to be authorised by a judge, nor does a judge supervise its application. While the minister's response states that judicial review of a decision to issue a notice is available pursuant to the *Judiciary Act 1903,* this appears to be relevant only to a provider's ability to apply for review of a decision to issue a notice. That is, it does not appear to give an individual whose rights may be impacted by a request or notice the ability to apply for review. In light of the secrecy provisions in the bill, it is unlikely that any person who has their rights affected by a technical assistance notice, technical capability notice or technical assistance request would be aware of the existence of a notice or request in order to seek review of the decision to issue it. Therefore, in terms of ensuring the impact on individual rights is proportionate for the purposes of international human rights law, the availability of judicial review for providers does not appear to be an adequate safeguard.[54]

1.535 As such, the absence of judicial control and supervision of the issue of technical assistance requests, technical assistance notices and technical capability notices remains a concern.

1.536 There are also other matters raised in the committee's previous analysis that are relevant to the Assistance and Access Act, including that a number of the Acts amended by the Assistance and Access Act (such as the *Telecommunications (Interception and Access) Act 1979*) which contain the underlying warrant and authorisation regimes were legislated prior to the establishment of the committee and therefore those schemes had not 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.*[55] These matters, as well as the broader

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52 *Big Brother Watch v United Kingdom*, European Court of Human Rights application nos.58170/13, 62322/14 and 24960/15 (13 September 2018) [309].

53 *Big Brother Watch v United Kingdom*, European Court of Human Rights application nos.58170/13, 62322/14 and 24960/15 (13 September 2018) [309].

54 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 64-65, 70-71.

55 See Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 66-67.

human rights compatibility of the Assistance and Access Bill, are addressed in further detail in *Report 11* and *Report 13 of 2018*.

Committee comment

1.537 The preceding analysis indicates that the amendments introduced by the bill engage and limit the right to privacy, the right to freedom of expression and the right to an effective remedy.

1.538 The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* as enacted addresses some of the concerns raised by the committee's previous analysis of the human rights compatibility of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 in its *Report 11 of 2018* and *Report 13 of 2018.* However, some concerns as to human rights compatibility remain that were not fully addressed in the Act as passed.

1.539 The committee's *Report 13 of 2018* raised concerns as to the proportionality of including the Australian Commission for Law Enforcement Integrity, the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commission Against Corruption (SA), and the Corruption and Crime Commission (WA) within the definition of 'interception agency'. As the amendments introduced by the bill seek to re-introduce those agencies into the definition of 'interception agency', these concerns remain.

1.540 The committee otherwise reiterates its previous analysis and draws the human rights implications of the bill to the attention of the parliament.

Treasury Laws Amendment (Consumer Data Right) Bill 2019

Purpose	Amends the *Competition and Consumer Act 2010*, *Australian Information Commissioner Act 2010* and *Privacy Act 1988* to establish the 'Consumer Data Right' to provide individuals and businesses with an entitlement to access specified data that businesses hold in relation to them
Portfolio	Treasury
Introduced	House of Representatives, 13 February 2019
Right	Privacy
Status	Advice only

Consumer Data Right

1.541 The bill would establish a consumer data right (CDR) for individuals and businesses to access consumer data that relates to them and direct that all or part of such data be shared or transferred to certain accredited recipients.[1] Under the bill, the minister, by legislative instrument, may apply the CDR to designated classes of information in various sectors of the economy over time.[2] A 'consumer' for CDR purposes is any identifiable or reasonably identifiable person to whom the designated information relates.[3]

1.542 The bill also sets out minimum privacy safeguards that apply to protect the confidentiality of CDR consumers' data.[4] Consumer data rules, which would be developed by the Australian Competition and Consumer Commission (ACCC) as disallowable instruments, may further supplement these safeguards as they apply to each sector.[5] Failure to comply with consumer data rules or the privacy safeguards is subject to civil penalties.[6]

Compatibility of the measure with the right to privacy

1.543 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing,

1 Statement of compatibility (SOC), p. 83.

2 Treasury Laws Amendment (Consumer Data Right) Bill 2019, proposed section 56AC.

3 Proposed section 56AI(3).

4 Proposed division 5. An example of a safeguard is that only a person to whom CDR data relates may validly request that data be transferred, whether to themselves or an accredited recipient: see, proposed section 56EI(1)(a).

5 Proposed section 56BA.

6 See, proposed section 56EU.

use and sharing of personal information. Measures in the bill engage and limit the right to privacy by authorising the use and disclosure of designated information relating to individual consumers and the creation of further rules governing the disclosure, use, accuracy, storage or deletion of such data.

1.544 Limitations on the right to privacy may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is proportionate to achieve that objective. In this regard, the statement of compatibility acknowledges that the measure engages and may limit the right to privacy, but argues that the limitations are reasonable and proportionate to achieving the stated objective.[7]

1.545 The statement of compatibility provides limited information about the overall objective of the CDR framework as being:

> 'designed to give customers more control over their information. It is expected to provide benefits to consumers such as more choice in where they take their business or more convenience in managing their money and services.'[8]

1.546 While the scheme as a whole appears to achieve a legitimate objective and may be rationally connected to that objective, there are questions about whether the measure will be a proportionate limitation on the right to privacy in practice. This is because the bill would confer extensive rule-making powers on the ACCC and grant broad ministerial discretion to designate information as CDR data. In this respect, the scope of information that the minister may designate as CDR data for a particular sector is not certain. Similarly, the consumer data rules may further prescribe or supplement requirements for disclosure, use, accuracy, storage or deletion of CDR data.

1.547 This is a potential issue because, in order to be a proportionate limitation on the right to privacy, regimes that allow the collection, use and disclosure of personal information must be sufficiently circumscribed. In particular, laws conferring discretion or rule-making powers must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[9] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Accordingly, the content and scope of the instruments designating CDR data for particular sectors and the consumer data rules are relevant to an assessment of whether the overall framework has adequate safeguards and is sufficiently circumscribed so as to be consistent with international human rights law. Should the bill be passed, the

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7 SOC, p. 85.

8 SOC, p. 83.

9 *Hasan and Chaush v Bulgaria*, European Court of Human Rights Application no.30985/96 (2000) [84].

committee will assess the legislative instruments for compatibility with human rights once they are received.

Committee comment

1.548 The preceding analysis indicates that any legislative instruments setting out 'consumer data right' rules and designating classes of information for particular sectors will be significant to the overall human rights compatibility of the consumer data right framework.

1.549 If the bill is passed, the committee will consider the human rights compatibility of the legislative instruments once they are received. The committee draws the human rights implications of the bill to the attention of the minister and parliament.

Bills not raising human rights concerns

1.550 Of the bills introduced into the Parliament between 12 and 21 February, 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 Amendment (Movement of Provisionally Allocated Places) Bill 2019
- Australian Business Securitisation Fund Bill 2019
- Australian Veterans' Recognition (Putting Veterans and their Families First) Bill 2019
- Banking Amendment (Rural Finance Reform) Bill 2019
- Banking System Reform (Separation of Banks) Bill 2019
- Broadcasting Services Amendment (Audio Description) Bill 2019
- Civil Aviation Amendment Bill 2019
- Coal Prohibition (Quit Coal) Bill 2019
- Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019
- Customs Amendment (Immediate Destruction of Illicit Tobacco) Bill 2019
- Customs Tariff Amendment (Craft Beer) Bill 2019
- Environment Legislation Amendment (Protecting Dugongs and Turtles) Bill 2019
- Excise Tariff Amendment (Supporting Craft Brewers) Bill 2019
- Fair Work Amendment (Right to Request Casual Conversion) Bill 2019
- Galilee Basin (Coal Prohibition) Bill 2019
- Governor-General Amendment (Salary) Bill 2019
- Higher Education Legislation Amendment (Voluntary Student Services and Amenities Fee) Bill 2019
- Military Rehabilitation Compensation Amendment (Single Treatment Pathway) Bill 2019
- National Health Amendment (Pharmaceutical Benefits) Bill 2019
- National Sports Tribunal Bill 2019
- National Sports Tribunal (Consequential Amendments and Transitional Provisions) Bill 2019
- Office for Regional Australia Bill 2019
- Refugee Protection Bill 2019

- Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2019
- Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019
- Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019
- Treasury Laws Amendment (2019 Measures No. 1) Bill 2019
- Treasury Laws Amendment (2019 Petroleum Resource Rent Tax Reforms No. 1) Bill 2019
- Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019
- Treasury Laws Amendment (Increasing the Instant Asset Write-Off for Small Business Entities) Bill 2019
- Treasury Laws Amendment (Mutual Reforms) Bill 2019
- Treasury Laws Amendment (Putting Members' Interests First) Bill 2019
- Treatment Benefits (Special Access) Bill 2019
- Treatment Benefits (Special Access) (Consequential Amendments and Transitional Provisions) Bill 2019
- Water Amendment (Indigenous Authority Member) Bill 2019
- Water Amendment (Purchase Limit Repeal) Bill 2019
- Wine Australia Amendment (Trade with United Kingdom) Bill 2019

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 available on the committee's website.[1]

Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Purpose	Would amend the threshold for the minister to determine that a person has ceased to be an Australian citizen following conviction of a criminal offence
Portfolio	Home Affairs
Introduced	House of Representatives, 28 November 2018
Rights	Freedom of movement; fair hearing; fair trial; children; obligation to consider the best interests of the child; nationality; private life; family; public affairs; liberty; non-refoulement; equality and non-discrimination; retrospective criminal laws; double punishment; work; social security; adequate standard of living; health; education
Previous reports	Report 1 of 2019
Status	Concluded examination

Background

2.3 The committee previously examined the human rights implications of expanding the basis on which a dual citizen's Australian citizenship will cease in its consideration of the *Australian Citizenship Amendment (Allegiance to Australia) Act*

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2015 (2015 Act) which amended the *Australian Citizenship Act 2007* (Citizenship Act).[2]

2.4 The committee first reported on the current bill in its *Report 1 of 2019* and requested a response from the minister by 4 March 2019.[3]

2.5 The minister's response to the committee's inquiries was received on 6 March 2019. The response is discussed below and is available in full on the committee's website.[4]

Expanding the circumstances in which a person's Australian citizenship will cease

2.6 Currently, under section 35A of the Citizenship Act, the minister may determine, in writing, that a person will cease to be an Australian citizen on conviction in the following circumstances:

- the person is a national or citizen of a country other than Australia at the time when the minister makes the determination;
- the person has been convicted of one of certain specified offences, set out in section 35A(1)(a);
- the person has been sentenced to a period of imprisonment of at least six years;
- the minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- having regard to a range of factors, the minister is satisfied that it is not in the public interest for the person to remain an Australian citizen.[5]

2 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) pp. 4-46; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 27-84. The amended Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 passed both Houses of Parliament on 3 December 2015 and received Royal Assent on 11 December 2015.

3 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 2-23.

4 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Removal of requirement for a sentence of imprisonment of at least six years in respect of a 'relevant terrorism conviction'

2.7 The bill would repeal current section 35A(1) and replace it with new section 35A(1). Under the bill the minister may determine a person's citizenship will cease in respect of a 'relevant terrorism conviction' or 'relevant other conviction'.

2.8 Except for the addition of the offence of associating with a terrorist organisation, the specified offences for which citizenship may be revoked are the same as those under current section 35A(1). However, the bill would also create two categories of offences: 'relevant terrorism convictions'[6] and 'other relevant convictions.'[7] In relation to a 'relevant terrorism conviction,' the bill would remove the requirement that the person has been sentenced to a period of imprisonment for at least six years. For 'relevant other convictions' there would still be a requirement that the person has been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years.

Lowering threshold as to whether a person has dual citizenship

2.9 As set out above, currently it is a precondition, under section 35A(1)(b), for cessation of citizenship on determination by the minister that a person is a dual

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5 The minister must consider public interest matters before making a determination to revoke a person's citizenship including: the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences; the degree of threat posed by the person to the Australian community; the age of the person; if the person is aged under 18—the best interests of the child as a primary consideration; the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person; Australia's international relations; and any other matters of public interest.

6 'Relevant terrorism conviction' is defined in the bill by reference to divisions of the Criminal Code and includes: delivering, placing, discharging or detonating an explosive device; treason; treason-assisting enemy to engage in armed conflict; treachery; terrorist acts; providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act; possessing things connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; other acts done in preparation for, or planning, terrorist acts; directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations (this is a new offence in respect of which citizenship can be lost under the bill); financing terrorism; financing a terrorist; incursions into foreign countries with intention to engage in hostile activities; engaging in a hostile activity in a foreign country; entering or remaining in a declared area overseas where terrorist organisations are engaged in hostile activities; allowing use of buildings, vessels and aircraft to commit foreign incursions offences; recruiting persons to join organisations engaged in hostile activities against foreign governments; recruiting persons to serve in or with an armed force in a foreign country; and preparations for incursions into foreign states for the purpose of engaging in hostile activities.

7 'Relevant conviction' is defined to include: sabotage; planning for or planning a sabotage offence; espionage; and foreign interference.

national or citizen of another country at the time when the minister makes the determination. The bill proposes to alter this threshold requirement in section 35A(1)(b) so that, in making a determination that a person ceases to be an Australian citizen, the minister only need be satisfied that the person would not become a person who is not a national or citizen of any other country.

Scope of application

2.10 Section 35A would apply in relation to a 'relevant terrorism conviction' occurring on or after 12 December 2005. In relation to a 'relevant other conviction' the amendments would apply if the conviction occurred after 12 December 2005 and, if it occurred before 12 December 2015, the person was sentenced to a period of imprisonment of at least 10 years in respect of the conviction.

2.11 These amendments also apply to children who have been convicted of a 'relevant terrorism conviction' or 'relevant other conviction'.[8]

Compatibility of the measures with the right to freedom of movement, right to liberty, right to protection of the family: initial analysis

Right to freedom of movement

2.12 The right to freedom of movement is protected under article 12 of the International Covenant on Civil and Political Rights (ICCPR) and includes a right to legally and practically leave Australia, as well as the right to enter, remain in, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties such as longstanding residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[9]

2.13 The initial human rights analysis noted that expanding the circumstances in which the minister may determine that a person's citizenship has ceased engages and may limit this right. For those whose citizenship ceases when they are outside Australia, they will lose the entitlement to return to Australia. Additionally, if they are in a country in which they do not hold nationality, the right to leave that other country may be restricted in the absence of any valid travel documents.

2.14 For those who are present in Australia at the time their citizenship ceases, as noted in the statement of compatibility these individuals will be entitled to an ex-citizen visa.[10] While this visa may allow the person to remain in Australia, in practice, it may operate to restrict any travel from Australia. This is because a person who

8 See, proposed section 35A(1); Statement of Compatibility (SOC) p. 16.

9 UN Human Rights Committee, *General Comment No.27: Article 12*, *Freedom of Movement* (1999). See also *Nystrom v. Australia*, UN Human Rights Committee Communication No.1557/2007 (2011).

10 Statement of compatibility (SOC), p. 10.

leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.[11] Further, an ex-citizen visa may be subject to cancellation on character grounds. As acknowledged in the statement of compatibility, an ex-citizen visa would be subject to mandatory visa cancellation if the person has a substantial criminal record and is serving a sentence of imprisonment against a law of the Commonwealth.[12] A person has a 'substantial criminal record' where they have been sentenced to a term of imprisonment of 12 months or more.[13] If a person has served a period of less than 12 months the cancellation of their visa is discretionary.[14] A person whose ex-citizen visa is cancelled will become an unlawful non-citizen and be subject to mandatory immigration detention and removal.[15] As such, this will limit a person's right to remain in their 'own country' if the person has strong ties to Australia.

Right to liberty

2.15 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

2.16 The initial analysis noted that expanding the circumstances in which the minister may determine that a person's citizenship has ceased engages and may limit this right. This is because, in the context of the existing law, a person present in Australia, whose citizenship has ceased, may and in some cases must have their ex-citizen visa cancelled on character grounds. Following cancellation of this visa the ex-citizen would be subject to mandatory immigration detention pending their removal under the Migration Act.[16] Such persons are also prohibited from applying for most other visas.[17]

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11 See section 35 of the *Migration Act 1958* (Migration Act).

12 SOC, p. 10.

13 Migration Act, section 501(7)(c).

14 SOC, p. 10.

15 Migration Act, sections 189, 198.

16 Migration Act, sections 189, 198.

17 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

The right to protection of the family

2.17 The right to protection of the family protects family members from being involuntarily and unreasonably separated from one another.[18] The initial analysis noted that a person whose Australian citizenship ceases may be prevented from returning to, or residing in, Australia, or traveling to another country. This may result in that person being separated from their family, which therefore engages and limits this right.

Limitations on human rights

2.18 The initial analysis noted that the right to freedom of movement, the right to liberty and the right to protection of the family may be subject to permissible limitations providing the measures limiting these rights meet certain 'limitation criteria', namely, they address a legitimate objective and are rationally connected and proportionate to this objective. However, the initial analysis raised questions as to whether the measures constitute permissible limitations according to these criteria.

2.19 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 7-14.[19]

2.20 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to freedom of movement, the right to liberty and the right to the protection of the family, including:

- 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 (including how current laws are insufficient to address this objective);
- how the measures are rationally connected to (that is, effective to achieve) that objective;
- whether the measures are proportionate, including:
    - why it is necessary to lower the threshold for determining dual citizenship, remove the requirement for a sentence of six years for 'relevant terrorism convictions' and apply citizenship loss provisions to the offence of associating with a terrorist organisation;
    - whether less rights restrictive approaches to achieving the stated objectives are reasonably available;

18 *Winata v. Australia,* UN Human Rights Committee Communication No.930/2000 (2001) [7.3].

19 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 7-14 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

- whether the offences specified as 'relevant terrorism convictions' or 'relevant other convictions' could be narrowed and the extent to which these offences are sufficiently circumscribed;
- whether consideration could be given to additional safeguards to ensure that a person is not subject to arbitrary detention (including the availability of periodic review of whether detention is reasonable, necessary and proportionate in the individual case or preventing prolonged detention);
- whether consideration could be given to explicitly requiring the minister to consider the impact of the citizenship loss on the right to protection of the family and the right to freedom of movement; and
- the existence of any other safeguards that may be relevant to the proportionality of the measures.

Minister's response and analysis

Legitimate objective and rational connection

2.21 The committee's initial analysis acknowledged that, in general terms, the stated objectives of national security, public order and the rights and freedoms of others have been recognised as being capable of constituting legitimate objectives for the purposes of international human rights law.[20] However, the minister's response identifies the following two further objectives:

> …firstly, to ensure the power of the Minister to cease Australian citizenship remains an adaptable and accessible tool to protect the Australian community in the evolving threat environment; and secondly, to maintain the integrity of Australian citizenship and the privileges that attach to it.

2.22 It is acknowledged that these objectives may also be capable, in general terms, of constituting legitimate objectives for the purposes of international human rights law. Of relevance to this issue, the minister's response explains that the effect of removing the requirement for an individual to be sentenced to a minimum of six years' imprisonment for relevant terrorism offences, is that the bill will broaden the cohort of offenders who may be eligible to have their Australian citizenship ceased. In the context of this measure, the minister's response provides some information relevant to how current laws may be insufficient to address the stated objectives:

> Sentences imposed for terrorism offences in Australia have ranged from 44 days to 44 years' imprisonment. This is reflective of the wide variety of matters that the court must take into account during sentencing, such as the degree to which the person has shown contrition for the offence, whether or not they pleaded guilty, and prospects for rehabilitation.

20 See, International Covenant on Civil and Political Rights (ICCPR), article 12(3).

> The removal of the sentencing requirement recognises that there are a number of offenders who have served, or will serve, sentences of less than 6 years' imprisonment (or less than 10 years' imprisonment, for those convicted prior to 12 December 2015) for relevant terrorism offences. While these offenders may be subject to intervention and rehabilitation initiatives while in custody, there is no guarantee that this will result in their complete disengagement from a violent extremist ideology. Recidivism remains a risk where offenders re-adopt or re-engage in violent extremist ideologies following their release into the community. Some of these offenders will continue to pose a threat to the community at the end of their sentence.

2.23 As such, the minister's response indicates that the measures are intended to address the recidivism risk that some offenders may pose to the community regardless of the length of sentence they have received. It would have been useful to the committee's analysis if the minister's response had provided evidence or data about the scope of this issue as a pressing and substantial concern. Although the measures may, on balance, pursue a legitimate objective for the purposes of international human rights law, some questions remain as to whether the measures address a pressing and substantial concern for the purposes of international human rights law. This is because the minister's response has not fully explained how a court's assessment of an appropriate sentence for having a committed a specified offence would not sufficiently accommodate the risk posed by an individual to the Australian community.

2.24 In relation to whether the measures are rationally connected to the objective of protecting the community, the minister's response states:

> …it is important to ensure there are a range of flexible and proportionate measures available to manage the risks posed by these offenders. Cessation of Australian citizenship is one such measure, which may be considered during or after a convicted terrorist offender's prison sentence. The measures in this Bill will clearly enhance the safety of the Australian community by enabling the revocation of Australian citizenship in circumstances where such a person poses a threat to the community and has repudiated their allegiance to Australia.

2.25 However, while the minister's response maintains stripping of citizenship will 'clearly enhance' the safety of Australians, it does not explain how expanding the power to strip citizenship will be effective in this respect. It is unclear, for example, how the asserted management of risks through the measures relate to the anticipated, immediate or ultimate consequences from loss of citizenship. Current provisions to strip citizenship following conviction have been in operation since 2015, however, the minister's response does not provide any information or evidence as to how these current provisions have been effective to protect the Australian community. Much depends on how the measures operate in practice and in the context of the existing regime. As such, it is unclear, in the absence of further

evidence or reasoning, how expanding powers to strip citizenship to a broader group of offenders will be effective to achieve (that is, rationally connected to) the objective.

Proportionality

2.26 As to the proportionality of the limitation, the minister's response states '[l]ess restrictive approaches are not available to meet this policy outcome and as far as possible, amendments to the [Citizenship Act] have been appropriately constrained.' However, the minister's response does not explain why less rights restrictive ways of addressing risks to the community are not reasonably available. For example, it is unclear why less rights restrictive approaches such as regular law enforcement techniques or criminal justice processes (e.g. arrest, charge and prosecution including for preparatory acts) are insufficient to protect the community. Further, the ability to impose conditions on an individual under a control order in a range of circumstances is already a coercive tool aimed at addressing such objectives.[21] The availability of these other mechanisms suggests that the measures may not be the least rights restrictive approach as is required to constitute a proportionate limitation on human rights.

2.27 In relation to whether the offences specified as 'relevant terrorism convictions' and 'relevant other convictions' are sufficiently circumscribed, the minister's response points to the fact that the list of offences included in the definitions are those already listed in section 35A of the Act. The fact that no other offences, aside from the offence of associating with a terrorist organisation, have been added does not substantively address whether the offences are sufficiently circumscribed. As noted in the initial analysis, 'relevant terrorism convictions' relate to a broad range of offences including offences that relate to preparation, assistance or engagement. They also cover conduct that may be reckless rather than intentional. Indeed, some of the offences which are 'relevant terrorism convictions' themselves raise human rights concerns. For example, the committee has previously raised specific concerns that the offence of entering or remaining in declared areas is likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.[22] The fact that individuals may be subject to a loss of citizenship for such offences even where they

21 For a human rights analysis of control orders and the human rights concerns they raise: see, Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment Bill (No. 1) 2018, *Report 10 of 2018* (18 September 2018) pp. 21-53.

22 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44; *Report 4 of 2018* (8 May 2018) pp. 88-90. The UN Human Rights Committee in its Concluding Observations on Australia also raised concerns as to the necessity and proportionality of 'declared area' offences: CCPR/C/AUS/CO/6 (2017), [15].

are not sentenced to over six years imprisonment exacerbates concerns as to the proportionality of the measures.[23] Enabling a person's citizenship to be stripped where the person has received a much lesser or even a non-custodial sentence, is an extremely serious outcome.

2.28 Further, while a person's citizenship may only be lost for 'relevant other convictions' where the term of imprisonment is more than 6 years, the scope of 'relevant other convictions' still raises human rights concerns. In this respect, the offences of espionage and foreign interference are among those defined as 'relevant other convictions' under the bill. However, the committee also previously raised concerns regarding the expanded scope of those espionage and foreign interference offences and human rights.[24] The retrospective application of provisions under the bill to all persons convicted of a terrorism offence after 12 December 2005 also raises further concerns that the measures may not be the least rights restrictive approach.

2.29 Nevertheless, the minister's response explains that the factors to which the minister is required to have regard in determining whether to cease a person's citizenship, operate as safeguards:

> In order to cease a person's citizenship, the Act already requires that the Minister be satisfied that it is not in the public interest for the person to remain an Australian citizen, having regard to the following factors:
>
> - the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
> - the degree of threat posed by the person to the Australian community;
> - the age of the person;
> - if the person is aged under 18-the best interests of the child as a primary consideration;
> - the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
> - Australia's international relations;
> - any other matters of public interest.

2.30 The consideration of such factors is relevant to the proportionality of the limitation imposed on human rights. As set out above, the committee also requested further information from the minister as to whether consideration could be given to

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23 The bill, by extending the citizenship removal power to the offence of 'associating with a terrorist organisation', also raises additional questions in this context.

24 See, Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill, *Report 3 of 2018*, (27 March 2018) pp. 244-260.

explicitly requiring the minister to consider the impact of the citizenship loss on the right to protection of the family and the right to freedom of movement. In relation to this issue, the minister's response indicates that the minister may already have regard to such matters under the proposed measures:

> In considering the person's connection to the other country and any other matters of public interest, the Minister may consider the person's connection with Australia, including potential impacts on family members.
>
> The requirement to consider and balance the various factors is intended to ensure that any interference with the family, the right to re-enter one's own country, or to the right to freedom of movement, is not arbitrary, since cessation will occur where the national security risks and threats to the Australian community are such that it is not in the public interest for the person to remain a citizen. The Minister must take into account the individual circumstances of the case in determining whether to exercise the power to cease a person's citizenship.

2.31 However, while the minister may consider the impact on family members or the right to freedom of movement in determining whether to cease a person's citizenship, there remains no express requirement for them to do so. As noted in the initial analysis, there appears to be nothing express to prevent the cancellation of a person's citizenship notwithstanding the impact of this decision on, for example, the right to the protection of the family.

2.32 The minister's response also does not address why it is necessary to lower the threshold for determining dual citizenship, remove the requirement for a sentence of six years for 'relevant terrorism convictions' and apply citizenship loss provisions to the offence of associating with a terrorist organisation. As noted in the initial analysis, the proposed amendment to the threshold for determining dual citizenship raises additional proportionality concerns. As noted above, currently it is a condition precedent for making a determination that a person *is*, as a matter of fact, a national or citizen of a country other than Australia. By proposing that the minister only need be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter. This is particularly the case noting that questions of dual nationality can be highly complex.

2.33 By amending the threshold in relation to dual nationality, as noted in the initial analysis, the bill would also restrict the scope of judicial review as to the question of a person's dual nationality. This is because, rather than being able to look at evidence and examine whether a person held dual nationality as a question of jurisdictional fact, the court would be restricted to looking at the reasonableness of the minister's satisfaction or legality of the minister's decision. This means that a court may be unable to correct an error in circumstances where it may have been

reasonable for the minister to be satisfied that a person was a dual citizen but the evidence before the court shows that they are not in fact a dual citizen. This raises serious concerns as to the proportionality of the measures, particularly noting the consequences that flow from the loss of citizenship. This issue was not addressed in the minister's response.

2.34 As noted above, a person present in Australia at the time their citizenship ceases will be entitled to an ex-citizen visa. However, in the context of the existing law, such individuals are liable to having their ex-citizen visa cancelled on character grounds.[25] Following cancellation of the visa, the person would be subject to mandatory immigration detention pending their removal.[26] In relation to the proportionality of this limitation on the right to liberty, the initial analysis stated that the consequence of visa cancellation and detention following the cessation of Australian citizenship is of particular concern in relation to individuals who may be rendered stateless, may not be accepted by another country, or may engage Australia's non-refoulement obligations. This is because it gives rise to the prospect of prolonged or indefinite detention, noting that a person will be subject to mandatory immigration detention following visa cancellation.[27] Lowering the threshold for determining dual citizenship may exacerbate this prospect noting the potential risk of statelessness. The United Nations Human Rights Committee (UNHRC) has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[28] In relation to this issue, the minister's response states:

> I note the Committee's assertion that the application of the measures in this Bill may result in an individual, who has had their Australian citizenship ceased, being subject to immigration detention on an indefinite basis. The loss of Australian citizenship does not automatically result in a person being placed in immigration detention or being removed from Australia. A person who is in Australia is granted an ex-citizen visa by operation of law upon cessation of their citizenship. That visa may then be subject to cancellation. As the Committee has noted, where the person fails the character test on the basis of a substantial criminal record and is serving a

25 SOC, p. 10.

26 Migration Act, sections 189, 198.

27 Migration Act, sections 189, 198.

28 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [18]. See, also, *C v. Australia,* UN Human Rights Committee Communication No.900/1999 (2002) [8.2]; *Bakhtiyari et al. v. Australia,* UN Human Rights Committee Communication No.1069/2002 (2003) [9.3]; *D and E v. Australia,* UN Human Rights Committee Communication No.1050/2002 (2006) [7.2]; *Shafiq v. Australia,* UN Human Rights Committee Communication No.1324/2004 (2006) [7.3]; *Shams et al. v. Australia,* UN Human Rights Committee Communication No.1255/2004 (2007) [7.2]; *F.J. et al. v. Australia* ,UN Human Rights Committee Communication No.2233/2013 (2016) [10.4].

> prison sentence at the time, then cancellation is mandatory. However, a discretionary power to revoke that cancellation is available, which allows full consideration of the person's individual circumstances.

2.35 While ex-citizen visa cancellation following cessation of citizenship will not be mandatory in all cases, it is a consequence that is likely to apply in many cases. The fact that, in circumstances where visa cancellation is mandatory, the minster nevertheless retains discretion to revoke visa cancellation does not fully address concerns in relation to the proportionality of the limitation on the right to liberty. This is because the minister may choose not to exercise their discretion to revoke the visa cancellation regardless of the impact on an individual being placed in potentially prolonged immigration detention. As such, the possibility of the minister exercising their discretion is unlikely to constitute a sufficient safeguard for the purposes of international human rights law. In relation to mandatory immigration detention following ex-citizen visa cancellation and the right to liberty, the minister's response states:

> The Government's position is that people who have no legal authority to remain in Australia, including if a person's ex-citizen visa is cancelled following the revocation of Australian citizenship, are expected to depart. Any immigration detention pending removal, if the person does not voluntarily depart, and/or consideration of other options, involves a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. Placement in an immigration detention facility is based on the assessment of a person's risk to the community and level of engagement in the status resolution process. Such placements are regularly reviewed.

2.36 While the government's position is that individuals who have had their ex-citizen visas cancelled are expected to depart, there may be impediments to a person doing so. This may be because they are stateless, they have not been accepted to enter another country, they have been found to engage Australia's non-refoulement obligations or they are in the process of legal challenges in relation to their detention, visa or citizenship status. In these circumstances, the concern is that a person may face prolonged immigration detention. In this respect, the minister's response indicates that arrangements can be made for persons other than detention. However, such arrangements are limited and remain at the discretion of the minister.[29] Therefore, notwithstanding the administrative processes to review detention, the minister is not obliged to release a person even if a person's individual circumstances do not justify continued or protracted detention.

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29 Migration Act, sections 195A(2),(4),(5); 197AB, 197AC(1). See, Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 1 of 2019* (12 February 2019) pp. 82-83.

2.37 While the minister refers in his response to a risk-based approach to the consideration of the appropriate placement and management of an individual, the committee has previously considered that the administrative and discretionary processes relating to the review of detention under Australian domestic law may not meet the requirement of periodic and substantive judicial review of detention so as to be compatible with Article 9.[30] This is because of the mandatory nature of detention of persons who have had their visa cancelled in circumstances where there does not appear to be a legal requirement of an individualised assessment of whether detention is justified, and the absence of an opportunity to challenge detention in substantive terms. This is particularly so noting that the Migration Act requires detained non-citizens (including ex-citizens) to be kept in immigration detention until they are removed, deported or granted a visa.[31] Further, the Migration Act requires that persons who have their visa cancelled on character grounds must have their detention continue unless a court finally determines that the detention is unlawful or that the person detained is not an unlawful non-citizen.[32] In circumstances where judicial review of the lawfulness of detention is limited in Australia to compliance with domestic law, and does not include the possibility to order release if detention is incompatible with the requirements of article 9 of the ICCPR, the UN Human Rights Committee has previously considered that detention in such circumstances is incompatible with Australia's obligations under article 9.[33] The committee has also previously concluded that visa cancellation, the consequence of which would be that the person is subject to immigration detention, is likely to be incompatible with the right to liberty.[34] Similarly, expanding the grounds for loss of citizenship, which gives rise to the prospect of visa cancellation and immigration detention, raises the same concerns in relation to the right to liberty.

2.38 Finally, it is noted that the UN Human Rights Committee, in its concluding observations on Australia, also raised concerns about 'the necessity and proportionality of certain counter-terrorism powers, including…revocation of citizenship.'[35]

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30 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202-205.

31 Migration Act, section 196(1).

32 Migration Act, section 196(4).

33 See *MGC v. Australia,* UN Human Rights Committee Communication No.1875/2009 (2015) [11.6]. See, also UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [37].

34 Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 1 of 2019* (12 February 2019) p. 84.

35 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [15].

Committee response

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

2.40 The preceding analysis indicates that the measures are likely to be incompatible with the right to liberty, the right to the protection of family and the right to freedom of movement (including the right to return to, or remain in, one's own country). The committee recommends the minister consider the committee's human rights concerns in this analysis noting these concerns have not been fully addressed by the minister.

Compatibility of the measures with non-refoulement obligations and the right to an effective remedy: initial analysis

2.41 Australia has 'non-refoulement' obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This means that Australia must not return any person 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.[36] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.42 As set out above and in the initial analysis, persons who are present in Australia at the time their citizenship ceases will be granted an ex-citizen visa.[37] However, an ex-citizen visa may be subject to cancellation on character grounds.[38] A consequence of a person's visa being cancelled is that the person will be classified as an unlawful non-citizen and will be liable to removal from Australia as soon as reasonably practicable.[39] Accordingly, expanding the bases upon which a person may be stripped of their citizenship, with the likely consequence of visa cancellation and removal, engages non-refoulement obligations.

2.43 In this respect, the initial analysis noted that the human rights compatibility of the underlying visa cancellation and removal provisions of the Migration Act were relevant to assessing whether the measures in the bill are compatible with Australia's non-refoulement obligations. The committee has previously concluded that powers to cancel or refuse a person's visa under the Migration Act, in the context of the current legislative regime, were likely to be incompatible with a number of human rights, including Australia's obligations in relation to non-refoulement and the right

36 UN Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (2018).

37 SOC, p. 10.

38 SOC, p. 10.

39 Migration Act, section 198.

to an effective remedy.[40] The committee has also previously considered that section 197C of the Migration Act, by permitting the removal of persons from Australia unconstrained by Australia's non-refoulement obligations, is incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.[41]

2.44 As noted in the initial analysis, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[42] Such review mechanisms are important in guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[43] Under the Migration Act there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds.[44]

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40 See, for example, Parliamentary Joint Committee on Human Rights, Migration Amendment (Strengthening the Character Test) Bill 2018, *Report 1 of 2019* (12 February 2019) p. 79; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 195–217; *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 13-28. The committee has also considered that measures introduced by the Migration Amendment (Validation of Decisions) Bill 2017, which retrospectively validated visa cancellation and refusal decisions that had been made in reliance on confidential information protected by a former provision of the Migration Act that had been found to be invalid by the High Court, was likely to be incompatible with a number of human rights: see *Report 11 of 2017* (17 October 2017) pp. 92-116; *Report 10 of 2017* (12 September 2017) pp. 5-26; *Report 8 of 2017* (15 August 2017) pp. 32-43. See, also, *Report 12 of 2018* (27 November 2018) pp. 2-22.

41 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34].

42 ICCPR, article 2 (the right to an effective remedy). See, for example, *Singh v. Canada,* UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9]; *Alzery v. Sweden*, UN Human Rights Committee Communication No. 1416/2005 (2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

43 *Alzery v. Sweden*, UN Human Rights Committee Communication No.1416/2005 (2006) [11.8].

44 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the Administrative Appeals Tribunal (AAT): see section 500(1)(b) of the Migration Act. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the AAT not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the Migration Act. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

Additionally, there is no merits review of the original decision to cancel the person's citizenship.[45]

2.45 The committee has considered on a number of previous occasions that in the Australian domestic legal context, the availability of merits review would likely be required to comply with Australia's obligations under international law.[46] While judicial review of the minister's decision to strip a person of citizenship or cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions.[47] This is because judicial review is only available on a number of restricted grounds and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. Further, in relation to the scope of judicial review afforded, by amending the threshold in relation to dual nationality, the bill would further restrict the scope of judicial review.

2.46 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 14-17.[48]

2.47 Noting that the obligation of non-refoulement and the right to an effective remedy was not addressed in the statement of compatibility, the committee sought the advice of the minister as to the compatibility of the measures with these obligations.

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45 Citizenship Act, section 52.

46 See, most recently, in relation to the Migration Amendment (Strengthening the Character Test) Bill 2018, Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 2-22. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

47 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84- 90. See also *Singh v. Canada,* UN Committee against Torture Communication No.319/2007 (2011) [8.8]-[8.9].

48 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 14-17 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

Minister's response and analysis

2.48 The minister's response notes that the committee expressed concerns about the compatibility of the measures with Australia's non-refoulement obligations. The minister's response states that:

> …the loss of Australian citizenship does not automatically result in removal. Any such removal would occur in line with well-established practices that accord with Australia's international obligations.

2.49 However, while loss of Australian citizenship does not automatically result in removal, it does expose a person to this consequence in the context of the existing legal regime. As set out above, the committee has found on a number of occasions that the existing legal regime is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy. The minister's response does not provide any further information which addresses these concerns.

Committee response

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

2.51 Consistent with the committee's previous analysis of Australia's *non-refoulement* obligations, in the context of the existing regime, the proposed expansion of the minister's power to cease a person's Australian citizenship risks being incompatible with Australia's non-refoulement obligations and the right to an effective remedy. The committee recommends the minister consider the committee's human rights concerns in this analysis noting these concerns have not been fully addressed by the minister.

Compatibility of the measures with the right to a fair trial and fair hearing, prohibition on double punishment and retrospective criminal law: initial analysis

2.52 The right to a fair trial and fair hearing apply to both criminal and civil proceedings. However, there are additional guarantees which apply in relation to criminal proceedings. This includes that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted (article 14(7) of the ICCPR). It also includes the prohibition on retrospective criminal laws, which requires that laws not impose criminal liability for acts that were not criminal offences at the time they were committed and that the law not impose greater penalties than those which would have been available at the time the acts were done (article 15 of the ICCPR).[49]

2.53 The initial analysis noted that there are concerns as to whether the measures are compatible with article 14(7) and article 15 of the ICCPR. This is because the

49 The prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations.

amendments in the bill would apply to persons who committed offences or were convicted of offences prior to the commencement of the bill such that they may now be liable for a greater punishment. Further, there are concerns that loss of citizenship may constitute a double punishment. The effect of the proposed amendments would be that dual nationals convicted of a 'relevant terrorism conviction' of less than six years will be eligible for loss of citizenship. This would be the case regardless of the length of their sentence.

2.54 However, articles 14(7) and 15 of the ICCPR, will only apply if stripping citizenship constitutes a 'punishment' or 'penalty' within the meaning of those articles.

2.55 The initial analysis stated, as set out in the committee's *Guidance Note 2*, that even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A penalty or punishment that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14(7) and 15 ICCPR.[50] The initial analysis raised questions as to whether the provision may be considered criminal for the purpose of international human rights law noting the severity of consequences that flow from loss of citizenship (including potentially removal).

2.56 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 17-19.[51]

2.57 The committee therefore sought the advice of the minister as to the compatibility of the measures with the prohibition on double punishment and retrospective criminal law (including whether the loss of citizenship may be considered a 'criminal' penalty for the purposes of international human rights law).

Minister's response and analysis

2.58 In relation to this issue, the minister's response states:

> Rather than being a punitive measure, the retrospective application of the measures in the Bill are designed to give further administrative options to manage offenders who continue to pose a threat to the community.
>
> Further, it must be emphasised that section 35A does not create a new criminal offence; rather, it allows for the imposition of an administrative

50 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

51 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 17-19 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

consequence at the Minister's discretion. When doing so, as noted above, the Minister must be satisfied it is not in the public interest for the individual to remain an Australian citizen, having regard to a number of factors including the seriousness of their conduct and the threat they pose to the Australian community.

2.59 However, as set out above, even if a penalty is classified as an administrative consequence under domestic law it may nevertheless be considered 'criminal' under international human rights law. The committee's *Guidance Note 2* sets out the relevant steps for determining whether penalty provisions may be considered 'criminal' for the purpose of international human rights law:

- first, the domestic classification of the penalty as civil or criminal (although the classification of a provision as 'civil' or 'administrative' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- second, the nature and purpose of the penalty: a penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, *and* where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.

2.60 As noted in the initial analysis, the second and third steps of the test are particularly relevant. Of relevance to step two, the minister's response confirms that the purpose is intended to be protective in relation to the Australian community. As noted in the initial analysis, this purpose means the provision is less likely to be considered criminal for the purposes of international human rights law under this step of the test.

2.61 However, the initial analysis noted that, even if step two of the test is not established, a penalty may still be 'criminal' for the purposes of international human rights law under step three based on severity. As discussed above, loss of citizenship may lead to very severe consequences including ultimately removal. As such, it is possible that loss of citizenship may be considered 'criminal' for the purpose of international human rights law. As the issue of severity is not fully addressed in the minister's response, questions remain as to whether the provision may be considered 'criminal' for the purposes of international human rights law. If it were considered 'criminal', criminal process rights under articles 14 and 15 would apply. If this were the case, serious questions arise as to the compatibility of the retrospective application of expanded powers to cease a person's citizenship with the prohibition on double punishment and retrospective criminal law.

Committee response

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

2.63 Based on the information provided and the above analysis, the committee is unable to conclude whether the provisions may be considered 'criminal' for the purposes of international human rights law. If the provisions were considered 'criminal', then the criminal process rights in articles 14 and 15 of the ICCPR would apply (including the prohibition on double punishment and retrospective criminal law). If this were the case, then the provisions, as drafted, may not be compatible with these rights. The committee recommends the minister consider the committee's human rights concerns in this analysis noting these concerns have not been fully addressed by the minister.

Compatibility of the measures with the right to equality and non-discrimination: initial analysis

2.64 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 equal and non-discriminatory protection of the law. 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[52] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular protected attribute (for example, nationality or national origin).[53] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[54]

2.65 The initial analysis noted that the bill provides for differential treatment on the basis that it applies only to those persons who hold, or are eligible to hold, dual citizenship. This gives rise to the possibility that the measures may directly discriminate on the basis of dual nationality. Additionally, noting that the measures may have a disproportionate negative effect on the basis of national or social origin or race, this raises a concern in relation to the possibility of indirect discrimination. As such, the measures engage the right to equality and non-discrimination.

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52 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'.

53 *Althammer v. Austria*, Human Rights Committee Communication no. 998/01 (2003) [10.2].

54 *D.H. and Others v. the Czech Republic,* European Court of Human Rights, Application no. 57325/00 (2007) [49]; *Hoogendijk v. the Netherlands*, European Court of Human Rights, Application no. 58641/00 (2005).

2.66 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.

2.67 While the statement of compatibility acknowledged the bill provided for differential treatment, it concluded that the cessation of citizenship is proportionate to the seriousness of the conduct without providing any further analysis.

2.68 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 19-21.[55]

2.69 The committee therefore sought the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination, in particular:

- 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;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate measure to achieve the stated objective (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 and analysis

2.70 In relation to these questions, the minister's response states:

> I note the Committee's comment that any differential treatment between single and dual citizens does not amount to unlawful discrimination if based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that criteria and is a proportionate means of achieving that objective. The measures in this Bill seek to meet the legitimate objective of promoting Australia's national security by enhancing the Minister's ability to cease the Australian citizenship of convicted terrorist offenders.
>
> It is appropriate that this power is constrained by Australia's international obligations not to render an individual stateless, such that the Minister may only cease the Australian citizenship of individuals who would not be

55 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 19-21 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

> rendered stateless. The measures in this Bill are reasonable and necessary to protect the Australian community and carefully balanced with Australia's broader international obligations.

2.71 In general terms, the objective of national security and protecting the Australian community may be capable of constituting a legitimate objective for the purposes of international human rights law. However, as set out above, questions remain as to whether the measures are rationally connected to this objective.

2.72 It is acknowledged that avoiding the consequence of rendering a person stateless could be a reasonable basis for the differential treatment of dual nationals. However, in this particular case, the bill proposes to lower the threshold for determining dual citizenship for the purposes of the citizenship loss power. By proposing that the minister only need to be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter. This, in turn, raises questions about whether the differential negative effect of the measures, on the basis of national or social origin or race, is proportionate. The minister's response does not address this issue.

Committee response

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

2.74 Based on the information provided and the above analysis, the committee is unable to conclude that the measures are compatible with the right to equality and non-discrimination. The committee recommends the minister consider the committee's human rights concerns in this analysis noting these concerns have not been fully addressed by the minister.

Compatibility of the measures with the rights of the child: initial analysis

2.75 The Convention on the Rights of the Child (CRC) requires state parties to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[56] Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference. The terms 'nationality' and 'citizenship' are interchangeable as a matter of international law.

2.76 The initial analysis noted that as the measures in the bill apply to children and may result in a child losing Australian citizenship,[57] they engage and may limit

56 Article 3(1).

57 Under international law all people aged under 18 years are defined as children.

these rights. The enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests.

2.77 The initial analysis stated that while the cessation of citizenship power is discretionary and the minister must have regard to the best interests of the child, the child's best interests is only one of a number of factors to which the minister must have regard. The initial analysis raised concerns that treating other considerations as of equal weight to the obligation to consider the best interests of the child may not be compatible with this obligation.[58] The initial analysis also raised concerns about the proportionality of applying the amendments to children, particularly where children as young as 10 may be subject to a loss of citizenship, and questioned whether the measures are the least rights restrictive approach.

2.78 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 21-23.[59]

2.79 The committee therefore sought the advice of the minister as to the compatibility of the measures with the rights of the child including whether any limitations are permissible, including:

- the relative weight which will be given to the obligation to consider the best interests of the child as a primary consideration in the context of the proposed measures;
- whether the measures are aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate measure to achieve the stated objective.

Minister's response and analysis

2.80 In relation to the compatibility of the measures with the rights of the child, the minister's response states:

> Where a child poses a threat to the Australian community by being involved in terrorist activities and has been held criminally responsible for doing so, the Australian Government may balance their best interests with

58 See, UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (29 May 2013).

59 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 21-23 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

> the protection of their Australian community. Australia is required to take into account the best interests of the child as a primary consideration, not the only primary consideration.

2.81 However, as noted in the initial analysis the UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…[60]

2.82 It follows that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. As such, the measures as described are likely to be incompatible with the obligation to consider the best interests of the child as a primary consideration.

2.83 In relation to a child's right to preserve their identity including nationality, the minister's response provides no further information about this issue. As noted in the initial analysis, both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[61] In this context, cessation of a child's citizenship on the basis of conduct may not be in accordance with accepted understandings of the capacity and culpability of children under international human rights law. Further, international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.[62] There are serious questions about the proportionality of the amendments in a context where a child as young as 10 may be subject to a loss of citizenship noting the age of criminal responsibility. Indeed, the UN Human Rights Committee has raised concerns that the age of criminal responsibility for Commonwealth offences is only 10 years. It has specifically recommended that Australia should raise the minimum age of criminal responsibility, in accordance with international standards.[63] The application of the amendments to children raises further concerns that the measures may not be the least rights restrictive approach.

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60 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013).

61 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), http://www.un.org/documents/ga/res/40/a40r033.htm; Australian Institute of Criminology, *The Age of Criminal Responsibility*, https://aic.gov.au/publications/cfi/cfi106.

62 CRC, article 40. See, also, UN Committee on the Rights of the Child, *General Comment 10: children's rights in juvenile justice* (2007) [10].

63 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [43]-[44].

Committee response

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

2.85 Based on the information provided and the preceding analysis, the measures are likely to be incompatible with the rights of the child. The committee recommends the minister consider the committee's human rights concerns in this analysis noting these concerns have not been fully addressed by the minister.

Migration Amendment (Seamless Traveller) Regulations 2018 [F2018L01538]

Purpose	Introduces contactless processing at international entry points
Portfolio	Immigration, Citizenship and Multicultural Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 November 2018; tabled Senate 12 November 2018)
Right	Privacy
Previous report	Report 1 of 2019
Status	Concluded examination

Background

2.86 The committee first reported on the instrument in its *Report 1 of 2019* and requested a response from the minister by 4 March 2019.[1]

2.87 The minister's response to the committee's inquiries was received on 8 March 2019. The response is discussed below and is available in full on the committee's website.[2]

Facial matching and disclosure to establish identity

2.88 The Migration Amendment (Seamless Traveller) Regulations 2018 (the regulations) amend the Migration Regulations 1994 to provide for an additional method for travellers to establish their identity at international entry ports.

2.89 Under the amendments, an image of a person's face and shoulders can be compared with electronic passport details held by the Department of Home Affairs (the Department) using new SmartGate technology or another authorised system, instead of a physical passport. For all travellers, the electronic details are taken the first time a person travels on that passport or, for Australian citizens, they may also be obtained from the Department of Foreign Affairs and Trade.[3]

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 35-38.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

3 Explanatory statement, p. 8.

2.90 At ports where the new technology has not been introduced, or where identity cannot be established through contactless processing, a physical passport will still be required. Further, at ports where the technology has been introduced, travellers can still choose to be manually processed or use the old SmartGate technology if still available, which requires a physical passport.

Compatibility of the measure with the right to privacy: initial analysis

2.91 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal information.[4]

2.92 The initial analysis noted that the regulations engage and limit the right to privacy by allowing the Department of Home Affairs to collect, store, use and disclose the biometric information of people who choose to self-process through contactless processing.[5] 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.

2.93 The statement of compatibility states that the objectives of the regulations are to create greater efficiencies in border processing and to confirm the identity of persons entering international ports.[6] The initial analysis raised questions as to whether the measure addresses a pressing and substantial concern for the purposes of international human rights law, noting that in order to constitute a legitimate objective a measure must not simply seek an outcome regarded as desirable or convenient. In this regard, the initial analysis also considered that it is unclear how the measure is rationally connected to (that is, effective to achieve) the stated objectives.

2.94 The initial analysis also raised concerns about the proportionality of the measure noting that compliance with the Australian Privacy Principles and the *Privacy Act 1988* does not necessarily provide an adequate safeguard for the purposes of international human rights law, due to the exceptions in that Act to the prohibition on use and disclosure of information. Further questions were raised about whether the advance notifications about the collection of personal information at a SmartGate, and the security of information collected and held, were sufficient safeguards for the purposes of international human rights law.

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4 International Covenant on Civil and Political Rights, article 17.

5 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) p. 36 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

6 Statement of compatibility (SOC), pp. 2 and 5.

2.95 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 35-38.[7]

2.96 The committee therefore sought the advice of the minster as to:

- 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 this measure is rationally connected to (that is, effective to achieve) the objective; and
- whether the measure is a proportionate limitation, including whether the measure is sufficiently circumscribed and whether adequate and effective safeguards are in place to ensure the limitation on the right to privacy is proportionate.

Minister's response and analysis

2.97 By way of general information relevant to the overall compatibility of the measure with the right to privacy, the minister's response explains that:

> These Regulations provide an additional way of complying with existing entry clearance requirements, a way that is aimed at benefitting travellers and which is subject to existing safeguards. No additional information is collected compared to the existing SmartGates but rather allows clearance without the presentation of a physical passport.

2.98 In this regard, the minister's response clarifies that the regulation does not provide for further collection of sensitive biometric information. This is significant in assessing the overall compatibility of the measure with the right to privacy.

2.99 In relation to how the measure pursues a legitimate objective for the purposes of international human rights law, the minister's response states:

> This new option is designed to be more convenient and faster for travellers as compared to existing manual processing. It is also beneficial to the Department in that electronic identity matching is generally considered to be faster and more accurate than a comparable manual matching process done by an officer.

2.100 The minister's response also states that a further objective of the measure is:

> …to mitigate the threat posed by persons seeking to enter Australia undetected as impostors or using fraudulent documents to conduct criminal or terrorist activities …

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7 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 35-39 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

2.101 In light of this information and in the particular context of border processing, on balance these objectives may collectively indicate that the measure pursues a legitimate objective for the purposes of international human rights law. Providing a more convenient, alternative means of electronic processing, which is generally considered a more accurate method of identity matching, appears to be rationally connected to this objective.

2.102 As to the proportionality of the measure, the minister's response provides detailed information about the legislative safeguards that protect a person's biometric information from improper access, use or disclosure. In particular, the minister's response states:

> The ability to collect, store, use and disclose biometric identification already exists under the *Migration Act 1958* (Migration Act) and is subject to existing safeguards. The collection, storage, use and disclosure of personal information by the Department is undertaken in accordance with the Australian Privacy Principles contained in the *Privacy Act 1988* (Privacy Act) and is subject to requirements in Part 4A of the Migration Act, "Obligations relating to identifying information", which provides for a range of rules and offences relating to the access, disclosure and use of identifying information. This is consistent with the United Nations Human Rights Committee General Comment 16 in which the Human Rights Committee stated that the gathering and holding of personal information on computers, databanks and other devices (that is, the use of information technology) must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it.

2.103 In relation to whether the measure is sufficiently circumscribed, the minister's response argues that the general legislative safeguards which regulate the handling of personal information accord sufficient and tailored protection in the context of biometric and other personal information collected for the purposes of border processing:

> Under the Privacy Act, biometric information is considered 'sensitive' information. Sensitive information is afforded a higher level of protection than other types of personal information. Sensitive information must only be collected with the consent of the individual unless one of the listed exceptions applies. Those exceptions include where the collection is authorised or required by law. Existing mechanisms in the Migration Act and Migration Regulations (sections SA, 166, 170, 175, 257 A, 258A-G, 336A-L) provide legislative authority for identity assessment, collection, storage and disclosure of personal identifiers (which includes biometric information). The ability to retain identifiers is set out in Part 4A, Division 5 of the Migration Act.
>
> Collection of personal identifiers is permitted under the Migration Act for a range of reasons including:

- Identification and authentication of identity.
- Improving the integrity of Australia's entry programs, including passenger processing at Australia's border.
- Enhancing the Department's ability to identify non-Australian citizens who have a criminal history or who are of national security or character concern.
- To assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen.

Disclosure of information is permitted under the Migration Act for specified purposes such as to assist in identifying and authenticating the identity of a person who may be of national security concern. The Migration Act and the Australian Border Force Act 2015 also contain offences for using and disclosing certain information if it is not a permitted or authorised disclosure.

2.104 The minister's response also notes that the retention and disposal of travellers' personal information must accord with the direction of the National Archives of Australia in accordance with the *Archives Act 1983*.

2.105 These are important safeguards that may be capable, in practice, of ensuring that any limitation on the right to privacy due to the use and storage of biometric data for contactless processing is proportionate. In addition, the minister's response recognises a number of additional safeguards which regulate the practical operation of the SmartGates and protect personal information from loss, unauthorised access or other misuse (including by contracted service providers):

> The environment for the new SmartGates consists of a set of gates that are a tamper resistant, physical device composed of entry and exit barriers, passport reader, sensors, biometric capture cameras, lights and display devices.
>
> Information collected by the new SmartGates from travellers is passed through the system that is located within the Australian Border Force (ABF)-only airport server room and into Passenger Analysis Clearance and Evaluation (PACE) for evaluation. PACE is a movement and alert system operated by ABF and is a primary border control system.
>
> All infrastructure, ICT servers and desktops, operating systems and databases (excluding the departure gate hardware) are standard operation environment builds using standard ABF security patterns. The gate infrastructure is physically located within Departmental systems, and the small public facing aspects of the gate system (the physical gate) are located within security controlled areas at airports and are physically tamper resistant.

2.106 These practical elements are important safeguards against unauthorised access and misuse and contribute to the conclusion that the limitation on the right to privacy is proportionate.

2.107 The minister's response also explains the ways in which notices about the potential use and collection of a person's biometric information may be brought to a person's attention to inform their decision about whether to use a SmartGate or be manually processed by a clearance officer. The minister's response states:

> The notifications in place are clearly worded and visible. Where a traveller is uncertain as to their meaning, they have the option of asking an officer for further information. Where there is a language barrier, officers can assist where they have the relevant language skills but if not, the officer can access translation services for the traveller. It also remains an option for the traveller to be processed manually and not use the new SmartGates with contactless processing.

2.108 In light of the information provided, it appears the safeguards in the regulation would be sufficient for the purposes of international human rights law if implemented in the manner described by the minister. In light of the information provided, the measure appears to be compatible with the right to privacy.

Committee response

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

2.110 The committee notes that, based on the information provided, the measure is likely to be compatible with the right to privacy.

Migration Amendment (Streamlining Visa Processing) Bill 2018

Purpose	This bill seeks to amend the *Migration Act 1958* to enable the minister, through legislative instrument, to specify groups of visa applicants who are required to provide one or more personal identifiers to make a valid visa application
Portfolio	Home Affairs
Introduced	House of Representatives, 29 November 2018
Rights	Privacy; equality and non-discrimination; rights of children
Previous report	Report 1 of 2019
Status	Concluded examination

Background

2.111 The committee first reported on the bill in its *Report 1 of 2019*, and requested a response from the minister by 4 March 2019.[1]

2.112 The minister's response to the committee's inquiries was received on 8 March 2019. The response is discussed below and is available in full on the committee's website.[2]

Broad discretionary power to collect biometric data from classes of persons

2.113 Section 46(2B) of the bill proposes to enable the minister to determine, by legislative instrument, classes of persons who must provide one or more specified types of 'personal identifiers'[3] in one or more specified ways,[4] as a prerequisite to

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 39-45.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

3 Section 5A of the Migration Act: 'personal identifier' means any of the following: (a) fingerprints or handprints of a person (including those taken using paper and ink or digital livescanning technologies); (b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914* .

4 Proposed subsection 46(2B) of the bill.

making a valid visa application. If an applicant in this specific class refuses to provide the required personal identifiers, they cannot make a valid visa application.[5]

Compatibility of the measure with the right to privacy: initial analysis

2.114 The right to privacy includes respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal information.[6] 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 seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

2.115 The initial analysis noted that the measure engages and limits the right to privacy by authorising the collection of personal information about specified classes of people.[7]

2.116 The statement of compatibility indicates that the power to designate classes of people who must provide additional specified identifiers is likely to pursue a legitimate objective and be rationally connected to that objective. However, the committee raised questions as to whether the measure constituted a proportionate limitation on the right to privacy. In particular, the committee raised questions as to whether the measure was sufficiently circumscribed. This is because the breadth of the power in proposed section 46(2B), including the absence of any specific limits on the exercise of the power, raised concerns that the power may be exercised in a manner that is not compatible with human rights. In this regard, the initial analysis noted that the compatibility of the measure with the right to privacy will turn on the content of the instrument and how the power is applied in practice. Concerns were also raised regarding the adequacy and inclusion of safeguards.

2.117 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 40-42.[8]

2.118 The committee therefore sought the advice of the minister as to whether the limitations on the right to privacy contained in the Migration Amendment

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

6 International Covenant on Civil and Political Rights (ICCPR), article 17.

7 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 40-40 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

8 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 40-42 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

(Streamlining Visa Processing) Bill 2018 are proportionate to the stated objective, including:

- whether the power to determine, by legislative instrument, classes of persons who must provide one or more specified types of 'personal identifiers' in one or more specified ways is sufficiently circumscribed and accompanied by adequate safeguards;
- whether there exists a detailed outline of the proposed instrument insofar as it relates to the right to privacy;
- whether adequate safeguards are in place for individuals incapable of understanding and consenting to the collection of personal identifiers; and
- any other matters relevant to the adequacy of the safeguards in relation to the collection, use, disclosure and retention of personal identifiers.

Minister's response and analysis

2.119 The minister's response focuses on the safeguards relating to the collection of personal identifiers, and explains that the purpose of the bill is not to expand or impact the nature or type of personal identifiers that can be required or amend the purposes for which they can be collected. In this regard, the response provides detailed information about the extent of applicable safeguards in addition to the Australian Privacy Principles (APPs) and the *Privacy Act 1988*, including the legislative restrictions on the collection, use and disclosure of personal identifiers under Part 4A of the *Migration Act 1958* and requirements under Part 3 of the Migration Regulations 1994 to notify a person in advance of relevant matters before the collection of personal identifiers that relate to them. The response explains that these legislative safeguards would apply to any instruments made under proposed section 46(2B) to specify classes of persons and categories of personal identifiers. These are important safeguards that are relevant to the proportionality of the measure, in particular in relation to how the measure applies to persons who may be incapable of understanding and consenting to the collection of personal identifiers (discussed further below in relation to the rights of the child).

2.120 However, the minister's response does not fully address the concern raised in the initial analysis that the power under proposed section 46(2B) may be overly broad with respect to its stated objective. As noted in the initial analysis, there do not appear to be any specific limits on the exercise of the power of the minister to specify classes of persons who must provide 'personal identifiers' in one or more specified ways. While the minister's response explains the limitations on the collection of information under the *Migration Act* (including relating to the type of information that can be collected and the manner in which it can be collected) that would apply to the exercise of the minister's power under proposed section 46(2B),[9]

9 See generally Part 4A of the *Migration Act 1958*.

the power to declare classes of persons remains unconstrained. Although the minister's response indicates, in relation to compatibility with the right to equality and non-discrimination, that determinations will be based on objective assessment of operational priorities, intelligence, and identifiable risks of fraud, the bill does not appear to require this. Noting the broad circumstances in which the minister could potentially exercise this discretion (e.g. with reference to particular circumstances, by prescribing a particular manner in which personal identifiers must be provided),[10] the minister's response does not address how the power is sufficiently circumscribed to the stated objective of the measure.

2.121 It is acknowledged that it may be a relevant safeguard that determinations are legislative instruments and so will be subject to further scrutiny by the committee and parliament. However, it is noted that the minister's response states any such instrument will be non-disallowable. Given such instruments will not be subject to disallowance (a procedure which would have the effect of repealing the instrument), this restricts the role of parliament as an effective safeguard in relation to the minister's power. Noting the potentially significant human rights implications of any such instrument, while a statement of compatibility would not be required for such an instrument,[11] the committee has previously noted that it is good practice for measures that engage human rights to provide an assessment of human rights compatibility. In this respect, it is noted that the committee is still required to examine a non-disallowable instrument for human rights compatibility.

2.122 In any event, the prohibition of arbitrary interference with an individual's privacy requires that any interference with privacy be reasonable in the particular circumstances. While any instrument made by the minister may be capable of providing sufficient safeguards to protect the right to privacy, in the absence of further information as to the proposed content of the instrument, it is difficult to conclude that the safeguards available under the *Migration Act* relating to collection of personal identifiers would operate as a sufficient safeguard to constrain the minister's broad power. Concerns therefore remain that the broad nature of the power does not appear to be sufficiently circumscribed to ensure that the exercise of the power will, in all circumstances, be compatible with the right to privacy.

Committee response

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

10 Proposed section 46(2C).

11 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, instruments exempt from disallowance are not required to be accompanied by a statement of compatibility. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

2.124 The preceding analysis indicates that, noting the broad scope of the proposed power under section 46(2B), there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with the right to privacy. However, setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of the legislative instrument once it is received.

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

2.125 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[12] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[13]

2.126 Differential treatment[14] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.127 The initial analysis raised concerns that while the statement of compatibility acknowledged that the measure may engage the right to equality and non-discrimination as it differentiates between citizens and non-citizens in order to regulate non-citizens coming into Australia,[15] it did not acknowledge that the right may also be engaged by the determination of 'classes of visa applicants'. The initial analysis noted that it is unclear whether these classes could lead to distinctions based on protected attributes (such as, race, sex, religion or national origin) which could amount to direct discrimination. Additionally, the determination of 'classes of visa applicants' may also have a disproportionate negative effect on particular groups based on national origin, race or religion and therefore be potentially indirectly

12 The prohibited grounds 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: UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

13 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

14 See, for example, *Althammer v Austria*, Human Rights Committee Communication no. 998/01 [10.2].

15 SOC, p. 15.

discriminatory. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.

2.128 While differential treatment will not constitute unlawful discrimination in certain circumstances, the risk, noting the broad scope of the power, of 'targeting' or profiling of classes of visa applicants without adequate justification, raises concerns that the measure may not be a proportionate means of achieving the objective.

2.129 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 42-44.[16]

2.130 The committee therefore sought 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 a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available); and
- whether there are any safeguards in place to ensure that the determination of 'classes of persons' is based on reasonable and objective criteria.

Minister's response and analysis

2.131 The minister's response appears to consider that the determination of particular visa classes could, in practice, coincide with personal attributes such as nationality:

> … decisions on which cohorts will be included in the instrument (i.e. to which classes of visa applicants the new provisions will apply) will be determined on an objective basis, namely, in line with operational priorities, intelligence, identifiable fraud risks and other factors informed by objective information such as the Department's collection and analysis of statistics and intelligence information. Whilst the determination of classes of visa applicants may coincide with certain characteristics like national origin, the characteristic itself is not the basis of the determination but rather the risk from that cohort of people which has been identified through analysis of statistical and intelligence information.
>
> Further, given the measures will specifically target classes of visa applicants where objective information has identified emerging fraud or national security risks (rather than all categories of visa applicants) it would be a proportionate measure in the sense that it addresses the risk specifically arising from that class of visa applicant.

16 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 42-44 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

2.132 As noted earlier in relation to the right to privacy, while the minister's response explains that any determination would be based on an objective basis in line with operational priorities, intelligence, identifiable fraud risks and other factors informed by objective information, there is no specific requirement for the minister to consider such factors when exercising their power under proposed section 46(2B). It is also noted that while the minister's response emphasises that any determination would not specifically target applicants on the basis of national origin (and therefore to that extent may not be directly discriminatory), this does not address the committee's concern that the determination of 'classes of visa applicants' may have a disproportionate negative effect on particular groups based on national origin, race, or religion and therefore be potentially indirectly discriminatory. The absence of objective criteria that restrict the potential for arbitrary exercise of the power, including the possibility of direct or indirect discrimination, mean that the compatibility of the measure will turn on the content of determinations and how that instrument-making power is exercised in practice. However, as discussed above in relation to privacy, the broad nature of the power is such that there is a risk it may be exercised in a manner incompatible with the right to equality and non-discrimination.

Committee response

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

2.134 The preceding analysis indicates that, noting the broad scope of the proposed power under section 46(2B), there may be human rights concerns in relation to its operation. This is because its scope is such that it could be used in ways that may risk being incompatible with the right to equality and non-discrimination. However, setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of the legislative instrument once it is received.

Compatibility of the measure with rights of the child: initial analysis

2.135 Children have special rights under human rights law taking into account their particular vulnerabilities. The Convention on the Rights of the Child (CRC) in particular guarantees the rights of the child, including the right to protection from harmful influences, abuse and exploitation and the obligation to consider the best interests of the child as a primary consideration. In addition, the CRC prevents arbitrary or unlawful interferences with the privacy of a child.[17]

17 Convention on the Rights of the Child, article 16.

2.136 To the extent that a child may be within a class of persons specified by the minister,[18] the bill engages and limits the rights of the child by providing for the potential collection of personal identifiers. The initial analysis noted that the stated objective of preventing the trafficking of children is a legitimate objective for the purposes of international human rights law, and the collection of personal identifiers is likely rationally connected to that objective.

2.137 However, the initial analysis raised questions as to the proportionality of the limitation on the right to privacy. The initial analysis noted that the collection, use, disclosure and retention of biometric information from children as young as 5 years of age is a serious intrusion into the privacy of a child. This raises specific concerns that collection of such information may not be the least rights restrictive approach to achieving the stated objective. Further, the initial analysis noted that it was unclear whether there were adequate safeguards in place as the bill does not appear to set any limits on the exercise of the instrument-making power in proposed section 46(2B). The initial analysis noted that much will depend on the content of the rules made under section 46(2B) and how the power is applied in practice

2.138 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 44-45.[19]

2.139 The committee therefore sought the advice of the minister as to the compatibility of the measure with the rights of the child, specifically whether the measure is compatible with the obligation to consider the best interests of the child and the child's right to privacy (including whether the limitation is proportionate given the broad nature of the discretionary power and whether adequate and effective safeguards exist).

Minister's response and analysis

2.140 In relation to the proportionality of the measure, including whether the measure is subject to adequate safeguards so as to be compatible with the rights of children, the minister's response refers to the information provided in relation to the compatibility of the measure with the right to privacy.

2.141 Relevant to proportionality in the context of children, the minister's response provides some information about the availability of safeguards for people who may be incapable of understanding and consenting to the collection of personal identifiers.

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18 Under proposed section 46(2B).

19 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 44-45 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

The amendments will potentially require individuals incapable of understanding and consenting to the collection of personal identifiers, including children, to provide personal identifiers, should they be specified in the legislative instrument.

In practice, individuals incapable of understanding and consenting to the collection of personal identifiers are also incapable of making a visa application themselves. Instead, these people have a visa application made on their behalf by their legal guardian. The legal guardian will also need to make arrangements for the incapable persons' personal identifiers to be collected, usually when the legal guardian provides their personal identifiers. Hence, it is the legal guardian of a person incapable of understanding and consenting to the collection of personal identifiers, who will understand the information provided prior to collection of personal identifiers (including how personal identifiers are obtained from minors and incapable persons), who gives consent of the incapable person.

2.142 It is also a relevant safeguard under the Migration Regulations 1994 that, before personal identifiers are collected, an affected person must be informed of certain matters. The person must be given enough time to read and understand those matters,[20] which include:

- the reason why a personal identifier is to be provided;
- how the personal identifier may be collected and used;
- notification that a personal identifier may be produced in evidence in a court or tribunal in relation to the person who provided the personal identifier;
- notification that the *Privacy Act 1988* applies to a personal identifier;
- that the person has a right to make a complaint to the Australian Information Commissioner about the handling of personal information; and
- if the person is a minor or incapable person - information concerning how a personal identifier is to be obtained from a minor or incapable person.

Further Regulation 3.20 provides that if a form is given to a person of the above information in compliance with section 2588(3), it must be given to the person at a time that gives the person enough time to read and understand the form before the identification test is conducted.

2.143 In this regard, it is significant that children who may be incapable of understanding and consenting to the provision of personal identifiers will, in practice, be unable to apply for a visa and so will be supported by a legal guardian.

20 See *Migration Act 1958*, section 258B(3) and Migration Regulations 1994, item 3.20.

2.144 Noting the above reasoning, it appears that there are a number of legislative and operational safeguards to protect the rights of children. However, in view of the minister's unrestricted discretion to specify classes of people and the manner in which they must provider personal identifiers (discussed above in relation to the right to privacy), it is not possible to conclude that the measure will, in all circumstances, result in outcomes that are sufficiently circumscribed to the stated objective of the measure so as to be compatible with the rights of children.

Committee response

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

2.146 The committee considers that while there are certain safeguards relevant to the rights of children, the measure, as drafted, may not be sufficiently circumscribed and there are risks that the minister's broad power may be exercised in a manner incompatible with human rights. However, setting out criteria for the exercise of this power by legislative instrument may be capable of addressing some of these concerns. If the bill is passed, the committee will consider the human rights implications of the legislative instrument once it is received.

Social Security (Pension Valuation Factor) Determination 2018 [F2018L01627]

Purpose	Prescribes the pension valuation factor that applies to a defined benefit income stream, for the purposes of determining a person's assets under the social security law
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 3 December 2018; tabled Senate 4 December 2018)
Right	Social security
Previous report	*Report 1 of 2019*
Status	Concluded examination

Background

2.147 The committee first reported on the instrument in its *Report 1 of 2019*, and requested a response from the Minister for Families and Social Services by 4 March 2019.[1]

2.148 The Minister's response to the committee's inquiries was received on 27 February 2019. The response is discussed below and is available in full on the committee's website.[2]

Specification of pension valuation factor for a defined benefit income stream

2.149 Under the *Social Security Act 1991* (Social Security Act), a person's eligibility for a number of social security benefits is based (in part) on the value of the assets the person owns or in which they have an interest.[3] The assets taken into account in determining a person's eligibility for a social security benefit, and the amount of social security that a person may receive, include defined benefit income streams.[4]

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019) pp. 46-48.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

3 See, for example, section 1064 of the *Social Security Act 1991*: Rate of age, disability support, wife pensions and carer payment (people who are not blind).

4 'Defined benefit income stream' is defined in section 9(1F) of the *Social Security Act 1991*, and refers mainly to income streams arising out of superannuation funds.

Under the Social Security Act, the value of a defined benefit income stream as an asset is determined by multiplying the annual amount payable under the stream by the applicable 'pension valuation factor'.[5]

2.150 The Social Security (Pension Valuation Factor) Determination 2018 (2018 Determination) specifies the 'pension valuation factor' to be applied to a person's defined benefit income stream for a year. It also repeals the Social Security (Pension Valuation Factor) Determination 1998 (1998 Determination) which previously set the 'pension valuation factor'.

2.151 The pension valuation factor is determined on the basis of a person's age on their next birthday, and the indexation factor applicable to the relevant income stream. The indexation factor is also set by the 2018 Determination, based on the method by which the income stream is indexed.[6]

Compatibility of the measures with the right to social security: initial analysis

2.152 Australia has obligations under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to progressively realise the right to social security, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of that right.[7]

2.153 The initial analysis raised questions as to whether the measures may constitute a backwards step in the progressive realisation of the right to social security. The statement of compatibility recognises that the measures engage the right to social security, and argues that the measures support that right. However, the statement of compatibility does not provide an assessment of how the measures are compatible with the right to social security. In particular, it does not explain whether the measures may limit a person's eligibility for social security benefits, or reduce the benefits to which a person may be entitled.

2.154 The full initial human rights analysis is set out at *Report 1 of 2019* (12 February 2019) pp. 46-48.[8]

2.155 The committee therefore sought the advice of the Minister as to whether the measures are compatible with Australia's obligations not to unjustifiably take any

5 Section 1120 of the *Social Security Act 1991*.

6 For example, section 7(2) of the 2018 Determination provides that, for an income stream that is indexed by reference to movements in salary, the indexation factor is taken to be a rate of at least 4 per cent but less than 5 per cent.

7 See ICESCR, article 9; United National Committee on Economic, Social and Cultural Rights, *General Comment 19: The right to social security*, E/C.12/GC/19 (2008).

8 Parliamentary Joint Committee on Human Rights, *Report 1 of 2019* (12 February 2019), pp. 46-48 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2019/Report_1_of_2019.

backwards steps (retrogressive measures) in relation to the right to social security, in particular:

- whether the measures may restrict a person's eligibility to receive a social security benefit, or reduce the benefits to which a person may be entitled, and if so:
- whether the measures are aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the measures are a reasonable and proportionate means of achieving its stated objective (including whether any less rights restrictive measures may be reasonably available and the sufficiency of any relevant safeguards).

Minister's response and analysis

2.156 The minister's response usefully clarifies that the measures in the 2018 Determination will not affect any persons who currently receive income from a defined benefit income stream. In this respect, the response states that:

> The [2018] Determination updates the pension valuation factors that are used when determining the asset value of defined benefit income streams established on or after 20 September 1998 for social security purposes. Defined benefit income streams established before 20 September 1998 are exempt under the social security assets test.
>
> There are currently no pension or allowance recipients who will be affected by the change, as there have been no defined benefit schemes established on or after 20 September 1998 to which these new pension valuation factors would apply.

2.157 In relation to the application of the measures to defined benefit income streams established in the future, the minister's response explains that:

> The Determination is required because it is possible that schemes will be created in the future to which the pension valuation factors outlined in the Determination will apply. Up-to-date pension valuation factors are therefore needed to make sure the asset value of defined benefit schemes assessed for social security purposes is fair and accurate.
>
> The updated pension valuation factors in the new Determination have been calculated by the Australian Government Actuary, using up-to-date economic and mortality assumptions. The Department of Treasury was also consulted on the updated figures.
>
> The new Determination means that any new defined benefit schemes created in the future will have their asset value determined using current factors, as opposed to factors that were calculated using assumptions from 1998. An accurate and fair assessment of the value of defined benefit

> income streams helps make sure that assets assessed under the Social Security Act 1991 are assessed equitably between recipients of social security payments, regardless of how a person holds their wealth.
>
> Continuing to use the old factors would have meant that a recipients' defined benefit income stream would not have been accurately or fairly assessed under the social security assets test. Therefore on balance, the Determination is compatible with the right to social security.
>
> The Determination therefore does not represent a backwards step in relation to the right to social security. Rather, the Determination helps make sure that Australia's social security system is fair and properly targeted to those most in need. By reviewing and updating the assumptions around the valuation of recipients' assets, the social security system remains sustainable for future generations.

2.158 Based on the information provided, on balance, the measures are unlikely to constitute a backwards step in relation to the right to social security. The measures are therefore likely to be compatible with that right.

Committee response

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

2.160 In light of the information provided, the committee considers that the measures are likely to be compatible with the right to social security.

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:

- Combatting Child Sexual Exploitation Legislation Amendment Bill 2019
- Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019
- Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019
- Export Finance and Insurance Corporation Amendment (Support for Infrastructure Financing) Bill 2019
- Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019
- Ministers of State (Checks for Security Purposes) Bill 2019
- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 [No. 2]

3.2 The committee continues to defer its consideration of the following legislation:[1]

- Discrimination Free Schools Bill 2018
- Lower Tax Bill 2018
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

1 See Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 143-144.