Chapter 2

Concluded matters

2.1 This chapter considers responses 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]

Bills

Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022[2]

Purpose	This bill sought to abolish the cashless welfare arrangements in Part 3D of the *Social Security (Administration) Act 1999*, and facilitate arrangements for individuals to enter or re-enter the income management regime under Part 3B of the Act The bill also sought to make consequential amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *National Emergency Declaration Act 2020* and the *Social Security Act 1991* to reflect the repeal of Part 3D and associated measures
Portfolio	Social Services
Introduced	House of Representatives, 27 July 2022 *Received Royal Assent on 30 September 2022*
Rights	Social security; private life; equality and non-discrimination; rights of the child

2.3 The committee requested a response from the minister in relation to the bill in [*Report 3 of 2022*](#).[3]

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022 *Report 5 of 2022*; [2022] AUPJCHR 38.

Abolishing the Cashless Debit Card program

2.4 This bill (now Act) sought to abolish the Cashless Debit Card (CDC) program[4] and transition certain individuals to the income management regime under Part 3B of the *Social Security (Administration) Act 1999* (the Act) following the closure of the CDC program. Regarding the latter, the bill sought to subject certain persons to the income management regime if, among other things, on the day before the 'closure day'[5] of the CDC program, they were a CDC participant due to Northern Territory residency[6] and were within a class of persons determined by the minister by legislative instrument.[7] Such persons included participants who are identified in a child protection notice;[8] vulnerable welfare payment recipients;[9] disengaged youth;[10] long term welfare payment recipients;[11] participants who have an eligible care child who is required to be, but is not, enrolled at a primary or secondary school;[12] participants who meet the school attendance criteria (namely where an unsatisfactory school attendance situation exists in relation to an eligible care child);[13] and participants who are the subject of a State or Territory referral notice.[14] Additionally, participants in the Cape York region of Far North Queensland may be required to transition from the CDC program to income management if the Queensland Commission (also known as the 'Family Responsibilities Commission', a

---

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2022* (7 September 2022), pp. 15-26.

4 Item 64 repealed Part 3D of the *Social Security (Administration) Act 1999*, which contains the substantive provisions establishing the Cashless Debit Card program.

5 Item 1 established a ‘closure day’, being the day that Part 1 of the bill would commence the process of abolishing the CDC program, and a ‘repeal day’, being the day that Part 3D of the *Social Security (Administration) Act 1999* is repealed by Part 2 of the bill and the CDC program would cease in its entirety.

6 Northern Territory participants who leave the Northern Territory may remain subject to the income management regime despite no longer meeting the Northern Territory residency requirement. See items 9, 10, 13 and 14.

7 Items 2–4, 7–8, 11–12, 15–16, 18–19 and 27–28.

8 Items 2 and 3.

9 Items 4 and 7.

10 Items 8 and 11.

11 Items 12 and 15.

12 Items 16 and 17.

13 Items 18 and 19.

14 Items 27 and 28.

body which operates under Queensland state law) gives the Secretary a written notice requiring a person to be subject to the income management regime.[15]

2.5 The bill provided for some exemptions. A person who would otherwise meet the eligibility criteria to transition to income management under the bill may not become subject to the income management regime if the Secretary makes a determination that the person should not be subject to the regime because it would pose a serious risk to their mental, physical or emotional wellbeing, or because the person has demonstrated reasonable and responsible management of their affairs.[16] The person seeking the exemption would bear the onus of producing evidence to satisfy the Secretary that they are suitable to be exempt.[17]

2.6 Finally, the bill sought to enable CDC participants in certain areas[18] to request to cease being a participant on or after the 'closure day' of the CDC program but before the 'repeal day' (that being the date when the CDC program ceases in its entirety for all participants).[19] The effect of this amendment would have been to enable certain participants to voluntarily 'opt-out' of the CDC program as soon as Part 1 of this bill commenced and prior to the repeal of the CDC program, which will occur at a later date.[20]

2.7 It is noted that prior to passage, 37 amendments to this bill were agreed to by both Houses of Parliament.[21] Most relevant to this analysis, an enhanced income

---

15 Items 20 and 23.

16 See items 7, 11, 15, 17, 19 and 26. The minister's powers to make these determinations exempting people from income management are set out in subsections 124PHA(1) or 124PHB(3) of the *Social Security (Administration) Act 1999*. It is noted that a determination made under subsection 124PHA(1) does not apply to persons in the Cape York area (subsection 124PHA(5)) but may apply to persons subject to the regime due to the Queensland Commission (see item 26).

17 *Social Security (Administration) Act 1999*, sections 124PHA and 124PHB.

18 The areas included Ceduna (item 33), East Kimberly (item 34), Goldfields (item 35), Bundaberg and Hervey Bay (item 36), Cape York (item 38) and the Northern Territory (item 40). However, subsequent amendments to this bill omitted items 38 and 40, having the effect that participants in the Cape York and Northern Territory areas may not request to cease to be a program participant.

19 Items 33–36.

20 Item 1 establishes the 'closure day' as the day on which Part 1 of Schedule 1 of this bill commences and the 'repeal day' as the day on which Part 2 of Schedule 1 of this bill commences. Part 1 would commence on the later of the day after the bill receives the Royal Assent and 19 September 2022. Part 2 would commence on a day to be fixed by Proclamation, however if the provisions do not commence within 6 months beginning on the day the bill receives the Royal Assent, then they would commence on the day after the end of that 6-month period.

21 See Schedule of the amendments made by the Senate.

management regime was introduced, meaning that CDC participants in the Northern Territory and Cape York region are now required to transition to this new income management regime under Part 3AA of the Act (instead of the regime under Part 3B).[22] Additionally, CDC participants in the Northern Territory and Cape York region are no longer able to request to cease to be a program participant.[23] Further, the class of persons in the Northern Territory who will transition from the CDC program to the income management regime has been limited.[24]

Summary of initial assessment

Preliminary international human rights legal advice

Right to social security, private life, adequate standard of living, equality and non-discrimination and rights of the child

2.8 As the committee has previously reported, measures relating to the CDC program engage numerous human rights.[25] The committee has found that, to the extent that the CDC program ensures a portion of an individual's welfare payment is available to cover essential goods and services, the CDC program could have the potential to promote rights, including the right to an adequate standard of living and the rights of the child.[26] However, the committee has found that the CDC program also engages and limits a number of other human rights, including the rights to a private life,[27] social security[28] and equality and non-discrimination.[29] In particular, it limits the rights to a private life and social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security

22 Item 1R of bill finally passed by both Houses.

23 Items 38 and 40 of the original bill were omitted.

24 See items 7, 11, 15, 17, 19, 28 of bill finally passed by both Houses; Supplementary Explanatory Memorandum, pp. 2–3.

25 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) pp. 21-36; *Report 7 of 2016* (11 October 2016) pp. 58-61; *Report 9 of 2017* (5 September 2017) pp. 34-40; *Report 11 of 2017* (17 October 2017) pp. 126-137; *Report 8 of 2018* (21 August 2018) pp. 37-52; *Report 2 of 2019* (2 April 2019) pp. 146–152; *Report 1 of 2020* (5 February 2020) pp. 132–142; *Report 1 of 2021* (3 February 2021) pp. 83–102; *Report 14 of 2021* (24 November 2021) pp. 14–18.

26 International Covenant on Economic, Social and Cultural Rights, article 11, and Convention on the Rights of the Child.

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

28 International Covenant on Economic, Social and Cultural Rights, article 9.

29 International Covenant on Civil and Political Rights, articles 2, 16 and 26 and International Covenant on Economic, Social and Cultural Rights, article 2. It is further protected by the International Convention on the Elimination of All Forms of Racial Discrimination, articles 2 and 5.

payments. Further, as the CDC program disproportionately affects Aboriginal and Torres Strait Islander persons,[30] it also engages and limits the right to equality and non-discrimination.[31] In relation to whether this limitation on rights is reasonable, necessary and proportionate, the committee has previously found that, while the stated objective of the CDC program—to combat social harms caused by the use of harmful
products—would constitute a legitimate objective, it is not clear that the CDC program is effective to achieve this objective, noting in particular, that the evaluations are inconclusive regarding its effectiveness and whether it has caused or contributed to other harms. Additionally, the committee has held that it has not been clearly demonstrated that the CDC program constitutes a proportionate limit on human rights, having regard to the absence of adequate and effective safeguards to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective, and the absence of sufficient flexibility within the program to treat different cases differently. For these reasons, the committee has previously considered that the CDC program appears to impermissibly limit the rights to social security, a private life and equality and non-discrimination.[32]

2.9 In light of the myriad ways in which the CDC program has limited human rights, in abolishing this specific program the bill would address the human rights concerns previously raised by this committee in relation to the program and, for those participants removed from any form of welfare restrictions, would alleviate the adverse impact of the program on their rights.

2.10 However, by requiring certain individuals to transition from the CDC program to the income management regime, the bill also engages and limits multiple human rights.[33] A person subject to the income management regime would continue to have a portion of their social security payment managed or quarantined and could only

---

30 The statement of compatibility, p. 33, states that approximately 49 per cent of CDC program participants are First Nations people.

31 International Covenant on Civil and Political Rights, article 26. Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute, see *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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.

32 See most recently Parliamentary Joint Committee on Human Rights, *Report 14 of 2021* (24 November 2021) pp. 14–18.

33 The committee has previously commented on mandatory income management in Parliamentary Joint Committee on Human Rights, *2016 Review of Strong Futures measures* (16 March 2016) pp. 37–62; *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) pp. 45–62.

spend their restricted funds on 'priority needs' (which excludes alcohol and gambling).[34] By subjecting an individual to mandatory income management and restricting how they may spend a portion of their social security payment, the measure limits the rights to social security and a private life insofar as it interferes with an individual's freedom and autonomy to organise and make decisions about their private and family life. The right to privacy is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and in preventing social exclusion and promoting social inclusion,[35] and enjoyment of the right requires that social support schemes must be accessible, providing universal coverage without discrimination.[36]

2.11 The measure may also engage and limit the right to an adequate standard of living. This right is often engaged simultaneously with the right to social security and requires that Australia take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.[37] Concerns have previously been raised regarding the inflexibility and restrictiveness of the BasicsCard (which those subject to income management are required to use), noting that fewer merchants accept the BasicsCard compared to the CDC and participants are unable to use the BasicsCard to purchase groceries and other essential services online.[38] In light of these concerns, it is not clear whether transitioning from the CDC program to the income management regime may result in

---

34 Department of Social Services, *Income Management* (5 April 2022); Statement of compatibility, pp. 33–34.

35 The Parliamentary Joint Committee on Human Rights has previously stated that the income management regime fails to promote social inclusion, but rather stigmatises individuals, and as such, limits the enjoyment of the right to social security, an adequate standard of living and privacy: *2016 Review of Strong Futures measures* (16 March 2016) p. 47.

36 UN Committee on Economic, Social and Cultural Rights*, General Comment No. 19: The Right to Social Security* (2008) [3]. The core components of the right to social security are that social security, whether provided in cash or in kind, must be available, adequate, and accessible.

37 International Covenant on Economic, Social and Cultural Rights, article 11.

38 Parliamentary Library, *Bills Digest No. 001, 2022-23* (1 August 2022) pp. 7–8. Telecommunications outages also appear to have an acute impact on individuals subject to the income management regime. In the Northern Territory, for example, evidence has been provided that telecommunications outages in remote Aboriginal communities result in disruptions to EFTPOS facilities and consequently have left individuals subject to the income management regime unable to purchase basic goods: see NAAJA, *Submission 17*, pp. 4–5 and 8 to the Senate Standing Committee on Community Affairs, *Inquiry into Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*. See also Northern Territory Women's Legal Services, *Submission 6*, pp. 4–5; Tangentyere Council, *Submission* 29, p. 5.

difficulties for participants in accessing and meeting their basic needs, such as food, clothing and housing. If this were the case, the measure may limit the right to an adequate standard of living.[39]

2.12 The measure also engages the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights). Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.[40] The measure would indirectly limit the right to equality and non-discrimination due to its disproportionate impact on Aboriginal and Torres Strait Islander persons and its differential treatment of participants based on geographical location. The statement of compatibility states that approximately 49 per cent of CDC program participants are First Nations persons.[41] There is evidence to suggest that an even higher proportion of CDC participants in the Northern Territory and Cape York region are Aboriginal and Torres Strait Islander persons,[42] noting that it is participants in these geographical areas that are to be transitioned to mandatory income management.[43]

---

39 The Parliamentary Joint Committee on Human Rights has raised concerns that welfare conditionality more generally may limit multiple rights, including the rights to social security and an adequate standard of living. See *ParentsNext: examination of Social Security (Parenting payment participation requirements – class of persons) Instrument 2021* (4 August 2021) pp. 73–112.

40 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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'.

41 Statement of compatibility, p. 33.

42 As at 3 June 2022 there were 3,931 cashless debit card participants in the Northern Territory, 78% of whom are Indigenous: see Parliamentary Library, Bills Digest No. 001, 2022-23 (1 August 2022) p. 9. See also Australian Council of Social Service (ACOSS), *Submission 6*, p. 2; NAAJA, *Submission 17*, p. 4 and NTCOSS, *Submission* 18, p. 2 to the Senate Standing Committee on Community Affairs, *Inquiry into Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022*.

43 The explanatory memorandum states that the intention of the bill is to end compulsory income management in most CDC program areas other than the Northern Territory and Cape York area: pp. 9, 10, 12–16.

2.13 Further, noting that 'disengaged youth' (which includes children aged between 15 and 17 years)[44] are a class of participants who are to be transitioned to the income management regime, the measure would engage the rights of the child. Children have special rights under human rights law taking into account their particular vulnerabilities.[45] Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child. All children under the age of 18 years are guaranteed these rights, without discrimination on any grounds.[46] For the reasons outlined above, the rights of a child to social security, privacy and equality and non-discrimination would be engaged and limited by subjecting disengaged youth to mandatory income management.[47] Additionally, noting that the bill does not provide an individual assessment of those participants who are to be transitioned from the CDC program to the income management regime,[48] the measure would appear to raise issues regarding Australia's obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[49] This obligation 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.[50]

2.14 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.

Committee's initial view

2.15 The committee considered the bill addressed the human rights concerns previously raised by the committee in relation to the CDC program and, for those participants removed from any form of welfare restrictions, would alleviate the adverse impact of the program on their rights.

2.16 However, the committee noted that the bill, in transitioning certain CDC participants to mandatory income management, limited a number of human rights.

---

44 Note that Category E payments apply to those aged between 15–25 years, see *Social Security (Administration) Act 1999*, s 123UCB.

45 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

46 UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [5]. See also International Covenant on Civil and Political Rights, articles 2 and 26.

47 Convention on the Rights of the Child, articles 2, 16 and 26.

48 Statement of compatibility, p. 33.

49 Convention on the Rights of the Child, article 3(1).

50 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 a primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

The committee considered further information was required to assess the human rights compatibility of this measure and sought the minister's advice in relation to:

(a) the objective that is sought to be achieved by compulsorily transitioning certain participants from the CDC program to the income management regime and why it is necessary to achieving the stated objective of abolishing the CDC program;

(b) why CDC participants in the Northern Territory are being treated differently from participants in other geographical areas;

(c) for those participants in the Northern Territory who would be required to transition to the income management regime, whether a request to the Secretary to cease participation in the CDC program could prevent a participant being subjected to mandatory income management;

(d) why certain participants are being compulsorily transitioned to the income management regime, rather than being able to voluntarily opt-in to the regime or, at a minimum, subjecting participants to the regime based on individual circumstances;

(e) the nature of the consultation that was undertaken with affected communities and individuals regarding the measure to compulsorily transition certain participants to income management, and the outcomes of such consultation;

(f) whether consideration was given to less rights restrictive ways to achieve the stated objective, and what other safeguards would operate to assist the proportionality of transitioning individuals to compulsory income management; and

(g) whether participants who will be subjected to the income management regime will have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management.

2.17 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[51]

2.18 The minister advised:

(a) What objective is being sought to be achieved by compulsorily transitioning certain participants from the CDC program to the income management regime and why is it necessary to achieving the stated objective of abolishing the CDC program?

51 The minister's response to the committee's inquiries was received on 4 October 2022. This is an extract of the response. The response is available in full on the committee's website.

The Government's objective is to implement voluntary income management (IM) regime in the near future. One step in achieving this overall objective is abolishing the Cashless Debit Card (CDC) program, which has now been achieved, and reforming the existing IM regime.

To this end, in the near future I intend to introduce a further Bill to facilitate the transition of IM to a voluntary regime. This further Bill will be introduced once I have had a sufficient opportunity to adequately consult with affected communities and individuals about what support is required, and to ensure appropriate support systems are in place before the transition occurs.

As addressed in detail further below, I have undertaken consultation on these reforms with affected individuals and communities. Following these consultations, the Government has considered how best to operationalise its commitment to abolish the CDC and reform the existing IM regime.

The option of abolishing CDC on a single date this year was considered but ultimately regarded as unsuitable for a number of reasons. The Government considered that a phased transition to a voluntary IM regime is the best option to ensure that individuals receive the support they require, noting that many individuals have received welfare payments through IM (and/or CDC once it became operational) arrangements for over 10 years. These individuals would likely be significantly disadvantaged by a sudden cessation of all cashless welfare arrangements, and will require time and appropriate support to move towards managing their welfare payments if they choose not to participate in the voluntary IM regime.

(b) Why are CDC participants in the Northern Territory being treated differently from participants in other geographical areas?

In the Northern Territory, a different approach is required to other existing CDC program areas because the Northern Territory is the only area in which an individual has been able to elect to move from IM to CDC. If individuals who voluntarily transitioned to CDC from IM were transitioned off CDC without restrictions on how they receive their welfare payments, they would face different arrangements to people who chose to stay on IM (who would continue to have their welfare payments restricted). This would have the effect of treating those individuals who chose to transfer to CDC differently to those that did not. To ensure fair and equivalent application of cashless welfare arrangements across the Northern Territory, it was decided that CDC program participants residing in the Northern Territory should transition to a form of IM upon closure of the CDC program. The amendments the Government introduced to this Bill addressed many of the Committee's overarching concerns relating to the Northern Territory.

(c) For those participants in the Northern Territory who would be required to transition to the income management regime, will a request to the Secretary to cease participation in the CDC program prevent a participant being subjected to mandatory income management?

The amendments to the Bill which passed both houses of parliament on 28 September 2022 address these concerns. Under the amended Bill, to ensure fairness to those in the Northern Territory who elected to remain on IM rather than transitioning to CDC, Northern Territory CDC participants will not be able to opt-out.

(d) Why are certain participants being compulsorily transitioned to the income management regime, rather than being able to voluntarily opt-in to the regime or, at a minimum, subjecting participants to the regime based on individual circumstances

In most circumstances, current CDC program participants will cease to be subject to any cashless welfare arrangements before the CDC program is legislatively closed. These individuals will be able to volunteer for IM if they choose to do so. There are two exceptions to this general circumstance, namely individuals residing in the Northern Territory and the Cape York area.

The compulsory CDC to IM in the Northern Territory is addressed above.

The mandatory transition of individuals from CDC to IM in the Cape York Area recognises the important role of the Family Responsibilities Commission (FRC) in supporting individuals within its jurisdiction. This will ensure the FRC can continue to exercise all powers available to it under its originating legislation and continue its work unchanged.

While voluntary CDC participants will automatically transition to IM, they will have the ability to opt-out.

(e) What is the nature of the consultation that was undertaken with affected communities and individuals regarding the measure to compulsorily transition certain participants to income management, and what were the outcomes of such consultation?

I have personally visited and spoke with communities in Ceduna, the East Kimberley, Cairns and the Northern Territory. Assistant Minister Elliot visited and spoke with communities in Bundaberg and Hervey Bay, Cape York and the Goldfields region. I have consulted not only with these broader communities, but also with individual CDC program participants and key stakeholders in the communities including First Nations leaders, service providers, healthcare workers, and police.

The discussions undertaken as part of these consultations have been focused on understanding:

- what services are needed to address social issues within communities and to drive economic independence.
- what supports people may need while transitioning off the program.
- what the future of IM may look like and what other supports that may be needed to operationalise this.

Outcomes of the consultations undertaken are detailed throughout this correspondence.

(f) ***Was consideration given to less rights restrictive ways to achieve the stated objective, and what other safeguards will operate to assist the proportionality of transitioning individuals to compulsory income management?***

The staged reform of welfare management, through the abolition of CDC and reforms to the IM regime, has been and will continue to be developed in consultation with affected communities and other stakeholders, including First Nations leaders. Several options have been mooted over time including full abolition. The Government considers that our chosen pathway is the most appropriate way to implement changes and remove or lessen restrictions with minimal disruption to accepted arrangements that have helped people to meet their priority needs.

The government is introducing a range of safeguards to support the transition away from CDC and, ultimately, to a voluntary scheme. These include tailored community support and engagement with services delivered to individual participants.

This process remains ongoing and, as with all successful policies, will adapt and may be revised as the pathway to voluntary arrangements gets underway.

(g) ***Will participants who will be subjected to the income management regime have an opportunity in the future to opt-out of this regime or cease their participation in mandatory income management***

The Government is committed to abolishing the mandatory CDC program and to instead support communities to make their own decisions about the way forward. As noted above, the Government's intention is to transition away from existing cashless welfare arrangements to a voluntary regime over coming years.

In order to best achieve this while ensuring affected individuals receive the support they require, a stepped approached is preferred by the Government and affected communities. This will involve initially abolishing the CDC program and reforming the IM regime, followed by further amendments to complete the transition to a voluntary regime.

Concluding comments

International human rights legal advice

Rights to social security, private life, equality and non-discrimination and rights of the child

2.19 The initial analysis noted that by requiring certain individuals to transition from the CDC program to the income management regime, the bill engaged and limited multiple human rights. As noted above (at paragraph [2.7]), several amendments were made to the bill prior to it passing both Houses of Parliament, including the introduction of a new enhanced income management regime. The initial analysis noted that the right to an adequate standard of living may be engaged

and limited if those participants who transitioned to the income management regime experienced difficulties in accessing and meeting their basic needs, such as food, clothing and housing. The supplementary explanatory memorandum states that the new enhanced income management regime addresses concerns regarding the inflexibility and restrictiveness of the BasicsCard, with individuals having access to a Contemporary Card with more modern functionality, including accessing more merchants, allowing for BPAY and online shopping and better supports for money management. Individuals will also receive support from Services Australia. Additionally, amendments to the bill allow the Secretary to vary the percentage of qualified and unqualified portions of a person's welfare payment if a person is unable to access their BasicsCard bank account as a direct result of a technological fault or malfunction with the card or account; a natural disaster; or a national emergency.[52] To the extent that these amendments mitigate the risk that individuals subject to income management will experience difficulties accessing and meeting their basic needs, the right to an adequate standard of living appears unlikely to be limited.

2.20 However, those subject to compulsory income management will continue to have a portion of their social security payment managed or quarantined and can only spend their restricted funds on 'priority needs'. As such, the amended measure would still engage and limit the rights to social security and private life and, insofar as it disproportionately impacts Aboriginal and Torres Strait Islander persons and applies to 'disengaged youth', the right to equality and non-discrimination and the rights of the child.

2.21 Further information was sought regarding the objective sought to be achieved by compulsorily transitioning certain CDC participants to the income management regime. The minister stated that the government's objective is to implement voluntary income management in the near future. The minister noted that abolishing the CDC program and reforming the existing income management regime are steps to achieve this objective. The minister noted that a further bill is intended to be introduced following further consultations with affected communities and individuals to facilitate the transition of income management to a voluntary regime. In the meantime, the minister stated that a phased transition to a voluntary income management regime is the best option to ensure that individuals receive the support they require, noting that many individuals, particularly those who have been on income management for a significant period of time, will require time and appropriate support to move towards managing their welfare payments.

2.22 As to the necessity of the measure, the minister noted that the Northern Territory is the only area where individuals were able to elect to transition from income management to the CDC program. If individuals who elected to transition from the income management regime to the CDC program were to cease to be

52 See item 1R, subsection 123SJ(4)–(5); item 48E, subsection 123SM(3)–(4); item 48M, subsection 123SP(3)–(4) of bill as finally passed by both Houses.

participants following the closure of the CDC program, those participants would be treated differently to people who elected to remain on the income management regime. The minister stated that it is therefore necessary to transition Northern Territory CDC participants to compulsory income management to ensure fair and equivalent application of cashless welfare arrangements across the Northern Territory. Regarding the transition of participants in the Cape York area, the minister stated that this measure recognises the important role of the Family Responsibilities Commission in supporting individuals within its jurisdiction. The minister noted that the Commission will continue to be able to exercise all powers available under its originating legislation and continue its work unchanged.

2.23 Considering the myriad ways in which the CDC program has limited human rights, abolishing the CDC program would be a rights-enhancing measure and making income management voluntary and removing any compulsory element would address the human rights concerns with the income management regime. In this way, the broader objective underpinning the bill – namely, abolishing the CDC program – would likely constitute a legitimate objective for the purposes of international human rights law.

2.24 However, questions remain as to whether the specific measure in this bill, of compulsorily transitioning certain CDC participants to income management, is, for the purposes of international human rights law, necessary and addresses a public or social concern that is pressing and substantial enough to warrant limiting human rights. While applying cashless welfare arrangements fairly across the Northern Territory may be important from a policy perspective, it is not clear that this objective would constitute a pressing and substantial concern such that it would warrant limiting human rights. Additionally, while it is important to ensure that individuals are adequately supported to transition away from the CDC program and are not disadvantaged by the program's closure, it remains unclear why this supported transition must occur on a mandatory basis.

2.25 Regarding proportionality, as noted in the initial analysis, for Northern Territory CDC participants there appears to be currently little flexibility to consider the merits of an individual case, as participation in the income management regime is broadly based on geographical location and the type of social security payment received. While specifying classes of persons who are to be subject to the income management regime, including disengaged youth and long-term welfare recipients, would assist with proportionality, concerns remain that this approach is not currently sufficiently individualised.

2.26 As to the existence of safeguards, the minister confirmed that participants in the Northern Territory are not able to opt-out of the CDC program.[53] As such, the

53 It is noted that items 38 and 40 were omitted from the bill as finally passed by both Houses, having the effect that participants in the Cape York and Northern Territory areas may not request to cease to be a program participant.

opt-out mechanism contained in the bill does not offer any safeguard value for those required to transition to mandatory income management. While the exemptions outlined above (in paragraph [2.5]) may operate as a safeguard, their value will depend on how they operate in practice, noting the committee has previously raised concerns about the adequacy and effectiveness of these exemptions in the context of the CDC program.[54]

2.27 To assess the effectiveness of community consultations as a safeguard, further information was sought from the minister regarding the nature and outcome of consultations undertaken to date. The minister stated that she had personally visited and spoken with communities in Ceduna, the East Kimberly, Cairns and the Northern Territory, while the assistant minister had visited and spoken with communities in Bundaberg and Hervey Bay, Cape York and the Goldfield region. The minister noted that consultation occurred with communities and individuals as well as key stakeholders, such as First Nations leaders, service providers, healthcare workers and police. As to the outcomes of consultations, the minister stated that the government and affected communities preferred a stepped approach involving initially abolishing the CDC program and reforming the income management regime, followed by further amendments to complete the transition away from existing cashless welfare arrangements to a voluntary regime. If this consultation process contained the constituent elements of free, prior and informed consent, with participants having a genuine opportunity to influence the decision-making process and outcome, it may satisfy the requirements under international human rights law regarding consultation.[55]

2.28 Finally, as to whether less rights restrictive ways to achieve the stated objective were considered, the minister stated that several options were considered,

---

54 See Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 98–102.

55 For consultation to be an effective safeguard, it must be a two-way deliberative process of dialogue in advance of a decision to progress the measure. This is particularly the case where Aboriginal and Torres Strait Islander people are affected by the decision. Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples provides that States should consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. The right of indigenous peoples to be consulted about measures which impact on them is a critical component of free, prior and informed consent. Genuine consultation in this context should be 'in the form of a dialogue and negotiation towards consent'. See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/12/34 (2009) [46]–[47]; 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) [14], [15], [20]. For previous committee commentary on this issue see Parliamentary Joint Committee on Human Rights, *Report 1 of 2021* (3 February 2021) pp. 95–98.

including full abolition of the CDC on a single date, but these options were ultimately regarded as unsuitable for a number of reasons. The minister stated that the chosen approach is the most appropriate way to implement changes and remove or lessen restrictions with minimal disruption to accepted arrangements. The minister noted that a phased transition will ensure individuals receive the support they require, noting that the sudden cessation of all cashless welfare arrangements would likely significantly disadvantage individuals, especially those who have been subject to such welfare arrangement arrangements for a long period of time (over 10 years). The minister further stated that the government is introducing a range of safeguards to support the transition away from the CDC program, and ultimately, to a voluntary scheme.

2.29 As noted above, ensuring that individuals are adequately supported to transition away from the CDC program and are not disadvantaged by the closure of the CDC program is an important aim. However, questions remain as to whether there may be a less rights restrictive way of achieving the stated objective, by providing extra support while allowing individuals to voluntarily opt-in to the regime or only be subject to the regime on the basis of individual circumstances.

2.30 In conclusion, in abolishing the CDC program, the bill would address the human rights concerns previously raised by this committee in relation to the program and, for those participants removed from any form of welfare restrictions, would alleviate the adverse impact of the program on their rights. The intention to make income management voluntary in the future is also positive for addressing the adverse impact on human rights. However, this bill, in requiring certain individuals to transition from the CDC program to the income management regime, still engages and limits multiple human rights. As it is not clear, as a matter of international human rights law, whether compulsorily transitioning certain participants to the income management regime addresses a pressing or substantial concern, and as the current income management regime is not accompanied by sufficient safeguards, this aspect of the bill risks impermissibly limiting the rights to social security, privacy and equality and non-discrimination. It is noted that the government intends to further amend the income management regime, ultimately transitioning to a voluntary scheme. Were the income management regime to be made voluntary and those transitioned to the regime under this bill to be removed from any form of welfare restrictions, the human rights concerns outlined above would be addressed.

Committee view

2.31 The committee thanks the minister for this response. The committee notes the minister's advice that the government intends to transition away from existing cashless welfare arrangements to a voluntary regime and will continue to develop this staged reform in consultation with affected communities and other stakeholders, including First Nations leaders. In particular, the committee notes the minister's advice that a further bill is intended to be introduced to facilitate the

transition of income management to a voluntary regime and this is to occur once further consultations are undertaken and appropriate support systems are in place.

2.32 The committee notes that were the income management regime to be made voluntary, the human rights concerns outlined above would be addressed. However, until a further bill is introduced, the committee notes that transitioning certain CDC participants to mandatory income management limits a number of human rights. As the bill has passed both Houses of Parliament, the committee makes no further comment.

Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022 [F2022L00877][1]

Purpose	This legislative instrument increases the daily amount from 1 July 2022 that certain detainees will owe the Commonwealth for the cost of their detention
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	This legislative instrument is exempt from disallowance (see section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015).
Rights	Right not to be punished twice; humane treatment in detention

2.33 The committee requested a response from the minister in relation to this instrument in *Report 3 of 2022*.[2]

Liability for costs of detention

2.34 This legislative instrument increases, from $456.23 to $490.69, the determined daily cost of maintaining a person in immigration detention between 1 July 2022 to 30 June 2024.[3] Persons convicted of people smuggling and illegal foreign fishing offences are liable to repay the Commonwealth for this cost of their immigration detention.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration (Daily maintenance amount for persons in detention) Determination (LIN 22/031) 2022 [F2022L00877], *Report 5 of 2022*; [2022] AUPJCHR 39.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (7 September 2021), pp. 27-30.

3 *S*ubsection 262(3) of the *Migration Act 1958* provides that this sum is to be no more than the cost to the Commonwealth of detaining a person at that place in that period. The explanatory statement states that the amount specified does not include indirect, variable or associated departmental costs, and is therefore no more than the actual cost (p. 2).

4 *Migration Act 1958*, section 262. Persons will be liable where: they are, or have been, detained under section 189 (as an unlawful non-citizen); were on board a vessel (not being an aircraft) when it was used in connection with the commission of an offence against the Migration Act or against a prescribed law in force in the Commonwealth or in a State or Territory, being a law relating to the control of fishing; and have been convicted of that offence.

Summary of initial assessment

Preliminary international human rights legal advice

Right not to be punished twice and right to humane treatment in detention

2.35 Making a person liable for the cost of their immigration detention, where that person is being detained in relation to conduct for which they have also been convicted of a criminal offence, may engage the right not to be punished twice, which is a dimension of the right to a fair trial and fair hearing. If the imposition of a cost for mandatory immigration detention may properly be regarded as a penalty, it may be that, as a matter of international human rights law, the imposition of this charge (and consequently an increase in that charge) would constitute a criminal penalty, such that the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (relating to the right to a fair trial and fair hearing) would apply.

2.36 The test for whether a matter should be characterised as 'criminal' for the purposes of international human rights law relies on three criteria:

(a) the domestic classification of the offence;

(b) the nature of the penalty; and

(c) the severity of the penalty.[5]

2.37 Further, the imposition of liability for the cost of a person's immigration detention may raise questions of compatibility with the right to humane treatment in detention. The right to humane treatment in detention provides that all people deprived of their liberty must be treated with humanity and dignity.[6] This applies to everyone in any form of state detention, including immigration detention, and provides that a person deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of their liberty.[7]

2.38 As this legislative instrument is exempt from disallowance, no statement of compatibility with human rights is required to be prepared.[8] As such, no assessment of the instrument’s compatibility with human rights is available.

---

5 For further detail, see the Parliamentary Joint Committee on Human Rights, *Guidance Note 2*: *Offence provisions, civil penalties and human rights* (December 2014).

6 International Covenant on Civil and Political Rights, article 10.

7 UN Human Rights Committee, *General Comment No. 21: article 10 (Human Treatment of Persons Deprived of Their Liberty)* [3].

8 *Human Rights (Parliamentary Scrutiny) Act 2011*, section 9.

Committee's initial view

2.39 The committee considered that further information was required to assess the compatibility of this measure with the right not to be punished twice and the right to humane treatment in detention, and as such sought the minister's advice in relation to:

(a) whether the imposition of liability for the costs of immigration detention (and an increase in that cost) amounts to a criminal penalty for the purposes of international human rights law, in particular:

(i) what is the intention of imposing the charge on the detained person;

(ii) the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention;

(iii) if the imposition of this charge were to be classified as a criminal penalty, whether this would impermissibly limit the right against double punishment; and

(b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

2.40 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[9]

2.41 The minister advised:

> ***(a) whether the imposition of liability for the costs of immigration detention (and an increase in that cost) amounts to a criminal penalty for the purposes of international human rights law, in particular:***
>
> ***(i) what is the intention of imposing the charge on the detained person***
>
> Immigration detention in Australia is administrative in nature and is not a punishment. Detention of unlawful non-citizens is required under s189 of the *Migration Act 1958* (the Act).
>
> The primary intention of making certain cohorts liable for the cost of their immigration detention is to recoup the significant financial impost detaining such persons represents to the Commonwealth. As the Committee notes, the *Migration Amendment (Abolishing Detention Debt) Act 2009* (the 2009 Act) amended the Act to

9 The minister's response to the committee's inquiries was received on 27 September 2022. This is an extract of the response. The response is available in full on the committee's website.

remove the liability for the cost of their detention for all detainees apart from convicted people smugglers and illegal foreign fishers. The then Minister for Immigration summarised the rationale and noted that the Bill aimed to strike:

> an appropriate balance by abolishing an ineffective system that penalises former detainees with enormous debt burdens, while ensuring that liability for detention costs remains a deterrent in relation to convicted illegal foreign fishers and people smugglers.

The explanatory memorandum accompanying the 2009 Act similarly stated "These provisions are being retained in response to the serious nature of the offences covered by section 262 of the Migration Act and in recognition of the need for a significant deterrent to apply to these offences."

These documents make it clear that the retention of the liability for detention costs for these particular cohorts was also intended to act as a deterrent due to the seriousness of these activities often perpetrated by recidivist offenders.

The individual and the master, owner, agent and charter of the vessel on which the person travel to Australia are jointly and severally liable for the costs of the individual's immigration detention.

The period subject to immigration detention debt does not include time spent in criminal custody. A person is not detained in immigration detention in relation to conduct for which they have been convicted of a criminal offence, rather it relates to their status as an unlawful non-citizen (generally after, and in some cases before, their criminal custody).

(ii) the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention

An immigration detainee who has exhausted visa options to remain in Australia must be removed from Australia as soon as reasonably practicable, subject to some exceptions relating to removal to a person's country of origin that give effect to Australia's *non-refoulement* obligations. The Department seeks to effect the removal of unlawful non-citizens who were convicted of people smuggling offences and illegal foreign fishers promptly after the conclusion of their criminal custody. The time an individual spends in immigration detention depends on a range of factors, including the complexity of their case, the legal processes they pursue and whether they voluntarily choose to leave Australia.

The Department has issued detention debt liability notifications for fewer than five individuals in total for the financial years from 2018/19 until 2022/23. A notice in respect to detention, removal or deportation costs is to be handed to an unlawful non-citizen once estimated costs of detention, removal or deportation are known.

The notice advises the unlawful non-citizen that the costs are an estimate only and that final costs will be sent to them via an invoice once the removal is completed.

(iii) if the imposition of this charge were to be classified as a criminal penalty, whether this would impermissibly limit the right against double punishment

The liability for detention costs is not a criminal penalty under the Act. Subsection 262(3) of the Act provides that the sum a person who is liable for in relation to their immigration detention cannot be more than the cost to the Commonwealth of detaining that person. It is clear from this wording that the amount imposed under the Act can only be for the actual cost of detention and cannot be a punitive measure. It is therefore not a punishment as the Act does not allow the Commonwealth to do so. Also, as noted above, the immigration detention debt does not relate to the conduct for which the person was convicted of a criminal offence. The person is therefore not charged for detention that relates to their conviction and the detention debt is not intended to amount a criminal penalty for the purposes of international human rights law or to the person being punished twice for their offence.

(b) whether imposing a daily charge (including increasing it) limits the right to humane treatment in detention.

All persons detained administratively under the Act have the same rights to humane treatment in immigration detention regardless of whether they are liable for the cost of their immigration detention.

The Government is committed to ensuring all detainees in immigration detention are provided with high quality services commensurate to Australian standards and that the conditions in immigration detention are humane and respect the inherent dignity of the person.

The Department invests a significant amount of resources to provide high quality facilities and amenities, a broad range of services and activities within the immigration detention network and to ensure safety and security within the centres. All people in immigration detention are accommodated in facilities most appropriate to their needs and circumstances, are able to access legal representation and are provided with the means to contact family, friends and other support.

Internal assurance and external oversight processes are in place to ensure that the health, safety and wellbeing of all immigration detainees is maintained.

Immigration detainees have access to appropriate food (accommodating dietary and cultural requirements), educational programs, cultural, recreational and sporting activities, internet and computer facilities, televisions, and clean, comfortable sleeping quarters.

Health care services for immigration detainees are generally commensurate with those available to the Australian community under the Australian public health system and as clinically indicated and with the person's consent.

> The imposition of a detention debt in relation to some immigration detainees does not limit their access to the above services or limit their rights to humane conditions of detention.

Concluding comments

International human rights legal advice

Right not to be punished twice and right to humane treatment in detention

2.42 As noted above, imposing liability for the costs of a person's immigration detention, where that person is being detained in relation to conduct for which they have also been convicted of a criminal offence, may engage the right not to be punished twice if the costs of detention are characterised as 'criminal' for the purposes of international human rights law. The relevant test for this relies on three criteria: the domestic classification of the offence; the nature of the penalty; and the severity of the penalty. The minister advised that the purpose behind the imposition of the costs is twofold, namely: to recoup the cost of detaining certain persons; and to serve as a deterrent in relation to people smuggling and illegal fishing offences. Given the stated intention of deterring others from engaging in people smuggling or relevant fishing, the penalty is more likely to be considered 'criminal' in nature under international human rights law.

2.43 As to the potential severity of the penalty, advice was sought as to the average, and longest, length of time people who have been convicted of people smuggling or illegal foreign fishing offences (and are therefore liable for the cost of their immigration detention) have been held in immigration detention. The minister noted that the department seeks to effect the removal of people convicted of people smuggling and illegal foreign fishing offences promptly after their custodial sentence has concluded, but stated that the length of time will depend on the complexity of their case, the legal processes they pursue and whether they voluntarily choose to leave Australia.

2.44 The minister did not provide information as to the average and longest length of time those persons have remained in detention (and therefore accrued debts). The potential severity of this penalty depends on the length of time that relevant persons remain in detention. Detention of merely weeks or months may not be so significant that the penalty can be regarded as criminal under international human rights law. However, a period of detention extending for years may risk this. In this regard, it is noted that statistics relating to all persons in immigration detention are regularly published. The most recent statistics indicate that, at 31 May 2022, the average length of immigration detention was 736 days, and that 138 people have been in detention for more than 1,825 days.[10] Applying those general

10 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (31 May 2022), p. 12.

statistics as a guide, were a person convicted of a foreign fishing or people smuggling offence to be held in immigration detention for the current average length of time and subject to this increased daily rate for that period, they would be liable for a debt of $361,147.84. A person held for 1,825 days would accrue a debt of $895,892.50. Given the magnitude of these potential costs, and the absence of information indicating that people in the relevant cohort are held for shorter periods of time (and so accrue smaller debts), there appears to be a risk that the penalties may be sufficiently severe in nature so as to be characterised as a criminal penalty for the purposes of international human rights law

2.45 The minister stated that the department has issued debt liability notices for less than five people for the financial years from July 2018 to present. However, it is noted that while these penalties may not be frequently imposed in practice, this does not alter the establishment of the liability for the penalty as a matter of law, and the ability to impose the penalty in every instance in which it arises.[11]

2.46 For those persons held for short periods of time after the conclusion of a custodial sentence, this measure would be unlikely to amount to a criminal charge or criminal penalty. However, for those for whom detention is lengthy, there is a risk that imposing (and increasing) this charge could be so severe as to amount to a criminal penalty for the purposes of international human rights law. This would require that the penalty must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence (the prohibition against double punishment).[12]

2.47 In relation to the prohibition against double punishment, the minister advised that the liability for detention costs is not a criminal penalty under legislation, and stated that it cannot be more than the cost to the Commonwealth of detaining that person. The minister also stated that the debt does not 'relate to' the conduct for which the person was convicted of a criminal offence, and the person is therefore not charged for detention that relates to their conviction. However, it is noted that this penalty only applies to persons in immigration detention who have been convicted of a people smuggling or foreign fishing offence, and consequently would appear to be directly related to the commission of those offences.

2.48 Relevant international jurisprudence on this precise question is limited. The UN Committee on Human Rights has held that a decision to proceed with deportation is administrative in nature and independent of a person's conviction and

11 It may, equally, raise questions as to the necessity and efficacy of imposing this liability for such debts at all, given that they appear to be rarely enforced.

12 International Covenant on Civil and Political Rights, article 14(7).

sentence under criminal law.[13] However, this would appear to be distinguishable from a decision to impose (and to increase) a daily fee for mandatory immigration detention only for those persons in immigration detention who have been convicted of a relevant offence. Further, the UN Committee on Human Rights has commented that proceedings for the expulsion of a person not holding the nationality of a State party are ordinarily outside the scope of article 14, however it would appear that this may change if a person were to demonstrate that a measure was intended to impose additional punishment upon them rather than to protect the public.[14] In this regard, it is noted that the minister has said that the imposition of this penalty only on people convicted of relevant offences is intended to deter potential offenders and re-offenders.

2.49 As such, it would appear that there is some risk that, in such instances where the accumulated debt for one's detention is so substantial that it may be regarded as a criminal penalty under international human rights law, the imposition of this penalty may constitute double punishment. Were this the case, this would violate the right to a fair trial.[15]

2.50 With respect to the right to humane treatment in detention, the minister stated that all persons in immigration detention have access to the same services and supports, including the availability of education, healthcare, and living quarters. The minister stated that the imposition of a detention debt in relation to some immigration detainees does not limit their access to those services or their rights to humane conditions of detention. However, in cases considering individuals detained under Australia's mandatory immigration detention scheme, the UN Human Rights Committee has found that the combination of subjecting individuals to arbitrary and protracted and/or indefinite detention, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or degrading treatment.[16] It may be that increasing a detainee's liability for the cost of their detention could render the overall conditions of their immigration detention more difficult, including noting that it may potentially deter those persons from pursuing legal avenues of appeal, which can take long periods of time (and would have the effect of causing the debt to continue to accrue). Within this broader

---

13 UN Human Rights Committee, *JG v New Zealand* (Communication No. 2631/2015) para [4.4].

14 UN Human Rights Committee, *Nystrom v Australia* (Communication No. 1557/2007) para [6.4].

15 See, for example, the language used by the UN Human Rights in *Babkin v Russian Federation* (CCPR/C/92/D/1310/2004) at para [13.6].

16 *F.K.A.G v. Australia*, UN Human Rights Committee Communication No. 2094/2011 (2013) [9.8]. See also *F.J. et al. v. Australia,* UN Human Rights Committee Communication No. 2233/2013 (2016) [10.6].

context, and having regard to previous findings by the UN Committee on Human Rights, there may, therefore, be a risk that increasing the daily fee for certain immigration detainees has the effect of exacerbating detention conditions which have previously been found to amount to cruel, inhuman or degrading treatment, and therefore constitute an impermissible limit on the right to humane treatment in detention.

Committee view

2.51 The committee thanks the minister for this response. The committee notes that for those persons held in immigration detention for short periods of time after the conclusion of a custodial sentence, increasing the costs of detention payable by a detainee would be unlikely to amount to a criminal penalty for the purposes of international human rights law. However, for those for whom detention is lengthy, the committee considers there is some risk that imposing (and increasing) this cost could be so severe as to amount to a criminal penalty for the purposes of international human rights law. If so, the committee notes that this would require that the penalty be shown to be consistent with criminal process guarantees, including the right not to be tried twice for the same offence (the prohibition against double punishment). The committee considers there may be a risk that, in such instances, the imposition of a substantial debt only on those convicted of certain offences may breach the prohibition against double punishment.

2.52 The committee notes that the United Nations Human Rights Committee has stated, regarding immigration detention in Australia that subjecting individuals to arbitrary and protracted and/or indefinite detention, the absence of procedural safeguards to challenge that detention, and the difficult detention conditions, cumulatively inflicts serious psychological harm on such individuals that amounts to cruel, inhuman or degrading treatment. Therefore, the committee considers there may also be a risk that increasing the daily fee for certain immigration detainees has the effect of exacerbating detention conditions, which could constitute an impermissible breach of the right to humane treatment in detention.

2.53 The committee draws these human rights concerns to the attention of the minister and the Parliament.

Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541]

Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866][72]

Purpose	The Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] create new public interest criteria, visa conditions and visa cancellation grounds in relation to visa applicants and visa holders who pose an unreasonable risk of unwanted critical technology knowledge transfer The Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866] create a new visa condition to screen for and manage risks to specified critical technologies in the postgraduate research sector
Portfolio	Home Affairs
Authorising legislation	*Migration Act 1958*
Last day to disallow	15 sitting days after tabling (tabled in both the Senate and the House of Representatives on 26 July 2022). Notice of motion to disallow must be given by 25 October 2022[73]
Rights	Education; work; freedom of expression; equality and non-discrimination

2.54 The committee requested a response from the minister in relation to the instruments in *Report 3 of 2022*.[74]

72 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541] and Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866], *Report 5 of 2022*; [2022] AUPJCHR 40.

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

74 Parliamentary Joint Committee on Human Rights, *Report 3 of 2022* (7 September 2022), pp. 31-37.

Restriction on visa holders relating to critical technologies

2.55 These two legislative instruments regulate the ability of specified visa holders to undertake study or research where there is an 'unreasonable risk of unwanted transfer of critical technology by the visa holder'. They provide that the minister can refuse to grant a visa on this basis (initially relating to student visas but applying to a further 12 subclasses of visas at a date to be specified by the minister), provide that a student visa holder may not change their course of study without ministerial approval,[75] and empower the minister to cancel a visa where satisfied that there is an unreasonable risk of unwanted transfer of critical technology by the visa holder.

2.56 'Critical technology' refers to: technology of a kind specified by the minister in a further legislative instrument; or property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any such specified technology.[76] The 'unwanted transfer of critical technology' means any direct or indirect transfer of critical technology; or communication of information about such technology by the person that would: harm or prejudice the security or defence of Australia, or the health and safety of the Australian public or a section of the Australian public, or Australia's international relations; or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth.[77]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to education, work, freedom of expression and equality and non-discrimination

2.57 It is noted that the state has a right to control immigration. However, by amending the Migration Regulations 1994 to allow for visa cancellations for those in Australia, or requirements for certain visa holders to gain the minister's approval to change their course of study, if the minister considers they pose an unreasonable risk

---

75 This condition was first established in Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 8 (visa conditions 8204A and B). These conditions were then repealed and replaced by visa condition 8208 in Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022 [F2022L00866].

76 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 1, definition contained in section 1.03.

77 Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 [F2022L00541], item 2, subsection 1.15Q(1).

of unwanted critical technology knowledge transfer, these legislative instruments engage and may limit several human rights including the rights to education, work, freedom of expression and equality and non-discrimination.[78]

2.58 Establishing a requirement for certain visa holders to seek ministerial approval to undertake certain studies engages and may limit the right to education. The right to education provides that education should be accessible to all.[79] This requires that States parties recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms. The requirement for certain visa holders to seek ministerial approval to undertake certain studies, and the provisions allowing for visa cancellations for persons in Australia, may also engage and limit the right to work. This right provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.[80] Enabling visas to be cancelled if certain information is communicated also appears to limit the right to freedom of expression. The right to freedom of expression 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.[81]

2.59 Further, because these measures would apply to non-citizens, and could potentially operate disproportionately in relation to people from particular countries, they also engage and may limit the right to equality and non-discrimination. This right 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.[82] It is recognised that nation states have a broad discretion to regulate the issue of visas, and to establish criteria accompanying those visas. However, those laws

78 Establishing further conditions on the granting, and possession of, certain visas may also engage the right to privacy (as acknowledged in the statements of compatibility). In addition, the cancellation of a visa may also have flow on effects, which may engage and limit the right to liberty, right to protection of the family, and Australia's non-refoulement obligations. These are recognised in the statements of compatibility.

79 International Covenant on Economic, Social and Cultural Rights, article 13.

80 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

81 International Covenant on Civil and Political Rights, article 19(2).

82 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

must be implemented in a non-discriminatory manner, consistent with the right to equality. The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).[83] Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.[84]

2.60 These rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective, and is a proportionate means of achieving that objective. With respect to the right to equality and non-discrimination, 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 objective and is a proportionate means of achieving that objective.[85]

Committee's initial view

2.61 To assess the human rights compatibility of this measure, the committee sought the minister's advice in relation to:

(a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when;

(b) what is meant by 'indirect' transfer of critical technology or communication of information about critical technology in subsection 1.15Q(1), and examples of the circumstances this is intended to address;

(c) whether the objective these legislative instruments seek to achieve is an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights, including whether there have

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

84 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. 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'.

85 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].

been prior instances in which unwanted communication of technology intended to be captured by these measures has occurred; and

(d) whether there are certain nationalities in relation to whom these provisions may operate more frequently in practice, and if so, whether this differential treatment is based on reasonable and objective criteria.

2.62 The full initial analysis is set out in *Report 3 of 2022*.

Minister's response[86]

2.63 The minister advised:

(a) what types of technology will be specified for the purposes of the definition of 'critical technology' and when?

The amendments made by the PACT Regulations provide that the Minister may, by legislative instrument, specify kinds of technology as critical technology in regulation. The Minister for Home Affairs is yet to make this instrument. The Department has undertaken extensive consultation with affected stakeholders in the higher education sector and industry groups on the list of technologies to be specified—informed by the Department of the Prime Minister and Cabinet’s 2021 *List of critical technologies in the national interest*.[87]

As at September 2022, the following list of classes of technologies has been provided to affected stakeholders for consultation for the purpose of the visa screening framework:

- Advanced materials and manufacturing technology
- Artificial intelligence, computing and communications technology
- Biotechnology, vaccines and gene technology
- Energy and environment
- Sensing, timing and navigation technology
- Transportation, robotics and space
- Quantum technology

The amendments made by the PACT Regulations commenced in part on 1 July 2022—amending the Migration Regulations to introduce the PIC for the Student visa subclass and applying the new Student visa condition.

86 The minister's response to the committee's inquiries was received on 27 September 2022. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

87 https://www.pmc.gov.au/sites/default/files/publications/ctpco-critical-tech-list-of-63.pdf

While they have been made, the amendments made by the PACT Regulations will not be operational (in effect, visa screening will not 'go live') until the Minister has specified the kinds of critical technology for the purpose of the regulations.

The application of the PIC to additional visa subclasses and the operation of new cancellation ground will commence no later than 6 October 2022. These mechanisms will similarly not be 'operational' until the kinds of critical technology have been specified.

The Department will draft a proposed legislative instrument and explanatory statement for the Minister's consideration in Q4 2022. The final content of the specification, and its timing, is at the discretion of the Minister.

(b) what is meant by 'indirect' transfer of critical technology or communication of information about critical technology in subsection 1.15Q(1), and examples of the circumstances this is intended to address?

These grounds are modelled after grounds outlined in section 121.1 of the *Criminal Code* in relation to information causing harm to Australia's interest (paragraphs (a), (b), (c) and subparagraph (d)(i)) and the grounds upon which the Defence Minister determines whether the supply of certain technologies would prejudice the security, defence or international relations under section 25A of the *Defence Trade Controls Act 2012* as prescribed in section 8 of the *Defence Trade Controls Regulation 2013* (subparagraphs (f)(ii) and (iii)).

An 'indirect' transfer of critical technology or communication of critical technology, for the purposes of the Migration Regulations, is a transfer or communication that would indirectly result in harm or prejudice to the security or defence of Australia, or to the health or safety of the Australian public, or interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of Commonwealth offences, or harm Australia's international relations.

'Indirect' transfer of critical technology is intended to capture conduct that would facilitate or contribute to the unwanted transfer of critical technology, including transfer of underlying research and other enablers.

(c) whether the objective these legislative instruments seek to achieve is an issue of public or social concern that is pressing and substantial enough to warrant limiting these rights, including whether there have been prior instances in which unwanted communication of technology intended to be captured by these measures has occurred.

Enhanced visa screening protects Australia's world-class science and technology institutions from malicious activities. Technological advances

drive productivity, growth and improved living standards; however, they also have the potential to harm our national security and undermine our democratic values and principles. University, industry and research sectors are key to our economic success and national security; however, some countries may seek to undermine Australia's interests through foreign interference in these sectors.

These threats are sophisticated, enduring and pervasive, with our higher education institutions at particular risk of unwanted transfers of critical technology to malicious actors. Such activities can result in the transfer of knowledge or theft of intellectual property, undermining Australia's strategic and commercial advantages. Effectively managing these risks is vital to maintaining Australia's status as a secure destination of choice for students and skilled workers.

The new visa screening framework will strengthen Australia's ability to identify and manage risks associated with the unwanted transfer of critical technologies. The following case studies illustrate the observed extant risk to critical technologies through the visa program.

Case Study 1:

- A foreign national applied for a Temporary Work visa, at an Australian university to research a critical technology, as per the List of critical technologies in the national interest. The technology is of significance to 'game changing' military strategies within a global context.
- The Department of Home Affairs identified that a foreign military-linked laboratory was funding the individual. The research conducted at the foreign laboratory was indistinguishable from the research at the Australian university. The foreign national's research conducted at the foreign laboratory indicated links to top-secret research for the military, meaning their research likely has links to military technologies.
- The foreign national may have intended to come to Australia to inform foreign military-related research, with a high likelihood this technology would be used to advance the foreign defence technologies.

Case Study 2:

- A foreign national, holding a Global Talent visa returned to Australia to seek employment in a critical technology field. They had completed their PhD at a top Australian university with highly-developed defence priority technologies, specifically in this field. The foreign national's PhD was funded by a foreign government scholarship program. Their PhD and research

assistance experience in Australia has direct correlation to a technology category identified in the List of critical technologies in the national interest that is also a priority of the foreign national's Government.

- The foreign national stated that they had interviews lined up in Australia for work in a critical technology field. However, the foreign national also stated they would continue to work remotely in Australia for a foreign state-owned company developing critical technologies.
- Australian Border Force Officers observed that the foreign national only became nervous when asked about how their return to Australia may be in conflict with obligations under the foreign government scholarship funding.
- Less than 24 hours after arriving in Australia, the foreign national departed for their home country. The Department of Home Affairs assesses that the individual may have become aware of the heightened awareness of critical technology-related issues and sensitivities in the Australian border environment.

Case Study 3:

- A foreign national lodged a Temporary Activity visa application to travel to Australia as a visiting PhD student for one year in an Australian research institution. The foreign national intends to study a technology identified in the List of critical technologies in the national interest. The applicant intends to be under the supervision of a highly renowned professor in that field, who has collaborated with multiple foreign universities linked to defence research. Defence application of research in this field is of high strategic interest globally.
- The foreign national intends to apply their theory to the professor's projects, and subsequently take their learnings back to their home country. The foreign national's host university is considered a very high-risk institution for its involvement in economic espionage and very high level of defence research. The foreign national's specific line of research is under a designated defence research area of their host university.
- The foreign national is also funded by a foreign government scholarship program, where an obligation is to return to their home country for a period after completing their degree. Links to defence research areas for the foreign national and professor, combined with foreign government funding, indicate this foreign national may be intending to advance interests of their state in a manner that may be against Australia's national interest.

> ***(d) whether there are certain nationalities in relation to whom these provisions may operate more frequently in practice, and if so, whether this differential treatment is based on reasonable and objective criteria.***
>
> The amendments made by the PACT Regulations do not differentiate on the basis of nationality and the provisions can be applied to non-citizens of any nationality, depending on their individual circumstances and on the assessed threat environment – which may change over time. This allows the Department to respond to the rapid pace of critical technology development, and to shifts in the geopolitical environment and foreign interference risks. Those countries which are high threat vectors for the unwanted transfer of Weapons of Mass Destruction intellectual property are also relevant in the critical technology transfer environment.
>
> In practice, visa applicants and visa holders with affiliations with countries that present greater threat of critical technology transfer will be more likely to be affected by these provisions. However, the decision as to whether a visa applicant or visa holder may present an unreasonable risk of an unwanted transfer of critical technologies will depend on their individual circumstances such as their field of study, the foreign institutions with which they are affiliated and how their research is being funded—informed by available intelligence about risks to Australia's national security that these factors may indicate. Therefore, any differential impact on citizens of some countries would be on the basis of reasonable and objective factors in their individual circumstances, with decisions by the Minister (or her delegate) being informed by intelligence from a range of Australian government sources.

Concluding comments

International human rights legal advice

Rights to education, work, freedom of expression and equality and non-discrimination

2.64 To assess whether the regulations meet the 'quality of law' test, further information was sought from the minister regarding what types of technology may be specified by legislative instrument for the purposes of defining 'critical technology'. The minister provided advice regarding the classes of technologies that may be specified, such as technology relating to manufacturing, artificial intelligence, biotechnology etc.

2.65 As to the meaning of 'indirect' transfer of critical technology or communication of critical technology, the minister advised that it is a transfer or communication that would indirectly result in harm or prejudice to the security or defence of Australia, or to the health or safety of the Australian public, or interfere with or prejudice the prevention, detection, investigation, prosecution or

punishment of Commonwealth offences, or harm Australia's international relations. The minister stated that 'indirect' transfer is intended to capture conduct that would facilitate or contribute to the unwanted transfer of critical technology, including transfer of underlying research and other enablers.

2.66 As to the timing of the legislative instrument, the minister advised that a draft legislative instrument specifying the list of technologies will be drafted later this year for consideration and noted that until such an instrument is made, the visa screening provisions and new cancellation ground contained in these regulations will not become 'operational'.

2.67 The list of technologies set out in the minister's response provides a clearer indication of what technologies may be specified by the minister and provides more certainty as to what is meant by 'critical technology'. The minister's response also provides greater clarity as to what is meant by indirect transfer of critical technology and communication of information about critical technology. This additional information assists in understanding how the measure is likely to operate in practice. If the legislative instrument were to be drafted in a way that is sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights, the measure would likely satisfy the 'quality of law' test (although noting that much will depend on the detail to be contained in the legislative instrument).

2.68 As to the objective being pursued by this measure, the initial analysis noted that while the stated objective of protecting national security, public order, public health and safety, and Australia's international relations, would be capable of constituting a legitimate objective, it was unclear whether the measure sought to address a pressing and substantial concern. In this regard, further information was sought as to whether there had been prior instances in which unwanted communication of technology had occurred. The minister advised that higher education institutions are at particular risk of unwanted transfers of critical technology to malicious actors and such activities can result in the transfer of knowledge or theft of intellectual property, which undermines Australia's strategic and commercial activities. To illustrate the extant risk, the minister provided three case studies. These case studies indicate instances where visa holders could communicate information about critical technologies, including military and defence technologies, to foreign institutions and actors, which, given the sensitivity of the information being communicated, could result in harm to Australia's national security. Based on this additional information, the regulations appear to address a pressing and substantial concern for the purposes of international human rights law. To the extent that the future legislative instrument is drafted in such a way as to capture the instances of unwanted transfer or communication of technology which the measure is intended to address, it may be effective to achieve the stated objective.

2.69 In assessing proportionality, it is necessary to consider a number of factors, including whether the proposed limitation is sufficiently circumscribed and accompanied by adequate safeguards. As noted in the initial analysis, the measure is accompanied by some safeguards, including the availability of merits review. However, as the technologies that are to be captured by this measure will be specified in a future legislative instrument, it is difficult to assess the potential breadth of the measure and whether it will be sufficiently circumscribed in practice. As noted above, were the legislative instrument to be drafted in way that is sufficiently clear and accessible, it would assist with proportionality.

2.70 With respect to equality and non-discrimination, the minister advised that in practice visa applicants and visa holders with affiliations with countries that present greater threat of critical technology transfer will be more likely to be affected by these provisions. The minister stated that whether an individual poses an unreasonable risk of an unwanted transfer of critical technologies will depend on their individual circumstances, such as their field of study, the foreign institutions with which they are affiliated and how their research is being funded. This assessment will also be informed by available intelligence about risks to Australia's national security. While it seems that the measure may have a disproportionate impact on individuals of some nationalities more than others in practice, this differential treatment would appear to be based on reasonable and objective criteria.

Committee view

2.71 The committee thanks the minister for this response. The committee considers that the measure pursues an important objective, that of seeking to protect national security, public order, public health and safety, and Australia's international relations by preventing the unwanted transfer of critical technology to malicious actors. Having regard to the case studies provided by the minister, the committee considers that there is an extant risk of unwanted transfers of critical technology, particularly in the higher education sector, and this measure seeks to address this pressing and substantial concern.

2.72 The committee considers that this measure may be compatible with human rights, if the detail of what constitutes a 'critical technology' is sufficiently clear and accessible. The committee notes it is intended that this detail will be specified in a future legislative instrument and notes that it will examine any such future instrument for compatibility with human rights.

Mr Josh Burns MP

Chair