Chapter 1

New and continuing matters

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

- bills introduced into the parliament between 30 August and 15 September 2016 (consideration of nine bills from this period has been deferred);[1]
- bills restored to the notice paper following the commencement of the 45th parliament (consideration of one bill has been deferred);
- legislative instruments received between 15 April and 18 August 2016 (consideration of six legislative instruments from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

Instruments not raising human rights concerns

1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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1 See appendix 1 for a list of legislation in respect of which the committee has deferred its consideration. The committee generally takes an exceptions based approach to its substantive examination of legislation.

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, '*Journals of the Senate*', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

3 See Parliament of Australia website, 'Journals of the Senate', http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Journals_of_the_Senate.

Response required

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

Budget Savings (Omnibus) Bill 2016

Purpose	The bill introduces a range of budget-related savings measures
Portfolio	Treasury
Introduced	House of Representatives, 31 August 2016
Rights	Social security; adequate standard of living; freedom of movement (see **Appendix 2**)

Background

1.6 The Budget Savings (Omnibus) Bill 2016 (the bill) contained a number of re-introduced measures which have previously been examined by the committee. The following schedules to the bill have previously been found to be compatible with human rights:

- Schedule 1—Minimum repayment income for HELP debts;[1]
- Schedule 2—Indexation of higher education support amounts;[2]
- Schedule 3—Removal of HECS-HELP benefit;[3]
- Schedule 6—Pause on indexation of private health insurance thresholds;[4]
- Schedule 11—Student start-up scholarships;[5]

1 Previously contained within Schedule 4 to the Higher Education and Research Reform Amendment Bill 2014 and Higher Education and Research Reform Bill 2014. See Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 59-60.

2 Previously contained within Schedule 8 to the Higher Education and Research Reform Amendment Bill 2014 and Higher Education and Research Reform Bill 2014. See Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 63-64.

3 Previously contained within Schedule 7 to the Higher Education and Research Reform Amendment Bill 2014 and Higher Education and Research Reform Bill 2014. See Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 62-63.

4 Originally contained in Schedule 1 to the Private Health Insurance Amendment Bill (No. 1) 2014, which passed the parliament and received Royal Assent on 26 November 2014. Schedule 6 to the current bill extends the measure for an additional three years. See Parliamentary Joint Committee on Human Rights, *Thirteenth Report of the 44th Parliament* (1 October 2014) 15.

- Schedule 12—Interest charge;[6]
- Schedule 14—Parental leave payments;[7]
- Schedule 22—Rates of R&D tax offset;[8] and
- Schedule 24—Single appeal path under the Military Rehabilitation and Compensation Act.[9]

1.7 The bill also introduced a number of new measures, many of which are compatible with Australia's international human rights obligations:

- Schedule 4—Job commitment bonus;
- Schedule 5—Reduction of funding to ARENA;
- Schedule 7—Abolishing the National Health Performance Authority;
- Schedule 8—Aged Care;
- Schedule 9—Dental Services;[10]
- Schedule 15—Fringe benefits;
- Schedule 17—Indexation of family tax benefit and parental leave thresholds;
- Schedule 21–Closing carbon tax compensation to new welfare recipient;[11] and
- Schedule 23—Single touch payroll reporting.

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5 Schedule 1 to the Labor 2013-14 Budget Savings (Measures No. 2) Bill 2015, which passed the parliament and received Royal Assent on 11 December 2015, replaced the student start-up scholarship payment with the student start-up loan. Schedule 11 to the current bill removes the student start-up scholarship for all remaining recipients. See Parliamentary Joint Committee on Human Rights, *Thirty-third Report of the 44th Parliament* (2 February 2016) 2.

6 Previously contained within the Social Services Legislation Amendment (Interest Charge) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 2.

7 Previously contained within the Social Services Legislation Amendment (Consistent Treatment of Parental Leave Payments) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Thirty-seventh Report of the 44th Parliament* (19 April 2016) 2.

8 Originally contained in Schedule 2 to the Tax and Superannuation Laws Amendment (2015 Measures No. 3) Bill 2015. See Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) 2.

9 Previously contained within the Veterans' Affairs Legislation Amendment (Single Appeal Path) Bill 2016. See Parliamentary Joint Committee on Human Rights, *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2.

10 Noting the bill was subsequently amended to remove Schedule 9.

11 Noting that the amendments made to Schedule 21 of the bill maintain the energy supplement for most social security recipients.

1.8 The bill passed both Houses of Parliament with amendments on 15 September 2016, and received Royal Assent on 16 September 2016.[12] Due to the quick passage of the bill, this report is the first opportunity for the committee to report on the human rights implications in relation to the bill.

1.9 Measures raising human rights concerns are discussed below.

Nature of the right to social security and associated obligations

Retrogressive measures

1.10 The human rights assessment of the bill appropriately focuses on individual measures that raise human rights concerns, and the committee's comments below are likewise directed to specific measures. However, each measure raises the same type of human rights concern, that is, Australia's obligation to refrain from unjustifiable retrogressive measures in the attainment of the right to social security.

1.11 Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out states' obligations in relation to economic and social rights (ESR) such as the right to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other ESR.

1.12 Australia's obligations include an obligation of progressive realisation of ESR to the maximum of Australia's available resources.[13] In other words, Australia has an obligation to work to achieve full realisation of ESR, but this may occur progressively according to the resources available to achieve that outcome.

1.13 Australia has a corresponding duty to refrain from unjustifiably implementing retrogressive measures. A retrogressive measure is one which reduces, or represents a backward step in, the level of attainment of ESR. In relation to the right to social security, this means that the state cannot unjustifiably take steps that negatively affect the enjoyment of this right.[14]

1.14 The concept of 'progressive realisation' according to the 'maximum available resources' means that each state is on its own path with respect to the full realisation of ESR. That is, the nature of the obligation is not relative to the level of

12 The amendments included the introduction of Schedule 21A—Income limit for Family Tax Benefit Part A Supplement.

13 There are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

14 See, Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights adopted in Maastricht 2-6 1986; UN Committee on Economic, Social and Cultural Rights, General Comment No. 3. The Nature of State Parties' Obligations (E/1991/23) (1990).

attainment of ESR in other countries. Retrogressive measures, or backward steps, are therefore to be assessed against Australia's current level of protection of ESR.

1.15 Retrogressive measures are a form of limitation on ESR. They are permissible providing that they are justified; and the applicable criteria are the same as those used to assess whether other forms of limitations on human rights are justified. That is, a measure that is retrogressive or that limits human rights must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Accordingly, in the analysis below, the use of the term 'limitation' should be understood as also encompassing retrogressive measures.

Assessment of the right to social security in relation to the bill

1.16 The statement of compatibility for the bill recognises that the right to social security is engaged by a number of the measures discussed below. However, it provides no substantive explanation of why it is to be concluded that the measures are compatible with the right to social security. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.[15]

1.17 The committee's specific requests for information from the minister reflect the inadequacy of the human rights assessment provided in the statement of compatibility, or the absence of such an assessment. Further information is needed from the minister to complete an assessment of whether or not each measure is compatible with the right.

Schedule 10—Newly arrived residents waiting period

1.18 Schedule 10 removed the exemption from the 104-week 'newly arrived resident's waiting period' (waiting period) for new migrants who are family members of Australian citizens or long-term permanent residents. The waiting period requires new migrants to provide for their own financial support during their initial settlement period in Australia by specifying that the person is ineligible to receive social security payments for 104 weeks, unless an exemption applies.

1.19 The effect of these amendments is that only permanent humanitarian entrants continue to be exempt from all waiting periods.

Compatibility of the measure with the right to social security and right to an adequate standard of living

1.20 The imposition of waiting periods before access to social security benefits engages the right to social security and an adequate standing of living because it reduces access to social security and may impact on a person's ability to afford the necessities to maintain an adequate standard of living. As the removal of the exemption from the waiting period further reduces access to social security, the

15 See Appendix 4.

measure is a limitation of the right to social security for the purposes of international human rights law.

1.21 However, aside from noting that the measure engages the right to social security, the short statement of compatibility provides no substantive assessment of whether the removal of the waiting period exemption for certain new migrants is justifiable for the purposes of international human rights law.[16]

Committee comment

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

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

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

Schedule 13—Debt recovery

1.24 This schedule enables Departure Prohibition Orders (DPOs) to prevent social welfare payment recipients who have outstanding debts and have failed to enter into a repayment arrangement from leaving the country. This measure was previously contained within Schedule 1 to the Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016, which the committee first examined in its *Thirty-sixth Report of the 44th Parliament*.

1.25 The committee requested a response from the Minister for Social Services by 1 April 2016 in relation to the compatibility of the measure with the right to freedom of movement. The minister's response to the committee's inquiries was received on 2 May 2016. The response is discussed in Chapter 2 and is reproduced in full at **Appendix 3**.

Committee comment

1.26 **The committee refers to its comments in relation to the Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 in Chapter 2 to this report.**

Schedule 16—Carer allowance

1.27 Prior to the passage of this bill, carer's allowance could be backdated up to 12 weeks before the date of claim where a person is either caring for a child with a

16 Explanatory memorandum (EM), statement of compatibility (SOC) 119.

disability or caring for an adult with a disability where the disability is due to acute onset.

1.28 Schedule 16 of the bill amended the *Social Security Administration Act 1999* to remove these backdating provisions, with the effect that the earliest date of effect for a grant of carer allowance is the date that the claim was lodged or the date of first contact with the Department of Human Services.[17]

Compatibility of the measure with the right to social security

1.29 The measure removed provisions for the backdating of social security payments beyond the date of lodgement of a claim or the date of first contact, which has the effect of reducing the amount of carer allowance to which a new claimant may be entitled. The measure therefore engages and limits the right to social security.

1.30 However, aside from noting that the measure engages the right to social security, the statement of compatibility for the bill provides no substantive assessment of whether the removal of the backdating provisions is justifiable as a matter of human rights law.[18]

Committee comment

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

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

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

Schedule 18—Pension means testing for aged care residents

1.33 Schedule 18 of the bill amended the *Social Security Act 1991* and the *Veterans' Entitlement Act 1986* to remove provisions that:

17 EM 212.

18 See EM 213.

- allow aged care residents to have any rental income from their former principal residence exempted from their assessable income for the pension income test; and
- provide an exemption from the pension asset test in respect of a former principal residence where the property is rented and aged care accommodation costs are paid on a periodic basis.

1.34 These amendments do not apply to existing age care residents. New entrants to aged care will have their former primary residence assessed under the assets tests after two years of living in aged care, unless the home is occupied by a protected person.[19]

1.35 The changes mean that some new entrants to aged care may no longer qualify for the pension or may have their pension reduced.

Compatibility of the measure with the right to social security

1.36 As the measure has the effect of excluding some new entrants to aged care from eligibility for the pension, the measure engages and limits the right to social security.

1.37 The statement of compatibility acknowledges that the measure engages the right to social security and appears to identify the objectives of the measure as ensuring that the social security system:

- is sustainable, by reducing pension outlays;
- is targeted to those in need, by reducing pension support to those who have the financial capacity to be more self-reliant;
- encourages self-provision, by progressively withdrawing pension payments as an individual's level of income and assets increases to ensure that people with additional private income and assets are better off than those relying solely on the pension; and
- is fair, by ensuring individuals with similar levels of income and assets receive similar levels of assistance through the pension.[20]

1.38 While these may be considered legitimate objectives for the purposes of international human rights law, the statement of compatibility does not fully assess whether the changes to means testing for the pension are justifiable as a matter of human rights law,[21] including whether the changes are rationally connected to and a proportionate means of achieving these objectives.

19 EM 227.

20 EM 226.

21 See EM 226.

1.39 Some useful information is provided about the monetary impact of the measures including potential impacts on the funding of aged care. However, further analysis of how the changes may affect a person's ability to fund an adequate level of aged care was needed (for example, whether the loss or reduction of the pension could limit access to an aged care facility for some individuals). Such information is relevant to assessing both the effectiveness of the measure in achieving its stated objectives (rational connection) and its proportionality. It may also have implications for other human rights such as the right to health and the right to an adequate standard of living.

Committee comment

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

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

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

Schedule 19—Employment income (nil rate periods)

1.42 Schedule 19 of the bill removed two income test exemptions for parents in 'employment nil rate periods'.

1.43 A person whose social security pension or benefit is not payable because of ordinary income (made up entirely or partly of employment income) may qualify for an 'employment income nil rate period'. During this period the person is still considered to be receiving a social security pension or benefit for the purposes of qualifying for certain other benefits, including retaining a health care card, certain supplementary benefits and remaining exempt from income tests for certain family payments. An 'employment nil rate period' can last for up to 12 weeks. After this period, unless the person's income has reduced sufficiently to qualify them for at least a part rate of social security pension or benefit, their pension or benefit is cancelled.[22]

1.44 The two exemptions that were removed are the:

- Family Tax Benefit Part A (FTB Part A) income test; and

22 See Department of Social Services *Guide to Social Security Law*, Version 1.224 (15 August 2016) 3.1.12 'Employment Income Nil Rate Period' at: http://guides.dss.gov.au/guide-social-security-law/3/1/12.

- Parental income test that applies to dependent children receiving youth allowance and ABSTUDY living allowance.

1.45 As a result, households with an income above the relevant income-free threshold may have their FTB Part A, or dependent child's youth allowance or AUSTUDY payments, reduced for periods where a parent is receiving sufficient employment income to trigger an employment income nil rate period.

Compatibility of the measure with the right to social security

1.46 The effect of removing the exemptions from income testing for parents in employment nil rate periods is to reduce the social security entitlement of those persons. The measure therefore engages and limits the right to social security.

1.47 However, while the statement of compatibility recognises that the measure engages the right to social security, and provides some information that could be relevant to identifying its legitimate objective, it effectively provides no substantive assessment of whether the removal of the exemptions is justifiable as a matter of human rights law.[23]

Committee comment

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

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

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

Schedule 20—Psychiatric confinement

1.50 Schedule 20 provided that an individual who is undergoing psychiatric confinement because they have been charged with a serious offence will not be able to access social security payments for the period of the confinement.

1.51 This measure was previously contained in the Social Services Legislation Amendment Bill 2015, which the committee examined in its *Twenty-second Report of the 44th Parliament* and *Twenty-fifth Report of the 44th Parliament*; and which lapsed at the prorogation of the Parliament on 17 April 2016.

23 EM, SOC 232.

1.52 In its concluding remarks on that bill, the committee noted that the measure may be incompatible with the right to social security; and recommended that the bill be amended to set out the specific circumstances in which a person will be considered to be undertaking integration back into the community and, as such, be eligible for social security.

1.53 The bill was amended to remove Schedule 20.

Committee comment

1.54 **The committee notes that the bill was amended to remove Schedule 20 and refers to its previous comments on the Social Services Legislation Amendment Bill 2015 in its *Twenty-second Report of the 44th Parliament* and *Twenty-fifth Report of the 44th Parliament*.**

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Purpose	The bill would establish a scheme to permit the continuing detention of 'high risk terrorist offenders' at the conclusion of their custodial sentence
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Liberty; freedom from arbitrary detention; right to humane treatment in detention; prohibition on retrospective criminal laws (see **Appendix 2**)

Continuing detention of persons currently imprisoned

1.55 The bill proposes to allow the Attorney-General (or a legal representative) to apply to the Supreme Court of a state or territory for an order providing for the continued detention of individuals who are imprisoned for particular offences under the *Criminal Code Act 1995* (Criminal Code).[1] The Attorney-General may also apply for an interim detention order pending the hearing of the application for a continuing detention order.[2] The effect of these orders is that a person may be detained in prison after the end of their custodial sentence.[3]

1.56 The particular offences in respect of which a person may be subject to continuing detention will include:

- international terrorist activities using explosive or lethal devices;[4]
- treason;[5] and
- a 'serious offence' under Part 5.3,[6] or an offence under Part 5.5,[7] of the Criminal Code.

1 See proposed sections 105A.3 and 105A.5.

2 See proposed section 105A.9. An interim detention order can last up to 28 days.

3 See proposed section 105A.9(3).

4 Criminal Code, Schedule 1, Division 72, Subdivision A.

5 Criminal Code, Schedule 1, Division 80, Subdivision B.

6 Criminal Code, Schedule 1, Part 5.3. The offences in Part 5.3 include directing the activities of a terrorist organisation; membership of a terrorist organisation; recruiting for a terrorist organisation; training involving a terrorist organisation; getting funds to, from or for a terrorist organisation; providing support to a terrorist organisation; associating with terrorist organisations; financing terrorism; and financing a terrorist.

1.57 Individuals who have committed crimes under these sections of the Criminal Code are referred to in the bill as 'terrorist offenders'.

1.58 The court is empowered to make a continuing detention order where:

(a) an application has been made by the Attorney-General or their legal representative for the continuing detention of a 'terrorist offender';

(b) after having regard to certain matters,[8] the court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community; and

(c) the court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.[9]

1.59 The Attorney-General bears the onus of proof in relation to the above criteria.[10] The standard of proof to be applied is the civil standard of the balance of probabilities.[11]

1.60 While each detention order is limited to a period of up to three years, further applications may be made and there is no limit on the number of applications.[12] This

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7 Criminal Code, Schedule 1, Part 5.5. Offences under this part include incursions into foreign countries with the intention of engaging in hostile activities; engaging in a hostile activity in a foreign country; entering, or remaining in, declared areas; preparatory acts; accumulating weapons etc; providing or participating in training; and giving or receiving goods and services to promote the commission of an offence.

8 Under proposed section 105A.8 the court must have regard to the following matters in deciding whether it is satisfied: (a) the safety and protection of the community; (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert; (c) the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment; (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by: (i) the relevant state or territory corrective services; or (ii) any other person or body who is competent to assess that extent; (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs; (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while: (i) on release on parole for any offence; or (ii) subject to a continuing detention order or interim detention order; (g) the offender's criminal history (including prior convictions and findings of guilt in respect of any other offences); (h) the views of the sentencing court at the time the relevant sentence of imprisonment was imposed on the offender; (i) any other information as to the risk of the offender committing a serious Part 5.3 offence; (j) any other matter the court considers relevant.

9 Proposed section 105A.7.

10 Explanatory memorandum (EM) 4.

11 See proposed section 105.A.13(1).

12 Proposed section 105A.7(5) and (6).

means that a person's detention in prison could be continued for an extended period of time.

1.61 This bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, unless it is necessary for certain matters set out in proposed section 105A.4(2).[13]

Compatibility of the measure with the right to be free from arbitrary detention

1.62 The measure allows ongoing preventative detention of individuals who will have completed their custodial sentence. At the outset, it is observed that the use of preventative detention, that is, detention of individuals that does not arise from criminal conviction but is imposed on the basis of future risk of offending, is a serious measure for a state to take.

1.63 While the measure engages and limits a range of human rights, the focus of this assessment is on the right to liberty, which includes the right to be free from arbitrary detention. Forms of detention that do not arise from a criminal conviction are permissible under international law, for example, the institutionalised care of persons suffering from mental illness. However, the use of such detention must be carefully controlled: it must reasonable, necessary and proportionate in all the circumstances to avoid being arbitrary, and thereby unlawful under article 9 of the International Covenant on Civil and Political Rights (ICCPR).

1.64 Specifically, post-sentence preventative detention of persons who have been convicted of a criminal offence may be permissible under international human rights law in carefully circumscribed circumstances.[14] The UN Human Rights Committee has stated that:

> to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.[15]

13 Proposed section 105A.4.

14 See, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014)[15], [21]. See, also UN Human Rights Committee, General Comment 8: Article 9, Right to Liberty and Security of Persons (30 June 1982).

15 See, for example, UN Human Rights Committee, General Comment 35: Article 9, Right to Liberty and Security of Person (16 December 2014) [21] .

1.65 The question therefore is whether the proposed preventative detention regime is necessary and proportionate, and not arbitrary within the meaning of article 9, bearing in mind the specific guidance in relation to post-sentence preventative detention.

1.66 For the purposes of this analysis, it can be accepted that the proposed continuing detention order regime pursues the legitimate objective of 'protecting the community from the risk of terrorist attacks',[16] and the measure is rationally connected to this stated objective in the sense that the individual subject to an interim or continuing detention order will be incapacitated while imprisoned. However, questions arise as to whether the regime contains sufficient safeguards to ensure that preventative detention is necessary and proportionate to this objective.

1.67 The proposed continuing detention order regime shares significant features with the current continuing detention regimes that exist in New South Wales (NSW),[17] and Queensland.[18] These state regimes apply in respect of sex offenders and/or 'high risk violent offenders' and have the following elements:

- the Attorney-General or the state may apply to the Supreme Court for a continuing detention order for particular classes of offenders;[19]
- the application must be accompanied by relevant evidence;[20]
- the effect of the continuing detention order is that an offender is detained in prison after having served their custodial sentence in relation to the offence;[21]
- the court may make a continuing detention order if it is satisfied to a 'high degree of probability' that the offender poses an 'unacceptable risk' of committing particular offences;[22]

16 EM 3.

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

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

19 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 5; *Crimes (High Risk Offenders) Act 2006* (NSW) section 13A.

20 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 5; *Crimes (High Risk Offenders) Act 2006* (NSW) section 14; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

21 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 14; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

22 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5B, 5E.

- in determining whether to make the continuing detention order, the court must have regard to a list of factors;[23]
- the court must consider whether a non-custodial supervision order would be adequate to address the risk;[24]
- the term of continuing detention orders can be made for extended periods of time;[25] and
- the availability of periodic review mechanisms.[26]

1.68 These continuing detention schemes were the subject of individual complaints to the UN Human Rights Committee (UNHRC) in *Fardon v Australia*,[27] and *Tillman v Australia.*[28] In *Fardon v Australia,* the author of the complaint had been convicted of sex offences in 1989 and sentenced to 14 years imprisonment in Queensland. At the end of his sentence, the complainant was the subject of continuing detention from June 2003 to December 2006. In *Tillman v Australia* the complainant was convicted of sex offences in 1998 and sentenced to 10 years imprisonment in NSW. At the end of his sentence, the complainant was the subject of a series of interim detention orders, and finally a continuing detention order of one year (effectively for a period from May 2007 until July 2008).

1.69 The UNHRC found that the continued detention in both cases was arbitrary in violation of article 9 of the ICCPR. In summary, the UNHRC identified the following as relevant to reaching these determinations:

- as the complainants remained incarcerated under the same prison regime the continued detention effectively amounted to a fresh term of imprisonment or new sentence. This was not permissible if a person has not been convicted of a new offence; and is contrary to the prohibition against

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23 In NSW this includes community safety, medical assessments, any other information relating to the likelihood of reoffending, the offender's compliance with supervision orders and willingness to engage in assessments or rehabilitation programs, the offender's criminal history, and any other matters that the court considers relevant: see, *Crimes (High Risk Offenders) Act 2006* section 17(4). In Queensland this includes medical reports or other information relating to the likelihood that the prisoner will reoffend, the prisoner's criminal history, the prisoner's engagement with rehabilitation programs, community safety, and any other relevant matter: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13.

24 *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

25 In Queensland continuing detention orders may be indefinite; in NSW a continuing order may be up to five years. The court may also order further continuing detention orders against the same offender: *Crimes (High Risk Offenders) Act 2006* sections 17(4), 18(3).

26 *Crimes (High Risk Offenders) Act 2006* section 24AC.

27 UN Human Rights Committee, (1629/2007) (18 March 2010).

28 UN Human Rights Committee (1635/2007) (18 March 2010).

retrospective criminal laws (article 15 of the ICCPR), particularly as in both instances the enabling legislation was enacted after the complainants were first convicted;

- the procedures for subjecting the complainants to continuing detention were civil in character, despite an effective penal sentence being imposed. The procedures therefore fell short of the minimum guarantees in criminal proceedings prescribed in article 14 of the ICCPR;
- the continued detention of offenders on the basis of future feared or predicted dangerousness was 'inherently problematic'. The application process for continuing detention orders required the court to 'make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.' The complainants' predicted future offending was based on past conduct, for which they had already served their sentences; and
- the state should have demonstrated that the complainant could not have been rehabilitated by means other than detention which were less rights restrictive.

1.70 The UNHRC's findings and the Australian government's formal response in relation to the similar schemes were not referred to in the statement of compatibility.

1.71 A number of the concerns about the NSW and Queensland schemes are relevant to an assessment of the current continuing detention proposal, including:

- individuals currently incarcerated may be subject to continuing detention contrary to the prohibition on retrospective criminal law;
- the civil standard of proof applies to proceedings (that is, the standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt);[29] and
- the difficulties arising from the court being asked to make a finding of fact in relation to the risk of future behaviour.

1.72 There are however two points of difference to the NSW and Queensland schemes.

1.73 First, the bill provides that a person detained under a continuing detention order must not be held in the same area or unit of the prison as those prisoners who are serving criminal sentences, except in certain circumstances. This safeguard appears to respond to one of the bases upon which the state-level regimes were incompatible with article 9, namely, that the applicants were incarcerated within the same prison regime, and therefore their preventative detention in effect constituted

29 See, proposed section 105.A.13(1). Some preventative detention regime proceedings are criminal in nature: *Dangerous Sexual Offenders Act* 2006 (WA) section 40.

a fresh term of imprisonment after they had served their sentence. However, it is noted the bill nonetheless does provide that persons subject to continuing detention orders are to be detained in prison and that there is a series of circumstances in which they may be detained in the same area or unit as those prisoners serving criminal sentences.

1.74 Second, the bill requires that a court may only make a continuing detention order if satisfied that there is 'no other less restrictive measure that would be effective in preventing the unacceptable risk'.[30] Accordingly, the bill appears to incorporate some aspects of the test of proportionality under international human rights law.[31]

1.75 This aspect of the bill appears to be a safeguard against the use of a continuing detention order in circumstances where an alternative to detention is available. However, it is not apparent from the bill how it is envisaged that this safeguard would operate in practice including whether and how the court would be able to provide for or assess less restrictive alternatives. Under the NSW and Queensland regimes, if satisfied that a prisoner is a serious danger to the community (in Queensland) or is a high risk sex offender or high risk violent offender (in NSW), it is open to a court to make either a continuing detention order or a supervision order.[32] By contrast, the bill does not empower the court to make an order other than a continuing detention order, although the bill does contain an annotation that a control order is an example of a less restrictive measure.

1.76 Further, it should be noted that the proposed legislative test requires consideration of whether the continuing detention order is the least rights restrictive only at the particular point of time at which it is being contemplated by the court, at or towards the end of the sentence. It is likely that interventions might be possible earlier in respect of a particular offender, such as effective de-radicalisation and rehabilitation programs. Including a requirement to consider this type of intervention, both prior to and after making any continuing detention order, would support an assessment of the proposed regime as proportionate, particularly that post-sentence detention is provided as a measure of last resort and is aimed at the detainee's rehabilitation and reintegration into society.

1.77 Finally, in the proposed scheme the assessment of 'unacceptable risk' is crucial in determining whether the court is empowered to make a continuing

30 Proposed section 105A.7.

31 State regimes currently contain a more limited version of this test; the court is required to consider whether a non-custodial supervision order would be adequate to address the risk in deciding whether to make a continuing detention order: see *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5D, 5G.

32 See *Dangerous Prisoners (Sexual Offenders) Act 2003* (QLD) section 13; *Crimes (High Risk Offenders) Act 2006* (NSW) sections 5B, 5E.

detention order. As the risk being assessed relates to future conduct there are inherent uncertainties in what the court is being asked to determine, akin to the concerns in *Fardon v Australia* and *Tillman v Australia*. The bill provides for the court to obtain expert evidence in reaching a determination in relation to risk, though given the nature of the task inherent uncertainties with risk assessments remain.[33] Other jurisdictions have sought to minimise these uncertainties by recommending that a 'Risk Management Monitor' be established to undertake a range of functions including developing best practices for risk assessments; developing guidelines and standards; validating new assessment tools; providing for procedures by which experts become accredited for assessing risk; providing education and training in the assessment of risk; and developing risk management plans.[34] Such a body is intended to act as a safeguard in relation to the quality of risk assessments.

Committee comment

1.78 **The proposed continuing detention regime engages and limits the right to liberty, as identified by the statement of compatibility.**

1.79 **The UNHRC has previously found that substantially similar existing preventative detention regimes in Queensland and NSW were incompatible with the right to be free from arbitrary detention and lacked sufficient safeguards.**

1.80 **The committee notes that the bill contains certain safeguards which may support an assessment that the regime of continuing detention orders is necessary, reasonable and proportionate; however, the analysis above raises questions regarding the adequacy of these safeguards, particularly in light of the UNHRC's determinations in relation to the state-level regimes.**

1.81 **The committee therefore seeks the advice of the Attorney-General as to the extent to which the proposed scheme addresses the specific concerns raised by the UNHRC as set out at [1.69] in respect of existing post-sentencing preventative detention regimes.**

1.82 **The committee further seeks the advice of the Attorney-General as to how the court's consideration of less restrictive measures pursuant to proposed section 105A.7 is intended to operate in practice, including:**

- **what types of less restrictive measures may be considered by the court;**
- **what options might be available to the court to assess or make orders in relation to the provision of less restrictive alternatives; and**

33 See proposed section 105A.6.

34 Victorian Sentencing Advisory Council, High Risk Offenders: Post-sentence preventative detention: final report (2007) 115; NSW Sentencing Council, High-risk Violent Offenders: Sentencing and Post-Custody Management Options (2012).

- **whether the Attorney-General will consider whether there are less restrictive alternatives in deciding whether to make an application for a continuing detention order.**

1.83 **The committee also seeks the advice of the Attorney-General as to the feasibility of the following recommendations:**

- **to address concerns regarding the application of the civil standard of proof to proceedings, that the bill be amended to provide for a criminal standard of proof (as currently is the case under the *Dangerous Sexual Offenders Act 2006* (WA), section 40);**
- **to assist in addressing concerns regarding assessments of future 'unacceptable risk', that a Risk Management Monitor be established including the functions outlined at [1.77];**
- **to assist in addressing concerns regarding the application of retrospective criminal laws (article 15 of the ICCPR), that the bill be amended to only apply to new offenders; and**
- **that the bill be amended to ensure the availability of rehabilitation programs to offenders that may be subject to the continuing detention order regime.**

Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016

Purpose	The bill amends the *Fair Work Act 2009* in relation to enterprise agreements or workplace determinations that cover emergency management bodies
Portfolio	Employment
Introduced	House of Representatives, 31 August 2016
Rights	Freedom of association; collectively bargain; just and favourable conditions of work (see **Appendix 2**)

Prohibition of terms affecting emergency services volunteers in enterprise agreements

1.84 The Fair Work Amendment (Respect for Emergency Services Volunteers) Bill 2016 (the bill) would amend the *Fair Work Act 2009* (Fair Work Act) to provide that an enterprise agreement covering 'designated emergency management bodies' must not include terms that adversely affect a body that manages emergency services volunteers (volunteer body). 'Designated emergency management bodies' include fire-fighting bodies, State Emergency Services, bodies prescribed by the regulations, and bodies established for a public purpose by or under a Commonwealth, state or territory law.

1.85 Enterprise agreements covering designated emergency management bodies would be prohibited from including an 'objectionable emergency management term'. These prohibited terms are defined as terms that have, or would be likely to have, the effect of:

- restricting or limiting a volunteer body's ability to engage or deploy volunteers; provide support or equipment to those volunteers; manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers; or otherwise manage its operations in relation to those volunteers;
- requiring a volunteer body to consult, or reach agreement with, any other person or body before taking any action for the purposes of engaging or deploying its volunteers; providing support or equipment to those volunteers; managing its relationship with, or working with, any recognised emergency management body in relation to those volunteers; or otherwise managing its operations in relation to those volunteers;
- restricting or limiting a volunteer body's ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community; or

- requiring or permitting a volunteer body to act other than in accordance with a law of a state or territory, so far as the law confers or imposes on the body a power, function, or duty that affects or could affect its volunteers.[1]

1.86 The amendments made by the bill would also have the effect of invalidating terms in existing enterprise agreements that would have the above effects.

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

1.87 The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state. The right to just and favourable conditions of work includes the right to safe working conditions, and the right to join trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

1.88 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.[3]

1.89 Prohibiting the inclusion of particular terms in an enterprise agreement engages and limits the right to just and favourable conditions of work and the right to collectively bargain. The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement.[4] Where matters are excluded from the scope of bargaining, the outcomes that may be reached between the parties are restricted.

1.90 Measures limiting human rights are generally permissible providing certain criteria are satisfied. To be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. Additionally, limitations on the right to freedom of association will only be permissible where they are 'prescribed by law'

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1 Explanatory memorandum (EM) i.

2 See, article 22 of the ICCPR and article 8 of the ICESCR.

3 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

4 ILO *General Survey by the Committee of Experts on the Application of Conventions and Recommendations on Freedom of Association and Collective Bargaining* (1994), [248]. See, also, ILO Committee of Experts on the Application of Conventions and Recommendations**,** *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973),* ILO Doc 062009AUS098 (2009).

and 'necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others'.[5]

1.91 The ILO's Freedom of Association Committee (FOA Committee) has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.[6] However, the FOA Committee has noted that there are circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that:

> any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.[7]

1.92 The current bill proposes to expand the range of terms that may be 'unlawful terms' in the Fair Work Act.[8] However, the proposed definition of 'objectionable emergency management term' is very broad, and may restrict the scope of negotiation and ultimately bargaining outcomes for numerous matters in enterprise agreements, including matters relating to staffing levels or occupational health and safety.

1.93 The statement of compatibility to the bill questions whether the bill engages rights at work, stating that:

> the extent to which the Bill engages such rights, and either promotes or limits these rights, is dependent on the nature of the particular term that is an objectionable emergency management term. Any limits to these rights would be an indirect effect of the operation of the Bill, that would be reasonable, necessary and proportionate to the legitimate objective of protecting the role of emergency services volunteers, and the broader community that the volunteers serve.[9]

1.94 However, the statement of compatibility does not explain the connection between protecting the role of emergency services volunteers and the broad proposed definition of 'objectionable emergency management term'.

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5 See ICCPR article 22.

6 See ILO *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 308th Report, Case No. 1897, [473]).

7 ILO *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth Edition (2006) 182 (citing ILO Freedom of Association Committee 330th Report, Case No. 2194, [791]; and 335th Report, Case No. 2293, [1237]).

8 See *Fair Work Act 2009*, section 194.

9 EM, statement of compatibility (SOC) vi.

1.95 Likewise, in relation to the right to collectively bargain, the statement of compatibility states that the measure will 'enhance the integrity of collectively bargained terms and conditions of employment contained in the enterprise agreement', however it does not explain the connection between this objective and the broad proposed definition of 'objectionable emergency management term'.

1.96 The statement of compatibility recognises that the bill engages collective bargaining rights and the right to freedom of association, but does not provide a substantive assessment as to whether the restriction on the freedom to collectively bargain is justifiable for the purposes of international human rights law.[10]

Committee comment

1.97 **The committee notes that the preceding legal analysis identifies the prohibition of terms in enterprise agreements as engaging and limiting the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility with these rights. In order to finalise its assessment of this bill, the committee seeks the advice of the Minister for Employment as to:**

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **whether the measure is rationally connected to the achievement of that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

10 EM, SOC vii-viii.

Plebiscite (Same-Sex Marriage) Bill 2016

Purpose	The bill seeks to establish the legislative framework for, and authorise federal spending on, a compulsory vote in a national plebiscite to ask Australians whether the law should be changed to allow same-sex couples to marry
Portfolio	Attorney-General
Introduced	House of Representatives, 14 September 2016
Rights	Right to equality and non-discrimination (see **Appendix 2**)

Public funding of the campaigns regarding the plebiscite proposal

1.98 The Plebiscite (Same-Sex Marriage) Bill 2016 (the bill) sets up a framework for a national plebiscite to ask registered voters whether the law should be changed to allow for same-sex marriage.

1.99 As part of this framework, section 11A of the bill provides for up to $15 million in public funding to be made equally available to two committees established to conduct public campaigns either not in favour of the proposal or in favour of the proposal.

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

1.100 Under the right to equality and non-discrimination in article 26 of the International Covenant on Civil and Political Rights, States are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground, the treaty otherwise prohibits discrimination on 'any ground', and the United Nations Human Rights Committee has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[1] On this basis, by restricting marriage to being between a man and a woman the existing law[2] appears to directly discriminate against same-sex couples on the basis of sexual orientation.[3] However, while the plebiscite relates to possible amendments to the *Marriage Act 1961* and the framework proposed by the bill engages the right to equality and non-discrimination, the statement of compatibility makes no reference to it.

1 See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

2 See section 5, definition of 'marriage' in the *Marriage Act 1961.*

3 See the discussion of the international human rights law position in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 113-114.

1.101 Australia's obligations under international human rights law in relation to the right to equality and non-discrimination are threefold:

- to respect—which requires the government not to interfere with or limit the right to equality and non-discrimination;
- to protect—which requires the government to take measures to prevent others from interfering with the right to equality and non-discrimination; and
- to fulfil—which requires the government to take positive measures to fully realise the right to equality and non-discrimination.

1.102 In relation to a number of other grounds of discrimination the federal Parliament has adopted a significantly different approach to that taken in this bill. In particular, federal legislation directly prohibits discrimination on the basis of race, sex, disability and age.[4] In contrast, this bill establishes, and provides substantial public funding to, a 'Committee for the No Case' whose sole function is to publicly campaign against changing the law to promote the right to equality and non-discrimination for same-sex couples. Were the campaign conducted by the 'Committee for the No Case' to lead to vilification against persons on the basis of their sexual orientation, this would not further respect for the principles of equality and non-discrimination.

Committee comment

1.103 **The committee notes that public funding of the No Case engages the right to equality and non-discrimination. The committee further notes that, in addition to concern about whether a campaign could lead to vilification against persons on the basis of their sexual orientation, funding of the Yes Case also raises concerns about whether a campaign could lead to vilification against persons on the basis of their religious belief.**

1.104 **The statement of compatibility has not identified or addressed the engagement of the right to equality and non-discrimination. Noting the concerns raised, the committee seeks the advice of the Attorney-General as to whether the measure is compatible with the right to equality and non-discrimination and whether any guidelines in relation to the expenditure of funding or other safeguards will apply.**

Obligations on broadcasters

1.105 The bill imposes a requirement on broadcasters that for a month before the plebiscite vote they must give a reasonable opportunity to a representative of an organisation that is not in favour, or is in favour, of the plebiscite proposal to broadcast 'plebiscite matter' during that period.[5] This applies to commercial

4 See *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984*; *Disability Discrimination Act 1992*; and *Age Discrimination Act 2004*.

5 See proposed Subdivision B of Part 3 of the bill.

television and radio broadcasters, community broadcasters, subscription television and persons providing broadcasting services under a class licence. It also applies to the Special Broadcasting Service (SBS) if, during the plebiscite period, SBS broadcasts plebiscite matter in favour or not in favour of the plebiscite.

1.106 'Plebiscite matter' is broadly defined to include matter commenting on the plebiscite itself, and also includes any matter commenting on same-sex marriage (not necessarily connected to the plebiscite).[6]

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

1.107 The statement of compatibility states that the bill would promote the right to freedom of expression by ensuring that broadcasters cannot selectively broadcast only one side of the debate. It also states that it would promote the right to participate in public affairs by ensuring that the free press and other media are able to comment on public issues and inform public opinion.[7] The statement of compatibility goes on to say:

> While this requirement may affect the editorial independence of broadcasters, the requirement would be time limited. The impact on broadcasters would be balanced with the promotion of the rights to freedom of expression by to [sic] participate in public affairs. The requirement to give reasonable opportunities is consistent with the approach taken to federal elections and referendums in the *Broadcasting Services Act 1992*.[8]

1.108 The statement of compatibility makes no reference to the right to equality and non-discrimination.

1.109 Under the *Broadcasting Services Act 1992* (Broadcasting Act), broadcasters are currently required to give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election during the election period. However, this is limited to political parties that were represented in either House of Parliament immediately before the election.[9] It is also confined to 'election matters' which relates to soliciting votes for a candidate, supporting a political party or commenting on policies of the party or matters being put to the electors.

1.110 In contrast, the bill would require broadcasters to give an opportunity to representatives of *any* organisation opposed to or in favour of the plebiscite. It would also apply to the broadcasting of material relating not only to the plebiscite,

6 See proposed section 4 of the bill, definition of 'plebiscite matter'.

7 EM, SOC 7-8.

8 EM, SOC 8.

9 See clause 3 of Schedule 2 to the *Broadcasting Services Act 1992*.

but also to same-sex marriage more broadly (not restricted to the question of whether the law should be amended).

1.111 The right to freedom of expression requires States to ensure that public broadcasting services operate in an independent manner and should guarantee their editorial freedom.[10] While enabling both sides of a debate in a national plebiscite to air their views may be a legitimate objective in promoting freedom of expression and the right to participate in public affairs, it is a limitation on editorial freedom. Such a limitation must be proportionate to the legitimate aim sought to be achieved. This requires effective safeguards or controls over the measures.

1.112 The only safeguard cited in the statement of compatibility is that the requirement relating to the plebiscite is time limited. However, the corresponding requirement in the Broadcasting Act restricts broadcasting opportunities to existing political parties already represented in the Parliament. This provides a safeguard towards helping to ensure that broadcasters are not required to broadcast the advertisements of organisations unlikely to be elected. The current provisions in the bill provide no equivalent safeguard. In addition, the proposed definition of 'plebiscite matter' is not equivalent to that in relation to 'election matters' because it is not restricted to the question of whether the law should be amended, but includes any matter commenting on same-sex marriage more broadly.

1.113 Additionally, as noted above, Australia's international human rights law obligation is to respect, promote and fulfil the right to equality and non-discrimination. Requiring broadcasters to give a reasonable opportunity to the representative of any organisation opposed to the plebiscite proposal to discuss same-sex marriage generally could lead to vilification of persons on the basis of their sexual orientation, which would not further respect for the principles of equality and non-discrimination.

Committee comment

1.114 **The committee notes that requiring broadcasters to give a reasonable opportunity to the representatives of any organisation in relation to 'plebiscite matters' engages the right to equality and non-discrimination. The statement of compatibility has not identified or addressed the engagement of this right.**

1.115 **The committee further notes that, in addition to concerns about whether the proposed access to broadcasting could lead to vilification against persons on the basis of their sexual orientation, it also raises concerns about whether a campaign could lead to vilification against persons on the basis of their religious belief.**

1.116 **Noting these concerns, the committee seeks the advice of the Attorney-General as to whether the measure is compatible with the right to**

10 See Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, [16].

equality and non-discrimination and whether any guidelines or other safeguards will apply.

1.117 **The preceding legal analysis also raises concerns regarding limitations on the editorial freedom of broadcasters and whether appropriate safeguards are in place. The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there are sufficient safeguards in place with respect to the right to freedom of expression.**

Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712]

Purpose	The regulation supports the merger of CrimTrac and the Australian Crime Commission
Portfolio	Attorney-General
Authorising Legislation	*Australian Crime Commission Act 2002*
Last day to disallow	21 November 2016
Rights	Privacy (see **Appendix 2)**

Collection and use of 'national policing information'

1.118 Subsection 4(1) of the *Australian Crime Commission Act 2002* (ACC Act) defines 'national policing information' as information that is collected by the Australian Federal Police, the police force of a state or a body prescribed by the regulations and which is of a kind prescribed by the regulations.

1.119 The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 (the regulation) prescribes a list of 310 bodies that collect 'national policing information', and provides that the kind of information prescribed is information that is held by or used to administer twenty listed systems. The prescription of these bodies and systems is intended to allow the Australian Crime Commission (ACC) to carry out CrimTrac's former functions following the merger of the two agencies. The regulation attempts to capture all information that is now collected and disseminated by the ACC through the former CrimTrac systems, to enable the ACC to carry out its new 'national policing information function'.

Compatibility of the measure with the right to privacy

1.120 The right to privacy includes the right to respect for private and confidential information and may be subject to permissible limitations in a range of circumstances. As national policing information is likely to include private, confidential and personal information, the collection, use and disclosure of such information by the ACC engages and limits the right to privacy.

1.121 The statement of compatibility for the regulation acknowledges that the right to privacy is engaged and concludes that the regulation 'creates permissible limitations on the right to privacy'.

1.122 However, while the statement of compatibility describes the purpose of the regulation, it provides very little assessment of its impact on the right to privacy. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*, which require that, where a limitation on a right is proposed, the statement of compatibility provide a reasoned and evidence-based

assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

1.123 In this respect, the goal of allowing the ACC to continue CrimTrac's functions following the merger of the two agencies may be a legitimate objective for the purposes of international human rights law. However, while it is clear that the information prescribed as 'national policing information' replicates information that was previously held by CrimTrac, some explanation of why the ACC requires access to each class of prescribed information is required to properly assess whether the regulation is compatible with the right to privacy. This is because, unless the ACC requires access to each class of prescribed information, the collection of that information may not be rationally connected to, or the least rights restrictive way of achieving, the stated objective of the measure.

1.124 Further, the information prescribed by the regulation includes information from a very broad range of organisations, such as local, state and federal government departments and agencies; church organisations; health and aged care organisations; educational institutions; and listed companies such as Qantas and PricewaterhouseCoopers. So too the information to be held in the prescribed systems will encompass a wide range of personal information, including names; birthdates; photographic identification; and DNA, fingerprints and other biometric information. As a scheme that is overly broad is unlikely to be compatible with the right to privacy, a proportionate limit on the right to privacy in this case requires the scheme to prescribe only that information which is necessary to achieve the stated objective of the measure.

1.125 Finally, because the ACC is not subject to the *Privacy Act 1988* (Privacy Act), the collection and use of the prescribed information by the ACC is not, as it was formerly when administered by CrimTrac, subject to the Privacy Act, the protections for personal information contained in the Australian Privacy Principles or oversight by the Australian Information Commissioner. However, the statement of compatibility does not explain why it is necessary that the collection and use of the prescribed information is no longer subject to these protections, and provides no information on what other safeguards will apply to the collection and use of national policing information by the ACC (including whether any such safeguards are comparable to those contained in the Privacy Act and Australian Privacy Principles).

Committee comment

1.126 **The committee notes that the collection and use of 'national policing information' engages and limits the right to privacy. The statement of compatibility has not sufficiently justified this limitation.**

1.127 **The committee observes that the preceding legal analysis raises questions as to whether all of the information prescribed is necessary to achieve the objective of the regulation; and whether there are effective safeguards in place to**

protect the privacy of individuals whose personal information may be classed as 'national policing information'.

1.128 **The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy (including safeguards that are comparable to those contained in the *Privacy Act 1988*).**

Biosecurity (Human Health) Regulation 2016 [F2016L00719]

Purpose	The regulation sets out the requirements for human biosecurity measures to be taken under the *Biosecurity Act 2015*
Portfolio	Health
Authorising legislation	*Biosecurity Act 2015*
Last day to disallow:	21 November 2016
Rights	Privacy (see **Appendix 2**)

Requirements for taking, storing and using body samples

1.129 Section 10 of the Biosecurity (Human Health) Regulation 2016 (the regulation) sets requirements for taking, storing, transporting, labelling and using body samples obtained from an individual who has undergone a specified kind of examination to determine the presence of a human disease as a requirement of a human biosecurity control order.[1] A human biosecurity control order may require an individual to undergo medical examination and have body samples taken even without consent in certain circumstances.[2]

Compatibility of the measures with the right to privacy

1.130 The right to privacy includes the right to respect for private information and the right to personal autonomy and physical and psychological integrity, and may be subject to permissible limitations in a range of circumstances.

1.131 Requirements for taking, storing, transporting, labelling and using body samples engage and limit the right to privacy.[3] Bodily samples taken and retained for testing purposes contain very personal information. International jurisprudence has noted that genetic information contains 'much sensitive information about an individual' and, given the nature and amount of personal information contained in cellular samples, 'their retention…must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[4] Further, as the taking of such samples may occur without consent under this regime, this will interfere with a

1 The Biosecurity (Listed Human Diseases) Determination 2016 [F2016L01027] lists the communicable diseases that are to be classified as a listed human disease that may require certain biosecurity measures to be implemented, such as those set out in this regulation. The listed human diseases include human influenza with pandemic potential; Middle East respiratory syndrome; plague; severe acute respiratory syndrome; smallpox; viral haemorrhagic fevers; and yellow fever.

2 See, *Biosecurity Act 2015* sections 71, 90-91.

3 See Appendix 2. See, also, *LH v Latvia - 52019/07, Judgment 29 April 2014, ECHR* (2014).

4 *S and Marper v UK*, ECtHR, 4 December 2008 [72] and [73].

person's personal autonomy and physical integrity as an aspect of the right to privacy.

1.132 The right to privacy may be subject to reasonable limits. However, the right to privacy is not addressed in the statement of compatibility. The committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.133 Determining the presence of human diseases entering Australia is likely to be an important mechanism for protecting public health. As such, the measures are likely to be considered to be pursuing a legitimate objective for the purposes of international human rights law.

1.134 The measures also appear to be rationally connected to that objective, in that the prescription of human biosecurity measures (such as taking body samples) to test for human diseases is likely to be effective in reducing the risk of human diseases entering Australia.

1.135 However, it is unclear whether the requirements for taking, storing and using body samples obtained from an individual set out in this regulation, are proportionate to achieving that objective. Under the regulation, there does not appear to be sufficient safeguards required to be put in place to protect the privacy of individuals whose body samples are taken.

1.136 The regulation provides that the body samples must 'be taken in a manner consistent with appropriate medical standards';[5] and 'stored, transported, labelled and used in a manner consistent with appropriate professional standards that are relevant to managing the risks to human health of listed human diseases'.[6] However, neither the regulation nor the explanatory statement defines which medical and professional standards apply. Accordingly, it is unclear whether this standard provides adequate safeguards including in relation to medical procedures that may be intrusive.

1.137 Further, the regulation does not include any requirements relating to how body samples are to be taken, the procedure for managing test results, and how long samples or records of the testing will be retained.

1.138 The regulation does not include requirements that the body samples be done in the least personally intrusive manner or that the records be destroyed after a certain period of time.

1.139 The regulation is silent as to whether such samples will be retained. It is unclear whether there is other existing legislation that would govern the retention

5 Biosecurity (Human Health) Regulation 2016, subsection 10(2).

6 Biosecurity (Human Health) Regulation 2016, subsection 10(3).

and destruction of samples taken in accordance with the regulation. These factors would be relevant to considering whether the measure is a proportionate limit on the right to privacy.

Committee comment

1.140 **The committee notes that the taking, storing, transporting, labelling and using of body samples engages and limits the right to privacy. The statement of compatibility has not addressed this limitation.**

1.141 **The committee observes that the preceding legal analysis raises questions as to whether there are effective safeguards in place to protect the privacy of individuals who are subject to body sampling in accordance with the regulation. This includes safeguards in relation to the taking, storing, transporting, labelling and using body samples under the regulation.**

1.142 **The committee therefore seeks the advice of the Attorney-General as to whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy.**

Census and Statistics Regulation 2016 [F2016L00706]

Purpose	The regulation prescribes the statistical information to be collected for the census
Portfolio	Treasury
Authorising legislation	*Census and Statistics Act 1905*
Last day to disallow	21 November 2016
Rights	Privacy (see **Appendix 2**)

Statistical information to be collected from persons for the census

1.143 Sections 9–12 of the Census and Statistics Regulation 2016 (the regulation) set what 'statistical information' is to be collected from persons for the census. This includes a person's name, address, sex, age, marital status, relationship to the other persons at the residence, level of educational attainment, employment, income, rent or loan repayments, citizenship, religion, ancestry, languages spoken at home and country of birth. Failing to provide this statistical information may result in an offence.[1]

Compatibility of the regulation with the right to privacy

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

1.145 However, this right may be subject to permissible limitations in a range of circumstances.

1.146 The compulsory collection, use and retention of personal information by government through an official census engages and limits the right to privacy.[2] The statistical information that is to be collected, used and retained under the regulation reveals very significant information about an individual and their personal life, including matters such as country of birth, ancestry, marital status, living arrangements and income. This information provides a very detailed picture of an individual's life.

1.147 Additionally, the information collected may be used on its own or with other information to identify, contact or locate a person.

1 See, *Census and Statistics Act 1905* sections 14 and 15.

2 See, *X v United Kingdom* 9072/82 ECHR (6 October 1982).

1.148 The *Census and Statistics Act 1905* (the Act) provides for penalties of up to $180 per day for failure to comply with a direction to provide the prescribed statistical information.[3]

1.149 While the right to privacy may be subject to reasonable limits, the statement of compatibility provides no assessment of whether the limitation arising from sections 9–12 of the regulation is a permissible limit on the right to privacy. The committee's usual expectation is that, where a measure limits a human right, the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.150 In relation to the apparent objective of the measures, the regulation is likely to be considered as pursuing a legitimate objective for the purposes of international human rights law. Collecting detailed information on the population and the socio-economic status of households in Australia is an important mechanism for governments to make informed decisions on resource distribution, including the implementation of housing, healthcare, education and infrastructure programs. Further, the availability of accurate statistical data is a particularly important tool for governments to fulfil a range of human rights obligations, including in relation to economic, social and cultural rights and rights to equality and non-discrimination.

1.151 The measures also appear to be rationally connected to their objective, in that the categories of information collected by the census, such as a person's age, income and educational attainment, may provide a valuable evidence base for policy development and government decision making.

1.152 However, it is unclear whether the measures are a proportionate means of achieving their apparent objective. To be proportionate limitations of the right to privacy, the measures must be accompanied by appropriate safeguards and be sufficiently circumscribed with respect to the collection, use, retention and disclosure of personal information. A measure that lacks these elements may not be the least rights restrictive way of achieving the objective of the measure, in which case it would be incompatible with the right to privacy.

1.153 The regulation itself makes no provision for how the statistical information collected under it may be used, retained, stored and disclosed. The regulation is also silent as to how long the information, including identifying information such as names and address, will be retained.

1.154 The Act does make provision in relation to when statistical information may or may not be disclosed. For example, it permits the minister, with the written approval of the Australian Statistician, to make legislative instruments providing for the disclosure of information provided in the census.[4] The Act also provides that

3 See, *Census and Statistics Act 1905* section 14.

4 See, *Census and Statistics Act 1905* section 13.

information of a personal or domestic nature relating to a person shall not be disclosed in a manner that is likely to enable the identification of that person,[5] and makes provision for the non-disclosure of census information to agencies or to a court or a tribunal.[6]

1.155 However, the Act provides no further specific limitations on how the statistical information collected under the regulation will be used and retained, including for what period of time. The statement of compatibility does not explain whether other legislative privacy protections apply in these circumstances.[7] Accordingly, there is a significant question as to whether the provisions in the Act and the regulation provide sufficient safeguards in relation to the right to privacy.

1.156 The Australian Bureau of Statistics (ABS), which is responsible for administrating the census, has a stated policy that it:

> [W]ill conduct regular audits of the protection mechanisms, and the use and the need for ongoing retention of Census names and addresses. For the 2016 Census, the ABS will destroy names and addresses when there is no longer any community benefit to their retention or four years after collection (i.e. August 2020), whichever is earliest.[8]

1.157 It is noted that all names and addresses collected in the 2011, 2006 and all previous censuses were destroyed approximately 18 months after the conduct of the censuses.[9]

1.158 The potentially prolonged linking and retention of names and addresses with other statistical information raises concerns about whether this represents the least rights restrictive approach. Noting the sensitive information that is required to be disclosed through the census, such linking may increase the risk of misuse of information and adverse impacts on an individual.

1.159 The retention of names and addresses collected in the 2016 census as a matter of ABS policy may point to the need to have more specific standards in the Act or regulation about how statistical data may be used, stored and retained. Under international human rights law, permissible limits on human rights must be prescribed by law. This means that a measure limiting a right must be set out in legislation (or be permitted under an established rule of the common law). It must

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5 See, *Census and Statistics Act 1905* subsection 13(3).

6 See, *Census and Statistics Act 1905* section 19A.

7 For example, *Privacy Act 1988*.

8 Australian Bureau of Statistics, *Retention of names and addresses collected in the 2016 Census of Population and Housing,* http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Retention+of+names+and+addresses+collected.

9 Australian Bureau of Statistics, *Privacy, confidentiality & security*, http://www.abs.gov.au/websitedbs/censushome.nsf/home/privacy.

also be accessible and precise enough so that people know the circumstances under which government agencies may restrict their rights.[10]

1.160 Further, where a measure limits a human right, discretionary or administrative safeguards alone are likely to be insufficient for the purpose of a permissible limitation. The law needs to indicate with sufficient clarity the scope of any discretion conferred on government agencies and the manner of its exercise.[11] This recognises that administrative and discretionary safeguards are less stringent than the protection of safeguards that are placed on a statutory footing.

Committee comment

1.161 **The committee notes that the compulsory collection, use and retention of personal information through an official census engages and limits the right to privacy. The statement of compatibility has not identified or addressed this limitation.**

1.162 **The committee observes that the preceding legal analysis raises questions as to whether there are effective safeguards in place to protect the privacy of individuals who provide personal statistical information in accordance with the regulation. This includes safeguards in relation to the collection, use, storage, disclosure and retention of personal information under the regulation.**

1.163 **The committee therefore seeks the advice of the Treasurer as to whether the limitation is a reasonable and proportionate measure for the achievement of its apparent objective, and in particular, whether there are sufficient safeguards in place to protect the right to privacy.**

10 See, *Sunday Times v the United Kingdom* (no. 1) ECHR, judgment of 26 April 1979, Series A no. 30, 31, [49]; *Larissis and Others v Greece* judgment of 24 February 1998, Reports 1998-I, 378, § 40.

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

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

Purpose	Specifies the amounts to be paid to the states and territories to support the delivery of specified outputs or projects, facilitate reforms by the states or reward the states for nationally significant reforms
Portfolio	Treasury
Authorising legislation	*Federal Financial Relations Act 2009*
Last day to disallow	Exempt
Right/s	Health; social security; adequate standard of living; children; education (see **Appendix 2**)

Background

1.164 The committee previously examined a number of related National Partnership payments determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.[1]

1.165 This report considers a number of new Federal Financial Relations (National Partnership payments) Determinations (the determinations).[2]

Payments to the states and territories for the provision of health, education, employment, housing and disability services

1.166 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Partnership payments (NPPs), which are financial contributions to support the delivery of specified projects, facilitate reforms or provide incentives to jurisdictions that deliver on nationally significant reforms. These NPPs are set out in National Partnership

1 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 10-14; and *Thirtieth Report of the 44th Parliament* (10 November 2015) 102.

2 Federal Financial Relations (National Partnership payments) Determination No. 104 (March 2016) [F2016L01193]; Federal Financial Relations (National Partnership payments) Determination No. 105 (April 2016) [F2016L01194]; Federal Financial Relations (National Partnership Payments) Determination No. 106 (May 2016) [F2016L01201]; Federal Financial Relations (National Partnership Payments) Determination No. 107 (June 2016) [F2016L01202]; Federal Financial Relations (National Partnership Payments) Determination No. 108 (June 2016) [F2016L01203]; Federal Financial Relations (National Partnership Payments) Determination No. 108 (July 2016) [F2016L01211].

agreements made under the IGA, which specify mutually agreed objectives, outcomes, outputs and performance benchmarks.

1.167 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to the determinations sets out the amount payable under the NPPs, contingent upon the attainment of specified benchmarks or outcomes relating to such things as healthcare, employment, disability, education, community services and affordable housing.

Compatibility of the measure with multiple rights

1.168 Setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights. As such, the determinations could engage a number of rights, including:

- the right to health;
- the right to social security;
- the right to an adequate standard of living including housing;
- the rights of children; and
- the right to education.

1.169 Under international human rights law, Australia has obligations to respect, protect and fulfil human rights. This includes specific obligations to progressively realise economic, social and cultural (ESC) rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

1.170 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.[3] Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

3 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills; see Parliamentary Joint Committee on Human Rights, *Twenty-third Report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17.

1.171 In relation to their human rights compatibility, the explanatory statements for the determinations state:[4]

> It is difficult to assess the human rights compatibility of either the determination or the making of National Partnership payments as the amounts paid to each state vary each month, since individual States meet varying milestones and benchmarks under different National Partnerships. However, in general, National Partnerships will promote multiple human rights by facilitating the provision of additional funding to the States to support service delivery in a range of areas. As such, neither this determination nor the making of National Partnership payments could be said to have a detrimental impact on any human rights.[5]

1.172 While the committee has previously acknowledged that month to month variations in funding may make it difficult to undertake a full human rights analysis for each NPP,[6] their contingent nature means that states or territories which do not meet agreed-upon benchmarks or outcomes in one month may receive less funding than in other months. This in turn could be expected to reduce the funding allocated to deliver services such as healthcare, affordable housing and education,[7] which may be regarded as a retrogressive measure in the realisation of ESC rights.

1.173 In terms of the requirement to justify retrogressive measures for the purposes of international human rights law, NPPs may be regarded as pursuing the legitimate objective of providing tied funding in accordance with mutually-agreed performance benchmarks and outcomes. However, the explanatory statements to the determinations do not provide any particular or general assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or be regarded as retrogressive (where funding is reduced).

Committee comment

1.174 **The committee notes that the setting of benchmarks for achieving certain standards that give rise to fluctuations in funding allocations engages and may promote or limit human rights.**

1.175 **The committee notes that the preceding legal analysis raises questions as to whether the setting of benchmarks and the consequential allocation of funding**

4 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the determinations are not required to be accompanied by statements of compatibility because they are exempt from disallowance (the committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine *all* instruments for compatibility with human rights).

5 Explanatory statement (ES) 2.

6 See Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 109 at [1.470].

7 See, for example, the terms and conditions set out in the ES of each Determination, 2.

through determinations is compatible with Australia's obligations of progressive realisation with respect to ESC rights. Accordingly, the committee requests the Treasurer's advice as to:

- **whether the setting of benchmarks for the provision of funds under the NPPs is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education);**
- **whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as, health, education or housing); and**
- **whether any retrogressive measures or trends:**
  - **pursue a legitimate objective;**
  - **are rationally connected to their stated objective; and**
  - **are a reasonable and proportionate measure for the achievement of that objective.**

Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016 [F2016L00770]

Purpose	This instrument amends the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 to insert additional decision-making principles that are relevant to making a determination that a person is a 'vulnerable welfare payment recipient' for the purposes of the *Social Security (Administration) Act 1999*
Portfolio	Social Services
Authorising Legislation	*Social Security (Administration) Act 1999*
Last day to disallow	21 November 2016
Rights	Equality and non-discrimination; social security, adequate standard of living; private life (see **Appendix 2**)

Background

1.176 The *Social Security (Administration) Act 1999* provides the legislative basis for the income management regime in place for certain welfare recipients in the Northern Territory and other prescribed locations.[1] Income management limits the amount of income support paid to recipients as unconditional cash transfers and imposes restrictions on how the remaining 'quarantined' funds can be spent. A person's income support can be subject to automatic deductions to meet 'priority needs', such as food, housing and healthcare. The remainder of the restricted funds can only be accessed using a 'BasicsCard', which can only be used in certain stores and cannot be used to purchase 'excluded goods' or 'excluded services'.[2]

1.177 A person on welfare benefits can voluntarily sign up for income management, or be made subject to compulsory income management. Certain young people who are determined to be 'vulnerable welfare payment recipients' may be automatically subject to compulsory income management.

1 See *Social Security (Administration) Act 1999*, Part 3B. Income management currently applies in the Perth Metropolitan, Peel and Kimberley regions, Laverton, Kiwirrkurra and Ngaanyatjarra Lands in Western Australia; Anangu Pitjantjatjara Yankunytjatjara Lands, Ceduna, Playford and Greater Adelaide in South Australia; Cape York, Rockhampton, Livingstone and Logan in Queensland; Bankstown in New South Wales; Greater Shepparton in Victoria; and in the NT. See also Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 37-38.

2 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 39.

1.178 The committee examined the income management regime in its *2013* and *2016 Reviews of the Stronger Futures measures*.[3] In its 2016 review, the committee noted that the income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.[4]

Time limits on 'vulnerable welfare recipient' determinations

1.179 Through the 'vulnerable measure' of income management, 50 per cent of a person's income support and family payments can be restricted, as described at paragraph [1.176], if a person is considered vulnerable to financial hardship, at risk of economic abuse, or at risk of homelessness. For vulnerable young people, the Secretary of the Department of Social Services (the secretary) must make a determination that a young person is a 'vulnerable welfare payment recipient' if they are in receipt of certain payments,[5] unless an exception applies.[6]

1.180 A determination that a young person is a 'vulnerable welfare payment recipient' is an automatic trigger to place that person on income management, meaning that a young person who is the subject of this determination will be subject to compulsory income management without an assessment of their individual suitability for the program.

1.181 The Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013 (the 2013 Principles) govern how an assessment that a person is a vulnerable welfare payment recipient must be made by the secretary.

1.182 The Social Security (Administration) (Vulnerable Welfare Payment Recipient) Amendment Principles 2016 (the new instrument) amends the 2013 principles to

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3 See Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (27 June 2013) and *2016 Review of Stronger Futures measures* (16 March 2016).

4 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 61.

5 *Social Security (Administration) Act 1999*, section 123UCA, and Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013, subsection 8(1). These payments are: Special Benefit (for people aged under 16 years); Youth Allowance granted at the Unreasonable to Live at Home level of payment (for people aged between 16 and 24 years); and Crisis Payment on release from prison or psychiatric confinement (for people aged under 25 years).

6 Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013, subsection 8(2), provides limited exceptions to the requirement to make a determination if the person's mental, physical or emotional wellbeing would be placed at risk as a result of being subject to income management; if the person is undertaking full-time study or is an apprentice; or if the person has received less than 25% of their applicable payment (i.e. because they have been receiving other declarable income, for example, from employment).

place a 12-month limit on certain determinations made by the secretary that result in vulnerable young people being automatically subject to income management.

Compatibility of the measure with human rights

1.183 Subjecting a person to compulsory income management for any length of time engages and limits the following rights:

- the right to equality and non-discrimination;
- the right to social security; and
- the right to privacy and family.

1.184 Each of these rights is discussed in detail in the context of the income management regime in the committee's *2016 Review of Stronger Futures measures* (2016 Review).[7]

1.185 In the 2016 Review, the committee accepted that the income management regime pursues a legitimate objective for the purposes of international human rights law, but questioned whether the measures were rationally connected to achieving the stated objective and were proportionate.[8] The committee's report noted:

> While the income management regime may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it.[9]

1.186 As noted above at [1.179], young people who receive certain payments are subject to automatic compulsory income management. Unlike the process for making other vulnerable welfare payment recipient determinations under the 2013 Principles,[10] the secretary is not required to make an individual assessment of whether income management is appropriate for a young person who receives these payments. As the committee noted in its 2016 review, this is relevant to assessing the proportionality of the income management measure:

> In assessing whether a measure is proportionate some of the relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, whether affected groups are particularly vulnerable, and whether there are other less restrictive ways to achieve the same aim…

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7 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 43-63.

8 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 42.

9 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 52.

10 See Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2013, section 7.

1.187 The compulsory income management regime does not operate in a flexible manner. Evidence indicates that the blanket application of the regime disproportionately affects Indigenous Australians and the exemption process is not conducive to allowing Indigenous Australians to apply for an exemption and to succeed in that application. This indicates that the income management regime may be a disproportionate measure and therefore incompatible with Australia's international human rights law obligations.[11]

1.188 The new instrument places a 12-month limit on certain determinations made by the secretary that result in vulnerable young people being automatically subject to income management.

1.189 The statement of compatibility for the new instrument recognises that it engages and limits the rights to social security and privacy, but concludes:

> The Amendment Principles are compatible with human rights…The Amendment Principles have been drafted to ensure that any limitation of freedom of expenditure and human rights is reasonable, necessary and proportionate to achieving the legitimate objective of reducing immediate hardship and deprivation, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[12]

1.190 The statement of compatibility does not address how the instrument engages and limits the right to equality and non-discrimination.

1.191 Restricting the time that a 'vulnerable welfare recipient determination' can operate will allow a young person's suitability for income management to be individually assessed after the 12-month period has expired.[13] This is preferable to an open-ended determination with no time limit or individual assessment. This will mean that the young person can no longer be subject to automatic compulsory income management after 12 months, and they must either volunteer for income management or be assessed by a social worker if their payments are to continue being subject to income management under the 'vulnerable' measure.

1.192 The new instrument is therefore an improvement to continuing automatic compulsory income management as it allows flexibility to treat different cases differently and provides for consideration of a young person's individual suitability for the program. However, the reasons why a 12-month period of automatic compulsory income management is more appropriate than a shorter period, or why a period of automatic compulsory income management prior to individual assessment is necessary at all, are not explained in the statement of compatibility.

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11 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 52, 56.

12 Statement of compatibility (SOC) 4.

13 SOC 1.

1.193 Additionally, young people who are automatically subject to income management because they have been recently released from jail or psychiatric confinement will continue to be subject to open-ended determinations. This means that these young people may continue to be subject to automatic compulsory income management for an indefinite period, without an assessment of whether income management is appropriate for their individual circumstances.

Committee comment

1.194 **The committee notes that subjecting a person to compulsory income management for any length of time engages and limits the right to equality and non-discrimination, the right to social security and the right to privacy and family.**

1.195 **The imposition of the limit on automatic compulsory income management for 'vulnerable welfare payment recipients' is clearly preferable to the preceding open-ended arrangements. Notwithstanding this, the preceding legal analysis raises questions as to whether the 12-month limit on the automatic imposition of compulsory income management is sufficient to ensure that compulsory income management is a proportionate limitation of these rights.**

1.196 **The committee therefore seeks the advice of the Minister for Social Services as to:**

- **whether the limitation is a reasonable and proportionate measure for the achievement of its stated objective;**
- **why a shorter period of operation for a determination, or the removal of the automatic trigger for vulnerable income management for young people, is not more appropriate; and**
- **why the 12-month limit on a determination does not apply to young people who have recently been released from jail or psychiatric confinement.**

Advice only

1.197 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Foreign Acquisitions Amendment (Agricultural Land) Bill 2010

Purpose	The bill proposes to amend the *Foreign Acquisitions and Takeovers Act 1975* in relation to foreign acquisitions of agricultural land
Sponsor	Senators Xenophon and Milne
Introduced	Senate, 31 August 2016
Rights	Fair trial and fair hearing (protection against self-incrimination); prohibition against arbitrary detention (see **Appendix 2**)

Background

1.198 The bill was first introduced into the Senate on 24 November 2010, and was restored to the Notice Paper by Senator Xenophon following the commencement of the 45th Parliament.

No statement of compatibility

1.199 As noted above, the bill was first introduced in 2010, at which time there was no requirement for bills to be accompanied by a statement of compatibility with human rights. However, this has been a requirement since January 2012, when the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act) commenced.[1]

1.200 To fulfil its function under the Act of assessing legislation for compatibility with human rights, the committee relies on statements of compatibility as providing the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

1.201 The committee's expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1*.

Committee comment

1.202 **The committee draws to the attention of legislation proponents the requirement for the preparation of statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011*, and the committee's expectations in relation to the preparation of such statements as set out in *Guidance Note 1*.**

1 *Human Rights (Parliamentary Scrutiny) Act 2011*, s 8.

1.203 **If the bill proceeds to further stages of debate, the committee may request further information from the legislation proponent.**

Australian Citizenship (Declared Terrorist Organisation—Islamic State) Declaration 2016 [F2016L00665]

Purpose	The instrument declares Islamic State as a declared terrorist organisation for the purposes of section 35AA of the *Australian Citizenship Act 2007*
Portfolio	Immigration and Border Protection
Authorising Legislation	*Australian Citizenship Act 2007*
Last day to disallow	21 November 2016
Rights	Freedom of movement; private life; protection of the family; take part in public affairs; liberty; obligations of non-refoulement; equality and non-discrimination; fair hearing and criminal process rights; prohibition against retrospective criminal laws; prohibition against double punishment; rights of children (see **Appendix 2**)

Background

1.204 Measures providing for the automatic loss of a dual citizen's Australian citizenship were introduced through the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (the bill). The bill passed both Houses of Parliament on 3 December 2015 and received Royal Assent on 11 December 2015 and now forms part of the *Australian Citizenship Act 2007* (Citizenship Act).

1.205 The committee considered and reported on the bill in August 2015 and March 2016.[1] That detailed human rights assessment raised specific concerns in relation to section 33AA of the bill (now section 33A of the Citizenship Act). Section 33A provides that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct with a specified intention.[2]

1.206 The previous human rights assessment of section 33A noted that measures for the automatic loss of citizenship engage and limit a range of human rights, including the right to freedom of movement; right to a private life; the right to

1 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 27-84; and *Twenty-Fifth Report of the 44th Parliament* (11 August 2015) 4-46.

2 Specified conduct under section 33AA(2) of the *Australian Citizenship Act 2007* includes: (a) engaging in international terrorist activities using explosive or lethal devices; (b) engaging in a terrorist act; (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act; (d) directing the activities of a terrorist organisation; (e) recruiting for a terrorist organisation; (f) financing terrorism; (g) financing a terrorist; or (h) engaging in foreign incursions and recruitment.

protection of the family; right to take part in public affairs; right to liberty; obligations of non-refoulement; right to equality and non-discrimination; right to a fair hearing and criminal process rights; prohibition against retrospective criminal laws; prohibition against double punishment; and rights of children.[3] The committee concluded that insufficient evidence had been provided by the minister to demonstrate that section 33A is compatible with these rights; and that the measure appears to be incompatible with a number of these rights.[4]

1.207 For example, in relation to the right to a fair hearing, the process for judicial review of a person's loss of citizenship is insufficient for a number of reasons. Neither the bill nor the provisions of the Citizenship Act provide for such review, rather, the Federal Court of Australia and High Court of Australia's original jurisdiction is the only avenue available for judicial review. It is unclear whether the onus of proof in such an application would rest with the respondent or with the plaintiff (that is, with the person whose citizenship has purportedly been lost). If the latter, the plaintiff may be placed in the difficult position of having to prove that they had not engaged in the conduct which led to the automatic loss of their citizenship. The inherent difficulty in proving a negative for a plaintiff may seriously limit that person's right to a fair hearing.

1.208 Second, the proceedings would be civil rather than criminal in nature under Australian domestic law, operating on the civil standard of proof rather than the criminal standard of beyond reasonable doubt, as well as lacking the protections of a criminal proceeding. However, the conduct at issue would be criminal conduct.

1.209 Third, the effect of the operation of sections 33AA and 35(1) of the bill is that a person is considered to have lost their citizenship through conduct. However, the evidence in relation to that alleged conduct may be in fact contested, which means that an individual may be treated as a non-citizen before having the opportunity to challenge or respond to allegations of specified conduct. Accordingly, the committee concluded that the measure is incompatible with the right to a fair hearing under international human rights law.[5]

Declaration of a terrorist organisation

1.210 The Australian Citizenship (Declared Terrorist Organisation—Islamic State) Declaration 2016 [F2016L00665] (the declaration) declares Islamic State as a terrorist organisation for the purpose of section 35AA and section 33AA of the Citizenship Act.

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3 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 34-59; and *Twenty-Fifth Report of the 44th Parliament* (11 August 2015) 4-46.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) [2.154].

5 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) [2.179].

As noted above, section 33AA provides that a dual Australian citizen will automatically cease to be an Australian citizen if they engage in specified conduct with a specified intention. The requisite intention for the purposes of section 33AA is if the conduct is done with the intention of advancing a political, religious or ideological cause, and coercing or influencing a government or intimidating the public or a section of the public.

1.211 However, the declaration of a terrorist organisation by the declaration has the effect that the element of intention does not need to be proven in relation to a person. Instead, if at the time the person engaged in the relevant conduct the person was a member of a declared terrorist organisation (or acting on instruction of, or in cooperation with, a declared terrorist organisation), the person is taken to have engaged in the conduct with the requisite intention without further need of proof of intention.

Compatibility of the measure with human rights

1.212 By declaring an organisation to be a terrorist organisation under section 35AA of the Citizenship Act, a person acting on instruction of, or in cooperation with, the organisation or a member of the organisation is taken to have engaged in the conduct with the requisite intention without the requirement of further proof of intention. This expands the class of persons to which the automatic cessation of citizenship may apply under section 33AA of the Citizenship Act.

1.213 Accordingly, the declaration engages and limits the range of human rights set out above at [1.206].

1.214 The statement of compatibility recognises that the declaration engages a number of, though not all, these rights, but states that the declaration is compatible with human rights because those limitations placed on human rights are reasonable, necessary and proportionate in light of the declaration's object and purpose, to protect the Australian community and Australia's national security. The statement of compatibility addresses some of these rights; however, it does not fully address the concerns previously raised in the original assessment of the bill.

Committee comment

1.215 The committee notes that the original human rights assessment of the automatic loss of citizenship by conduct now legislated for in section 33AA of the Citizenship Act, including the requisite element of intention, was likely to be incompatible with multiple human rights.

1.216 **The effect of the instrument is to expand the class of persons to which these provisions may apply. The instrument therefore raises the same significant human rights concerns detailed in the original human rights assessment of the bill which introduced the automatic loss of citizenship by conduct. The statement of compatibility does not address a number of these concerns, and the committee**

therefore draws to the attention of the minister the requirements for the preparation of statements set out in the committee's *Guidance Note 1*.

1.217 **Noting the significant human rights concerns raised by the automatic loss of citizenship by conduct, identified in the previous human rights assessment of the measure, and the expansion of the class of persons to which this automatic loss of citizenship applies under the declaration, the committee draws the human rights implications of the declaration to the attention of the Parliament.**

Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679]

Purpose	The instrument revokes IMMI 16/007 [F2016L00455] and expands the class of asylum seekers who are 'fast track applicants' in respect of protection visas
Portfolio	Immigration and Border Protection
Authorising Legislation	*Migration Act 1958*
Last day to disallow	Exempt from disallowance
Right(s)	Non-refoulement; fair hearing; obligation to consider the best interests of the child (see **Appendix 2**)

Background

1.218 Fast-track assessment processes for certain visa classes were introduced by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the bill), which was reported on by the committee in October 2014 and March 2016 and which passed both Houses of Parliament on 5 December 2014.[1] These reports provided a human rights assessment of fast-track processes in relation to asylum seekers who arrived irregularly in Australia on or after 13 August 2012, to whom the bill applied, while noting that the process could be expanded to other groups of asylum seekers.

1.219 The human rights assessment of the bill noted that the fast-track assessment process engages and limits a range of human rights, and contains insufficient safeguards to sufficiently protect the right to a fair hearing and the obligation to consider the best interests of the child.[2] This is because under the fast-track assessment process asylum seekers no longer have access to the Refugee Review Tribunal (RRT), but instead have access to review of their refugee claims via a new body, the Immigration Assessment Authority (IAA). IAA review is conducted 'on the papers' and is a limited form of review - for example, there is no requirement to give the asylum seeker information which was before the primary decision maker or for the asylum seeker to comment or make representations on the material before the IAA. These features, which affect the procedural fairness of the fast-track process,

1 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 149-194; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 85-88.

2 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) [2.700].

raise concerns in relation to the right to a fair hearing and the obligation to consider the best interests of the child.[3]

1.220 The human rights assessment of the bill also found that the limited review under processes within the fast-track assessment process fell short of the requirement for independent, effective and impartial review of non-refoulement decisions and, accordingly, did not adequately protect the obligation of non-refoulement, which is absolute and can never be subject to any limitation.[4]

Expansion of the fast-track assessment process

1.221 The Migration Act 1958 - Class of Persons Defined as Fast Track Applicants 2016/049 [F2016L00679] (the instrument) expands the group of asylum seekers to which the fast-track assessment process for a protection visa applies. This process now applies to children born in Australia after 1 January 2014 whose parents are subject to the fast-track assessment process for a protection visa, which means that these children will only have access to the limited form of review provided through the IAA.

Compatibility of the measure with human rights

1.222 The application of the fast-track assessment process to children born in Australia after 1 January 2014 engages and limits a range of human rights, including:

- the right to a fair hearing;
- the obligation to consider the best interests of the child; and
- the obligation of non-refoulement.[5]

1.223 As with the original human rights assessment of the bill (described above at [1.218] to [1.220]), the limited merits review and other procedural guarantees that apply to this group of children under the fast-track assessment process does not adequately protect the right to a fair hearing and the obligation to consider the best interests of the child, and falls short of the minimum requirements of independent, effective and impartial review of non-refoulement decisions.[6]

1.224 However, the statement of compatibility to the instrument does not address the significant human rights concerns identified in the original human rights assessment of the fast-track assessment process. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

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3 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 174-187.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 149-194

5 These rights are descripted at Appendix 2 of the report.

6 See *Agiza v Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003 (2005) [13.7].

Committee comment

1.225 The committee notes that the expansion of the fast-track assessment process to include children born in Australia after 1 January 2014 whose parents are subject to the fast-track assessment process for a protection visa engages and limits the human rights of these children.

1.226 The committee also notes that the original human rights assessment of the fast-track assessment process indicated that it may be incompatible with the right to a fair hearing and the obligation to consider the best interests of the child. That assessment also indicated that the limited form of review conducted by the IAA is likely to be incompatible with Australia's obligation to ensure independent, effective and impartial review (including merits review) of non-refoulement decisions, which is absolute and may not be subject to any limitations.

1.227 **Noting the concerns about the fast-track assessment process identified in the human rights assessment of the bill, the committee considers that the statement of compatibility for the instrument should have addressed these matters in its assessment of the expansion of the fast-track assessment process to a new group of children; and therefore draws to the attention of the minister the requirements for the preparation of statements of compatibility set out in the committee's *Guidance Note 1*.**

1.228 **Noting the significant human rights concerns raised by the fast-track assessment process in relation to the right to a fair hearing, the obligation to consider the best interests of the child and the obligation of non-refoulement, and the expansion of that process to a new group of children by the instrument, the committee draws the human rights implications of the instrument to the attention of the Parliament.**

Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248]

Purpose	Amends the Social Security (Administration) (Trial – Declinable Transactions) Determination 2016 to add terminal identification codes as items in the table at Schedule 4, as well as an additional schedule
Portfolio	Social Services
Authorising legislation	*Social Security (Administration) Act 1999*
Last day to disallow:	15 sitting days after tabling
Rights	Social security; private life; equality and non-discrimination (see **Appendix 2**)

Background

1.229 The Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (the determination) implements measures that were previously considered by the committee in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill).[1] The Debit Card Bill passed both houses on 14 October 2015 and received Royal Assent on 12 November 2015. It amended the *Social Security (Administration) Act 1999* to provide for a trial of cashless welfare arrangements in prescribed locations. Persons on working age welfare payments in the prescribed locations would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling. The trial arrangements are currently operating in two trial locations of Ceduna and East Kimberley.

1.230 The committee undertook an evaluation of the human rights compatibility of income management as part of its *2016 Review of Stronger Futures measures*.[2] As the human rights issues raised by the Debit Card Bill were similar to those of income management, the committee finalised its consideration of the Debit Card bill when it published its final report on the Stronger Futures measures. In its review, the committee noted that the income management measures engage and limit the right

1 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36.

2 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016).

to equality and non-discrimination, the right to social security and the right to privacy and family.[3]

Restrictions on how social security payments are spent

1.231 The debit card trial tests the concept of 'cashless welfare' by quarantining payments to certain welfare recipients in a 'welfare restricted bank account', which is accessed by a debit card and does not allow cash withdrawals.

1.232 The restricted portion of a person's payment, generally 80 percent, may not be used to purchase alcohol or for gambling. To achieve this, the Secretary of the Department of Social Services determines, in a legislative instrument, businesses in respect of which a transaction from a welfare restricted bank account may be declined by a financial institution.

1.233 The determination expands the existing list of businesses in relation to which debit card trial transactions may be declined. Currently, the prescribed businesses include hotels; drinking places; betting and gambling places or businesses; businesses which provide products that are representative of cash, such as money orders; and businesses involved in alcohol manufacture or retail. The determination adds further specific hotels and restaurants as well as a supermarket to the list of businesses that may decline a transaction involving a welfare restricted bank account. The determination also lists the purchase of money orders through Australia Post as a 'declinable transaction'.

Compatibility of the measure with human rights

1.234 The statement of compatibility to the determination acknowledges that the right to a private life, the right to an adequate standard of living, and the right to equality and non-discrimination are engaged by the determination. The statement of compatibility concludes:

> A trial of cashless welfare arrangements will advance the protection of human rights by ensuring that income support payments are spent in the best interests of welfare payment recipients and their dependents. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour, and reducing the likelihood that welfare payment recipients will be subject to harassment and abuse in relation to their welfare payments.[4]

1.235 Measures limiting human rights may be permissible providing certain criteria are satisfied. To be capable of justifying a limit on human rights, the measure must

3 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 61.

4 Statement of compatibility (SOC) 5.

address a legitimate objective, be rationally connected to that objective, and be a proportionate way to achieve that objective.

1.236 The committee has previously accepted that the objective of the income management regime and the debit card trial is a legitimate objective for the purposes of international human rights law.[5] When considering the Debit Card Bill, the previous human rights assessment noted the similarities between the debit card trial with income management. The human rights assessment reiterated concerns as to whether income management has been demonstrated to be rationally connected (that is, effective in achieving) its stated objective.[6] However, the human rights analysis noted advice from the minister that the debit card trial is intended to be different from income management. In considering the proportionality of the measures in the Debit Card Bill, the previous human rights assessment also noted the following safeguards incorporated into the trial, which are highlighted in the statement of compatibility to the determination:

> First, the roll-out of the Trial in trial areas has been subject to an extensive consultation process.
>
> The second safeguard is the power of community bodies to vary the percentage of funds that a person has restricted, subject to that person's agreement (as provided for under section 124PK of the Act). This will provide an ongoing mechanism to ensure that there is flexibility to treat individual cases differently.
>
> A third safeguard lies in the Trial being subject to an independent, comprehensive evaluation that will consider the impacts of limiting the amount of welfare funds that may contribute to community-level harm. The evaluation will use both quantitative and qualitative information to explore perceived and measurable social changes in trial communities.
>
> Finally, subsection 124PF(1) of the Act specifies that the Trial will commence on 1 February 2016 and end on 30 June 2018. The policy intention is that the Trial will only run for 12 months in each trial area. The clause acts as an appropriate and effective safeguard as Parliament must amend the legislation to continue the Trial beyond 2018.[7]

1.237 While these safeguards improve the proportionality of the measure, there are still human rights concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets.

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5 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 48-49, and *Thirty-first report of the 44th Parliament* (24 November 2015) 23.

6 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 23.

7 SOC 2.

Committee comment

1.238 **The effect of the determination is to expand the range of transactions from welfare restricted bank accounts which may be declined. The committee observes that the preceding legal analysis shows that the determination raises the same human rights concerns detailed in the original human rights assessment of the bill which introduced the debit card trial arrangements.**

1.239 **Noting the human rights concerns raised by the debit card trial and income management, identified in the previous human rights assessment of the measure, and in the *2016 Review of Stronger Futures measures*, and the expansion of the list of businesses which may decline an affected welfare recipient's transactions, the committee draws the human rights implications of the determination to the attention of the Parliament.**

Reintroduced or related measures previously assessed

1.240 The committee refers to its previous comments on the following measures which have been reintroduced. The committee does not require a response to these comments.

Building and Construction Industry (Improving Productivity) Bill 2013

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

Purpose	The bills propose to re-establish the Australian Building and Construction Commission (ABCC) and reintroduce building industry specific laws
Portfolio	Employment
Introduced	House of Representatives, 31 August 2016
Rights	Freedom of association; form and join trade unions; freedom of assembly; freedom of expression; privacy (see **Appendix 2**)

Background

1.241 The committee previously examined the bills in its *Second Report of the 44th Parliament*, *Tenth Report of the 44th Parliament*, *Fourteenth Report of the 44th Parliament* and *Thirty-fourth Report of the 44th Parliament* (23 February 2016).[1]

1.242 The bills were reintroduced to the Senate on 31 August 2016, following the commencement of the 45th Parliament.

1.243 The previous human rights assessment of the bills concluded that the proposed prohibition on picketing and restrictions on industrial action was incompatible with the right to freedom of association and the right to form and join trade unions. It also concluded that the prohibition on picketing was likely to be incompatible with the right to freedom of assembly and the right to freedom of expression.

1 The committee originally considered the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113. These bills were then reintroduced as the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]; see *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2.

1.244 That human rights assessment also concluded that the proposed disclosure of information provisions in sections 61(7) and 105 of the Building and Construction Industry (Improving Productivity) Bill 2013 were incompatible with the right to privacy.[2]

Committee comment

1.245 **The committee notes that the previous human rights assessment of the bills concluded that the proposed prohibition on picketing and restrictions on industrial action, as well as proposed disclosure of information provisions, were incompatible with the right to freedom of association and the right to form and join trade unions, the right to freedom of assembly, the right to freedom of expression and the right to privacy.**

1.246 **Noting the concerns raised in the previous human rights assessment of the bills, the committee draws the human rights implications of the bills to the attention of the Parliament.**

2 Proposed section 61(7) would provide power to the ABCC to compel the disclosure of information or documents not limited by any provision of any other law that prohibits the disclosure of information. Proposed section 105 allows disclosure of information to third parties for a wide range of purposes.

Counter-Terrorism Legislation Amendment Bill (No. 1) 2016

Purpose	The bill proposes to amend a number of Acts to make changes to counter-terrorism legislation including in relation to the control order regime, preventative detention order regime, and special intelligence operations
Portfolio	Attorney-General
Introduced	Senate, 15 September 2016
Rights	Equality and non-discrimination; liberty; freedom of movement; fair trial and the presumption of innocence; fair hearing; privacy; freedom of expression; freedom of association; protection of the family; prohibition on torture and cruel, inhuman or degrading treatment; work; social security; adequate standard of living; children's rights (see **Appendix 2**)

Background

1.247 The committee previously examined the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 (2015 bill) in its *Thirty-second Report of the 44th Parliament* and *Thirty-sixth Report of the 44th Parliament*.[1]

1.248 The bill was reintroduced as the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (2016 bill) following the commencement of the 45th Parliament, with a number of further changes implementing recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Independent National Security Legislation Monitor (INSLM).

1.249 The bill contains 18 schedules. The analysis below relates to seven of those schedules focusing on the most serious human rights issues. Accordingly, the committee has concluded that 11 of the schedules in the bill do not require further examination.[2]

National security and human rights

1.250 In the human rights analysis of previous national security legislation the committee noted its recognition of the importance of ensuring that national security and law enforcement agencies have the necessary powers to protect the security of

1 See the analysis of the 2015 bill at Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 3-37 and *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 85-136.

2 Schedules 1, 3, 4, 6, 7, 11, 12, 13, 14, 16 and 17 of the bill.

all Australians.[3] The committee also noted that while legislative responses to issues of national security are generally likely to engage a range of human rights, human rights principles should not be understood as inherently opposed to national security objectives or outcomes. Rather, international human rights law allows for the balancing of human rights considerations with responses to national security concerns.

Schedule 2—Extending control orders to 14 and 15 year olds

1.251 The 2016 bill proposes to amend the control orders regime under Division 104 of the *Criminal Code Act 1995* (Criminal Code) to allow for control orders to be imposed on children aged 14 or 15 years of age. Currently, control orders may only be imposed on adults and children aged 16 or 17 years of age. As noted above, the committee considered this measure in its examination of the 2015 bill.

1.252 The committee has previously considered the control orders regime as part of its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014;[4] and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.[5] The 2016 bill's expansion of the control orders regime to children aged 14 and 15 years of age raises the threshold question of whether the existing control orders regime is compatible with human rights.

1.253 The control orders regime grants the courts power to impose a control order on a person at the request of the Australian Federal Police (AFP), with the Attorney-General's consent. The terms of a control order may impose a number of obligations, prohibitions and restrictions on the person subject to the order. These include:

- requiring a person to stay in a certain place at certain times;
- preventing a person from going to certain places;
- preventing a person from talking to or associating with certain people;
- preventing a person from leaving Australia;
- requiring a person to wear a tracking device;
- prohibiting access or use of specified types of telecommunications, including the internet and telephones;

3 The committee has previously considered three bills in relation to counter-terrorism and national security: National Security Legislation Amendment Bill (No. 1) 2014; Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; and Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.

4 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 3.

5 See Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 7.

- preventing a person from possessing or using specified articles or substances; and
- preventing a person from carrying out specified activities, including in relation to their work or occupation.

1.254 The steps for the issue of a control order are:

- a senior AFP member must obtain the Attorney-General's written consent to seek a control order on prescribed grounds;
- once consent is granted, the AFP member must seek an interim control order from an issuing court, which must be satisfied on the balance of probabilities:
    - (i) that making the order would substantially assist in preventing a terrorist act; or
    - (ii) that the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
    - (iii) that the person has engaged in a hostile activity in a foreign country; or
    - (iv) that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or a terrorist act; or
    - (v) that the person has been convicted in a foreign country for an equivalent offence; or
    - (vi) that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
    - (vii) that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country; and
- currently, the court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
    - (i) protecting the public from a terrorist act; or
    - (ii) preventing the provision of support for or the facilitation of a terrorist act; or
    - (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;[6] and
- the AFP must subsequently seek the court's confirmation of the order, with a confirmed order able to last up to 12 months.

6 See Criminal Code section 104.4.

1.255 The changes in the 2016 bill would amend this legislative test, to provide that in determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

(a) as a paramount consideration in all cases the objects of:

(i) protecting the public from a terrorist act;

(ii) preventing the provision of support for or the facilitation of a terrorist act;

(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;

(b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and

(c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

Compatibility of the measure with human rights

1.256 The control orders regime, and the amendments to that regime proposed by the bill, engage and limit a number of human rights, including:

- right to equality and non-discrimination;
- right to liberty;
- right to freedom of movement;
- right to a fair trial and the presumption of innocence;
- right to privacy;
- right to freedom of expression;
- right to freedom of association;
- right to the protection of the family;
- prohibition on torture and cruel, inhuman or degrading treatment;
- right to work; and
- right to social security and an adequate standard of living.

1.257 The proposed expansion of the control orders regime to children aged 14 and 15 years of age also engages the obligation to consider the best interests of the child and a range of rights set out in the Convention on the Rights of the Child.

Threshold assessment of control orders—legitimate objective

1.258 The statement of compatibility for the 2016 bill focuses primarily on the proposed change to the age threshold for control orders rather than dealing more

broadly with the human rights implications of the control orders regime. The control order regime was legislated prior to the establishment of the committee so the scheme was not subject to a human rights compatibility assessment by the Attorney-General in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[7]

Threshold assessment of control orders—rational connection to a legitimate objective

1.259 A measure that limits human rights must be rationally connected to a legitimate objective, that is, it must be likely to achieve this objective.

1.260 The committee has previously considered that the stated objective of the control orders regime, that is, 'providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts in Australia', is a legitimate objective for the purposes of international human rights law.[8]

1.261 However, as noted in the previous human rights assessment of the measure, there is doubt as to whether control orders are rationally connected to that objective as they may not necessarily be the most effective tool to prevent terrorist acts noting the availability of regular criminal justice processes.[9]

Threshold assessment of control orders—proportionality

1.262 The previous human rights assessment of the measure noted that in terms of proportionality there may be questions as to whether control orders are the least rights restrictive response to terrorist threats, and whether control orders contain sufficient safeguards to appropriately protect Australia's human rights obligations.[10]

1.263 For example, amendments introduced by the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 allow control orders to be sought in circumstances

7 See Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

8 See Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 16.

9 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 90; for example, see Independent National Security Legislation Monitor, *Declassified Annual Report* (20 December 2012) 30.

10 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 11.

where there is not necessarily an imminent threat to personal safety.[11] The protection from imminent threats has been a critical rationale relied on for the introduction and use of control orders rather than ordinary criminal processes. In the absence of an imminent threat it is difficult to justify as proportionate the imposition of a significant limitation on personal liberty without criminal charge or conviction.

1.264 In addition, the issuing criteria for a control order set out in section 104.4 of the Criminal Code requires that each proposed condition of a control order must be reasonably necessary, and reasonably appropriate and adapted, to the purpose of protecting the public from the threat of a terrorist act. However, there is no requirement that the conditions be the least rights restrictive measures to protect the public.

1.265 As noted in the previous human rights assessment of the measure a least rights restrictive approach would not mean that public protection would become a secondary consideration in the issuance of a control order. It would simply require a decision-maker to take into account any possible less invasive means of achieving public protection. In the absence of such requirements it is difficult to characterise the control orders regime as the least rights restrictive approach for protecting national security, and to assess the proposed measures as a proportionate way to achieve their stated objective.

1.266 In light of these concerns and noting that the control orders regime has not been subject to a foundational assessment of human rights, the committee previously recommended that a statement of compatibility be prepared for the control orders regime, that sets out in detail how the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal just processes (e.g. arrest, charge and remand).[12]

Committee comment

1.267 **The control orders regime engages and limits a range of human rights. As noted above, the control orders regime has not been subject to a foundational assessment of human rights nor has a standalone statement of compatibility been provided for the control orders regime.**

1.268 **The committee notes that it previously recommended that a statement of compatibility be prepared for the control orders regime that sets out in detail how**

11 For example, in its submission to the PJCIS inquiry into the bill the Law Council of Australia warned that control orders could be sought against persons to prevent online banking, online media or community and/or religious meetings. See, Law Council of Australia, *Submission 16,* Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2014.

12 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 93, 94.

the coercive powers provided for by control orders impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal just processes (e.g. arrest, charge and remand).

1.269 **Noting the concerns raised in the previous human rights assessment relating to the control orders regime, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Applying control orders to 14 and 15 year olds—legitimate objective

1.270 Turning to the specific amendments in Schedule 2, which would allow the AFP to seek a control order for children aged 14 or 15 years of age, the statement of compatibility explains the legitimate objective of these measures as:

> The vulnerability of young people to violent extremism demands proportionate, targeted measures to divert them from extremist behaviour. It is appropriate and important that all possible measures are available to avoid a young person engaging with the formal criminal justice system and to mitigate the threat posed by violent extremism. Consequently, the ability to use control orders to influence a person's movements and associations, thereby reducing the risk of future terrorist activity, addresses a substantial concern and the regime is aimed and targeted at achieving a legitimate objective.[13]

1.271 It can be accepted that preventing the radicalisation of young people, and preventing the engagement of radicalised children in violent acts is a legitimate objective. However, the use of control orders against children involves the imposition of limitations on basic freedoms, the breach of which is subject to criminal sanctions. There are a wide range of other measures that can be used in relation to children who are at risk of dangerous behaviours, and who are risk of radicalisation. It is concerning that control orders are being proposed in the statement of compatibility as a form of behaviour management or supervision, which they are not. Indeed, the consequences that attend the breach of control orders, that is, the criminal sanctions imposed on activities that are otherwise legal, create their own risk that a child subject to a control order will become engaged in the criminal justice system.

1.272 Moreover, to be capable of justifying a proposed limitation of human rights, a legislation proponent must provide a reasoned and evidence-based explanation as to how the measures address a pressing or substantial concern. This statement does not explain in detail how the current criminal law does not adequately provide for the protection against terrorist acts by 14 and 15 year olds.

13 Explanatory memorandum (EM), statement of compatibility (SOC) 20.

Applying control orders to 14 and 15 year olds—rational connection

1.273 In addition, as outlined above, it is not clear from the statement of compatibility how the measures are effective to achieve either the objective of protection against terrorist acts or the objective of avoiding having young people engage with the formal criminal justice system.

Applying control orders to 14 and 15 year olds—proportionality and safeguards

1.274 In terms of proportionality, the previous human rights assessment of the measure noted that the 2015 bill makes a number of significant legislative changes to control orders applying to children aged 14 to 17 years of age. The previous assessment considered that many of these provisions provided safeguards in the regime as it applied to children, compared to the control orders regime that applied to adults, but could not conclude that these safeguards were adequate to ensure that the controls orders regime would impose only proportionate limitations on human rights.[14]

Applying control orders to 14 and 15 year olds—proportionality and best interests of the child considerations

1.275 The previous human rights assessment of the 2015 bill contained detailed consideration of whether the measure was consistent with Australia's obligations to consider the best interests of the child as a primary consideration.[15] The concerns raised in that assessment included that neither the AFP nor the Attorney-General were required to consider the best interests of the child in deciding to make an application for a control order. Further, the court was not required to consider the child's best interests when initially considering whether, on the balance of probabilities, a control order was necessary in accordance with the legislative criteria. Under the 2015 bill the court was explicitly required to focus on whether the terms were necessary, appropriate and adapted for the purposes of protecting the public from a range of potential acts related to terrorism. It was only as part of this process that the court was required to take into account the best interests of the child.

1.276 The previous human rights assessment of the 2015 bill noted that while the court was required to take the best interests of the child into account, the court was not required to be satisfied that the terms of the control order were in the best interests of the child, nor that the control order terms were the least rights restrictive terms that would protect the public. In taking the child's interests into

14 Parliamentary Joint Committee on Human Rights, *Thirty-second Report of the 44th Parliament* (1 December 2015) 14.

15 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 100-105.

account, the court was not required to weigh those interests up as a primary consideration.[16]

1.277 The 2016 bill revises this proposal in accordance with a recommendation by the PJCIS,[17] and instead provides that in determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account:

(a) as a paramount consideration in all cases the objects of:

  (i) protecting the public from a terrorist act;

  (ii) preventing the provision of support for or the facilitation of a terrorist act;

  (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country;

(b) as a primary consideration in the case where the person is 14 to 17 years of age—the best interests of the person; and

(c) as an additional consideration in all cases—the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).

1.278 This new proposed formulation would allow the court greater scope to also ensure that the terms of the control order are in the best interests of the child. It makes clear that the court is to consider both the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration. As such, the revised formulation would improve the proportionality of the measure.

1.279 However, there remains no requirement that making a control order be the least rights restrictive way of protecting the public or preventing the provision of the relevant types of support or facilitation. Further, there remains no requirement that the best interests of the child be considered by the AFP in making an application for a control order or the Attorney-General in consenting to an application for a control order in respect to a child under 18 years of age. As such there are still serious concerns about whether the application of a control order would be proportionate in the case of individual children. If a measure is not proportionate, then it will not be a permissible limit on human rights. That is, the proposed amendments may enable the imposition of control orders in a manner incompatible with human rights.

16 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 102.

17 See recommendation 1 of Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (15 February 2016).

Committee comment

1.280 **The committee notes that proposed amendment to lower the age at which a person may be subject to a control order to 14 years engages and limits multiple human rights.**

1.281 **The committee observes that the previous human rights assessment of the 2015 bill considered that the proposed amendment was inconsistent with the obligation to consider the best interests of the child as a primary consideration and may enable the imposition of control orders in a manner incompatible with human rights.**

1.282 **Revised amendments address some of these concerns by providing that a court must, in determining whether each of the proposed obligations, prohibitions and restrictions under the control order are necessary and appropriate, consider the best interests of the child as a primary consideration and the safety and security of the community as a paramount consideration.**

1.283 **However, the preceding legal analysis states that this revision does not address all the concerns in relation to the human rights compatibility of the proposed amendments. Noting the concerns raised above, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Schedule 2—Young person's right to legal representation in control order proceedings

1.284 New subsection 104.28(4) will require an issuing court to appoint a lawyer for a young person aged 14 to 17 years in relation to control order proceedings, where the young person does not have legal representation, except in the limited circumstances.[18]

Compatibility of the measure with the right of the child to be heard in judicial and administrative proceedings

1.285 Item 46 of Schedule 1 to the 2015 bill proposed to insert a new section 104.28AA in the Criminal Code to provide for an issuing court to appoint a lawyer as an advocate to act on behalf of a child between the ages of 14 and 17 who has been made subject to an interim control order. The court-appointed advocate would not have acted as the child's legal representative and, as such, was not obliged to act on the instructions or wishes of the child.

1.286 The previous human rights assessment of the 2015 bill considered that the introduction of court appointed advocates for children engaged and limited the right of the child to be heard in judicial and administrative proceedings. This was on the

18 The issuing court is not required to appoint a lawyer if (a) the proceedings are ex parte proceedings relating to a request for an interim control order; or (b) the person refused a lawyer previously appointed during proceeding relating to: (i)the control order; or(ii) if the control order is a confirmed control order the interim control order that was confirmed.

basis that the advocate was not required to take into account the wishes of the child or act on their instructions during any court proceedings, and was able to act independently and make recommendations as to a specific course of action which may have been explicitly in opposition to the wishes of the child.

1.287 The committee previously expressed in principle support for the recommendations of the PJCIS that the bill be amended to expressly provide that a young person has the right to legal representation in control order regimes and that the bill be amended to remove the role of the court-appointed advocate.

1.288 Consistent with the PJCIS recommendation, the 2016 bill removes the role of court-appointed advocates and provides that a young person in proceedings relating to a control order will have access to legal representation. As such, proposed section 104.28(4) is compatible with the right of the child to be heard in judicial and administrative proceedings and may promote that right.

Committee comment

1.289 **The previous human rights assessment of the 2015 bill considered that the introduction of court appointed advocates for children engaged and limited the right of the child to be heard in judicial and administrative proceedings.**

1.290 **The committee previously expressed in principle support for the recommendations of the PJCIS that the bill be amended to expressly provide that young person has the right to legal representation in control order regimes and that the bill be amended to remove the role of the court-appointed advocate.**

1.291 **The 2016 bill removes the role of court-appointed advocates and provides that a young person in proceedings relating to a control order will have access to legal representation. The committee considers that this provision of legal representation is compatible with the right of the child to be heard in judicial and administrative proceedings and may promote that right.**

Schedule 5—Preventative detention orders

1.292 Currently, a preventative detention order (PDO) can be applied for if it is suspected, on reasonable grounds, that a person will engage in a terrorist act, possesses something in connection with preparing for or engaging in a terrorist act, or has done an act in preparation for planning a terrorist act.[19] The terrorist act must be one that is imminent and expected to occur, in any event, at some time in the next 14 days.[20]

19 See subsection 105.4(4) of the Criminal Code. There is also the power for a PDO to be issued if a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain a person to preserve evidence (subsection 105.4(6)).

20 See subsection 105.4(5) of the Criminal Code.

1.293 Schedule 5 of the bill seeks to change the current definition of a terrorist act as being one that is imminent and expected to occur in the next 14 days, to one that 'is capable of being carried out, and could occur, within the next 14 days'.

Compatibility of the measure with the right to liberty

1.294 As PDOs allow for the detention of a person for up to 48 hours, and the amendments would broaden the basis on which a PDO can be made, the bill engages and limits the right to liberty.

1.295 The previous human rights assessment of the bill considered substantially similar amendments in the previous bill. The main change is that the amendments under consideration in this bill remove reference to the term 'imminent' terrorist act. The definition of what is the relevant terrorist act, however, remains the same as that sought by the previous bill (namely that it be capable of being carried out, and could occur, within the next 14 days). The EM explains that this change is based on a recommendation from the PJCIS that the word 'imminent' be removed so as, in the words of the EM, 'to not stretch the meaning of the term 'imminent' beyond its ordinary usage'.[21]

1.296 The statement of compatibility states that the change to the imminent test engages but does 'not impact upon the right' to liberty.[22] However, the proposed amendments do impact the right to liberty. The amendments would lower the threshold for the imposition of preventative detention pursuant to a PDO, so that instead of the basis for the PDO being an event 'expected to occur' within the next 14 days, the event need only be 'capable of being carried out' and be an event that 'could occur' within the next 14 days.

1.297 PDOs are administrative orders, made, in the first instance, by a senior AFP member, which authorise an individual to be detained without charge, and without a necessary intention to charge the subject with any offence. PDOs raise human rights concerns as they permit a person's detention by the executive without charge or arrest. The statement of compatibility states that the right to freedom from arbitrary detention is safeguarded by the existing provisions in the PDO regime.[23] However, the PDO regime was legislated prior to the establishment of the committee so the scheme has not previously been subject to a human rights compatibility assessment in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[24] Since the committee's establishment there have been a number of

21 EM 72.

22 EM, SOC 28.

23 EM, SOC 28.

24 See Parliamentary Joint Committee on Human Rights: *Fourteenth Report of the 44th Parliament* (28 October 2014); *Sixteenth Report of the 44th Parliament* (25 November 2014); *Nineteenth Report of the 44th Parliament* (3 March 2015); *Twenty-second Report of the 44th Parliament* (13 May 2015); and *Thirty-Sixth Report of the 44th Parliament* (16 March 2016).

amendments to the PDO regime and statements of compatibility have been prepared for those individual amendments but not for the regime as a whole. It is imperative that this regime be fully justified in order to understand whether the PDO regime meets Australia's international human rights obligations not to subject individuals to arbitrary detention.

1.298 The statement of compatibility states that PDOs are only used 'in the most exceptional and extreme circumstances, where rapid preventative detention is reasonably necessary for preventing a terrorist act occurring, even where the timing of that terrorist act remains uncertain'.[25] The current amendments are intended to capture situations 'to deal with terrorist acts that are not planned to occur on a particular date, even where the preparations for that terrorist act may be in the final stages or complete'.[26] The example given is where a terrorist is prepared and waiting for a signal or instruction to carry out their act, but where the AFP is not able to identify when that signal or instruction will be sent.[27]

1.299 However, as the previous human rights assessment noted, in such situations it is unclear why that individual cannot be charged with the offence of planning or preparing for a terrorist act.[28] Terrorist laws are unique in Australia as they criminalise conduct that is so early in the preparation of an offence that it would not ordinarily meet the definition of an offence. As previously noted, as PDOs authorise an individual to be detained without arrest or charge, for such a regime to be justified for the purposes of international human rights law it must be in circumstances where there is a real and imminent threat to life where there is no alternative available under the criminal law to protect the community. It is not consistent with human rights law that powers of this nature be exercised if there is not a high risk of a terrorist attack.

1.300 The previous human rights assessment noted that as the amendments sought in the previous bill could allow a PDO to be sought even where there is not an imminent threat to life, it was not clear that the amendments were rationally connected to the legitimate objective of protecting national security, nor did the amendments impose a proportionate limitation on the right to liberty in the pursuit of national security.

25 EM, SOC 28.

26 EM 72.

27 EM 72.

28 Section 101.6 of the Criminal Code make its offence to do 'any act in preparation for, or planning a terrorist act.

Committee comment

1.301 **As noted above, the preventative detention order (PDO) regime has not been subject to a foundational assessment of human rights nor has a standalone statement of compatibility been provided for the PDO regime.**

1.302 **The committee notes that it previously recommended that a statement of compatibility be prepared for the PDO regime, setting out in detail how the necessarily coercive powers impose only a necessary and proportionate limitation on human rights having regard to the availability and efficacy of existing ordinary criminal processes (e.g. arrest and charge).**

1.303 **The committee notes that the previous human rights assessment of the amendments to the imminence test for PDOs concluded that those amendments lower the threshold of when an attack may be considered to be imminent and may be incompatible with the right to liberty.**

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

Schedule 8, 9, 10—Monitoring of compliance with control orders etc.

1.305 Schedules 8, 9 and 10 introduce a number of measures in relation to the ability of law enforcement agencies to monitor compliance with control orders. Schedule 8 would establish a 'monitoring warrant' regime to apply to individuals subject to a control order, and which would allow a law enforcement officer to enter, by consent or by monitoring warrant, premises connected to a person subject to a control order. A person subject to a control order may also, by consent or monitoring warrant, be subject to a search of their person including a frisk search. Schedule 9 would allow law enforcement agencies to obtain warrants for the purposes of monitoring compliance with a control order, specifically in relation to telecommunications interception. Schedule 10 would allow law enforcement agencies to obtain warrants to monitor a person who is subject to a control order to detect breaches of the order.

Compatibility of the measure with the right to privacy

1.306 The previous human rights assessment of the measures considered that the power to search premises, intercept telecommunications and install surveillance devices for the purposes of monitoring compliance with a control order in the absence of any evidence (or suspicion) that the order is not being complied with and/or any specific intelligence around planned terrorist activities involved serious intrusions into a person's private life. Accordingly, these measures engaged and limited the right to privacy.

1.307 While the statement of compatibility to the 2015 bill set out a legitimate objective, and a rational connection between the limitation and the legitimate objective, the committee retained concerns about the proportionality of the

measures. The committee concluded in its *Thirty-sixth Report of the 44th Parliament* that the measures may be incompatible with the right to privacy.[29]

1.308 The previous analysis also noted that a number of recommendations made by the PJCIS would provide important safeguards if implemented.[30] These recommendations were that:

- an issuing officer for a monitoring warrant have regard to whether the exercise of their powers under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances;[31]
- notification is required by the AFP to persons required to produce information of their right to claim privilege against self-incrimination and legal professional privilege;[32]
- the AFP notify the Commonwealth Ombudsman within six months following the exercise of monitoring powers, retain all relevant records in relation to the use of monitoring warrants or the exercise of monitoring powers, and notify the Commonwealth Ombudsman as soon as practicable of any breaches of the monitoring powers requirements;[33]
- the Commonwealth Ombudsman report to the Attorney-General annually regarding the AFP's compliance with the requirements of the monitoring powers regime;[34]
- the Attorney-General be required to report annually to the Parliament on the AFP's use of the monitoring powers regime, including the number of monitoring warrants issued, the number of instances on which powers incidental to the issue of a monitoring warrant were exercised, and

29 See Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 123.

30 See recommendations 9 to 13 of Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (15 February 2016) xvi-xvii.

31 See Schedule 8 to the 2016 bill, proposed paragraph 3ZZOA(4)(g) to the *Crimes Act 1914* (Crimes Act).

32 See Schedule 8 to the 2016 bill, proposed subsections 3ZZKE(4) and (5) to the Crimes Act.

33 See Schedule 8 to the 2016 bill, proposed sections 3ZZTD and 3ZZTE to the Crimes Act; Schedule 9, proposed amendment to paragraph 35(1)(a), and proposed section 59B, to the *Telecommunications (Interception and Access) Act 1979* (TI Act); and Schedule 10, proposed section 49A, proposed subsections 51(l)-(m) and proposed paragraph 52(1)(k), to the *Surveillance Devices Act 2004* (SD Act).

34 See Schedule 8 to the 2016 bill, proposed section 3ZZUH to the Crimes Act; Section 9, amended subsection 84(1) to the TI Act; and Schedule 10, proposed subsection 55(2)(a) to the SD Act.

particulars of any breaches self-reported to the Commonwealth Ombudsman or any complaints made or referred to the Commonwealth Ombudsman relating to the exercise of monitoring powers;[35] and

- for a telecommunications interception control order warrant, the issuing officer is to have regard to whether the interception of telecommunications under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary in all the circumstances.[36]

1.309 These recommendations have largely been incorporated into the reintroduced bill. However, while the final recommendation stipulates that the issuing officer is to 'have regard to whether the interception… constitutes the least interference with the liberty or privacy… **that is necessary in all the circumstances**' (emphasis added), this final caveat was not included in the 2016 bill. This consideration of the necessity of the interception is an important safeguard for the measure.

Committee comment

1.310 **The committee notes that the previous human rights assessment of the monitoring warrants concluded that they are incompatible with the right to privacy (that is, the warrants were not a proportional limit on the right to privacy).**

1.311 **The bill contains a number of safeguards in respect of the proposed monitoring warrants, as recommended by the PJCIS. This will assist to address some but not all of the concerns regarding the proportionality of the proposed warrants. The committee recommends that in order to improve the compatibility of the measure, proposed paragraph 46(5)(f) to the *Telecommunications (Interception and Access) Act 1979* be amended to include the specific requirement that the issuing officer is to have regard to whether the interception of telecommunications under the warrant constitutes the least interference with the liberty or privacy of any person that is necessary *in all the circumstances*.**

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

Schedule 15—Protecting national security information in control order proceedings

1.313 Schedule 15 of the 2015 bill proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to allow a court to make orders restricting or preventing the disclosure of information in control order proceedings. The NSI Act currently allows a court to prevent the disclosure of information in federal criminal and civil proceedings where it would be likely to

35 See Schedule 8 to the 2016 bill, proposed paragraphs 104.29(2)(g)-(i) to the Criminal Code.

36 See Schedule 9 to the 2016 bill, proposed paragraph 46(5)(f) to the TI Act.

prejudice national security (except where this would seriously interfere with the administration of justice). The new types of orders provided for in Schedule 15 would have restricted or prevented the disclosure of information in control order proceedings such that:

- the subject of the control order and their legal representative might be provided with a redacted or summarised form of national security information (although the court may consider all of the information contained in the original source document);[37]
- the subject of the control order and their legal representative might not be provided with any information contained in the original source document (although the court may consider all of that information);[38] or
- the subject of the control order and their legal representative might not be provided with evidence from a witness in the proceedings (although the court may consider all of the information provided by the witness).[39]

Compatibility of the measure with the right to a fair hearing

1.314 The previous examination of the bill considered that the non-disclosure of information to the subjects of control orders and their legal representatives engaged and limited the right to a fair hearing and particularly the principle of equality of arms.[40] The previous examination also noted that the PJCIS had made the following recommendations in relation to the Schedule 15 measures in the 2015 bill:

- the minimum standard of information disclosure in a control order proceeding be amended to allow the subject of the control order proceeding to be provided with sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations;
- a system of special advocates be introduced to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded; and
- the Attorney-General be required to annually report on the number of orders granted by the court and the related control order proceedings.[41]

37 See item 21 of Schedule 15 to the 2016 bill, proposed new subsection 38J(2) to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act).

38 See item 21 of Schedule 15 to the 2016 bill, proposed new subsection 38J(3) to the NSI Act.

39 See item 21 of Schedule 15 to the 2016 bill, proposed new subsection 38J(4) to the NSI Act.

40 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 128.

41 See recommendations 4, 5 and 6 of Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015* (15 February 2016) 75-82.

1.315 Subject to the special advocates regime being in place before other amendments in Schedule 15 came into force, the previous examination considered that amendments implementing these recommendations would address the concerns as to the compatibility of the schedule with the right to a fair trial.[42]

1.316 Schedule 15 has been updated in the 2016 bill to implement the above PJCIS recommendations. However, the amendments putting in place the special advocates regime will commence up to 12 months after the other amendments in the schedule.[43] The EM states that the delayed commencement is to ensure that sufficient time is provided to make appropriate regulations relating to the special advocate scheme, and to ensure sufficient special advocates are available to participate in the scheme. The EM also notes that the court may exercise inherent powers to appoint a special advocate for a person subject to a control order proceeding on an ad hoc basis.[44]

1.317 However, despite the ability to appoint special advocates on an ad hoc basis, the delayed commencement of the special advocates regime may mean that the court is empowered to make orders that may unjustifiably limit the right to a fair hearing during the period before the special advocates regime commences.

Committee comment

1.318 **The committee notes that the previous human rights assessment of Schedule 15 considered that the measures engage and limit the right to a fair trial and the right to a fair hearing.**

1.319 **The committee further notes that the previous human rights assessment of Schedule 15 in the 2015 bill considered that the implementation of the relevant PJCIS recommendations would address concerns in relation to the human rights compatibility of the measures contained in Schedule 15. However, this view was premised on the special advocates regime being established prior to the commencement of the other measures in the schedule.**

1.320 **Schedule 15 has been updated in the 2016 bill to implement the relevant PJCIS recommendations. However, noting that the 2016 bill currently provides for a delay in commencement of the special advocates regime of up to 12 months after the commencement of the other amendments in Schedule 15, the committee recommends that the bill be amended to provide for the commencement of the special advocates regime prior to other amendments in Schedule 15 entering into effect.**

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42 Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 136.

43 See clause 2 of the 2016 bill (commencement).

44 EM 159.

Schedule 18—Special intelligence operations

1.321 Schedule 18 is a new schedule, amending the special intelligence operations (SIO) regime in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to implement recommendations made by the INSLM in his February 2016 *Report on the impact on journalists of section 35P of the ASIO Act* (INSLM report).[45]

1.322 The current SIO regime includes two offences in relation to the unauthorised disclosure of information relating to a SIO.[46] The second offence is an aggravated offence intended to apply to deliberate disclosures intended to endanger health and safety or the effectiveness of a SIO. The offences currently apply to disclosures by any person, including:

- participants in a SIO;
- other persons to whom information about a SIO has been communicated in an official capacity; and
- persons who are the recipients of an unauthorised disclosure of information, should they engage in any subsequent disclosure.

Compatibility of the measure with the right to freedom of expression

1.323 Section 35P of the ASIO Act and the special intelligence operations regime were previously examined by the committee in its *Sixteenth Report of the 44th Parliament*.[47] The previous examination considered that the offence provisions in section 35P engaged and disproportionately limited the right to freedom of expression. In particular, the previous examination noted that, as the non-aggravated offence applies to conduct which is done recklessly rather than intentionally, a journalist or other person could be found guilty of an offence even though they did not intentionally disclose information about a SIO.[48] This raised concerns as to the potential 'chilling effect' of the offences on the reporting on and scrutiny of ASIO activities. The previous examination also considered that the defence provisions were very narrow and did not offer adequate protection of the public interest in respect of public reporting.[49]

1.324 The amendments in new Schedule 18 amend section 35P to provide for two types of offences; one applying to ASIO officers or affiliated persons ('entrusted

45 Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (February 2016).

46 See *Australian Security Intelligence Organisation Act 1979* (ASIO Act) sections 35P(1) and (2).

47 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 33.

48 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 56.

49 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament* (25 November 2014) 56.

persons') and one applying to other persons who are not connected to or affiliated with ASIO, such as journalists and other members of the community. Disclosures of information relating to a SIO by people who have not received the information in their capacity as an 'entrusted person' will only be an offence if the information would endanger any person or prejudice the conduct of a SIO.[50] The amendments also provide for a prior publication defence for people other than entrusted persons.[51]

Committee comment

1.325 **The committee notes that the previous human rights assessment of section 35P of the ASIO Act considered that the offences of unauthorised disclosure of information relating to a special intelligence operation engaged and disproportionately limited the right to freedom of expression.**

1.326 **The committee further notes that Schedule 18 amends section 35P to narrow the circumstances in which disclosure by someone who is not an 'entrusted person' will be an offence. The committee considers that these amendments improve the proportionality of the section with human rights.**

1.327 **However, noting the significant human rights concerns raised by section 35P of the ASIO Act and the broader special intelligence operation regime, identified in the previous human rights assessment of the measure, the committee draws the human rights implications of the schedule to the attention of the parliament.**

50 See item 4 of Schedule 18 to the 2016 bill, proposed new subsections 35P(1)-(2) to the ASIO Act.

51 See item 6 of Schedule 18 to the 2016 bill, proposed new subsection 35P(3A) to the ASIO Act.

Criminal Code Amendment (Animal Protection) Bill 2015

Purpose	The bill proposes to amend the *Criminal Code Act 1995* to insert new offences in relation to failure to report a visual recording of malicious cruelty to domestic animals, and interference with the conduct of lawful animal enterprises
Sponsor	Senator Back
Introduced	Senate, 31 August 2016
Rights	Fair trial and fair hearing (protection against self-incrimination); prohibition against arbitrary detention (see **Appendix 2**)

Background

1.328 The committee previously considered the bill in its *Twenty-fourth Report of the 44th Parliament* and *Twenty-eighth Report of the 44th Parliament*.[1] The bill was reintroduced to the Senate on 31 August 2016, in identical form, following the commencement of the 45th Parliament.

1.329 The committee's previous examination of the bill noted that the proposed offence for the failure by a person recording what they believe to be malicious cruelty to report it to relevant authorities engages and limits the right to protection against self-incrimination, and gives rise to concerns about proportionality.

1.330 The committee also commented on the proposed offence of interference with the conduct of lawful animal enterprises, for which a person who causes economic damage exceeding $10 000 will be liable to a prison term of up to five years. The committee noted that the breadth of the offence provision, the uncertainty in its application and the size of the penalty (which could result in a term of imprisonment being imposed) could amount to arbitrary detention.

Committee comment

1.331 **The committee notes that the previous human rights assessment of the bill considered that the proposed new offences engage and limit the right to protection from self-incrimination and the prohibition against arbitrary detention.**

1.332 **The committee also notes its previous recommendation that the legislation proponent seek the advice of the Attorney-General to ensure that the offence provision is drafted consistently with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

1 See Parliamentary Joint Committee on Human Rights, *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 3; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 40.

1.333 **Noting the concerns raised in the previous human rights assessment of the bill, the committee draws the human rights implications of the bill to the attention of the Parliament.**

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

Purpose	The bill would amend the *Fair Work Act 2009* to remove the requirement that certain small businesses pay penalty rates, unless the work is performed on a weekend; is in addition to 38 hours of work over a seven day period; is in addition to ten hours of work in a 24 hour period; or is performed on a public holiday
Sponsor	Senators Leyonhjelm and Day
Introduced	Senate, 31 August 2016
Rights	Just and favourable conditions of work; adequate standard of living; equality and non-discrimination (see **Appendix 2**)

Background

1.334 The committee previously considered the bill in its *Twenty-seventh report of the 44th Parliament* and *Thirtieth report of the 44th Parliament*.[1] The bill was reintroduced to the Senate in identical form following the commencement of the 45th Parliament.

1.335 The committee's previous examination of the bill noted that the proposed amendment to the *Fair Work Act 2009* to exclude certain employers from being required to pay penalty rates was likely to be incompatible with the right to just and favourable conditions of work, the right to an adequate standard of living and the right to equality and non-discrimination.

Committee comment

1.336 **The committee notes that the previous human rights assessment of the bill concluded that the bill was likely to be incompatible with the right to just and favourable conditions of work, the right to an adequate standard of living and the right to equality and non-discrimination.**

1.337 **Noting the analysis and concerns raised in the previous human rights assessment of the bill, the committee draws the human rights implications of the bill to the attention of the Parliament.**

1 See Parliamentary Joint Committee on Human Rights, *Twenty-seventh Report of the 44th Parliament* (8 September 2015) 8; and *Thirtieth Report of the 44th Parliament* (10 November 2015) 125.

Fair Work Amendment (Registered Organisations) Amendment Bill 2014

Purpose	The bill proposes to establish a Registered Organisations Commission and provide it with investigation and information-gathering powers to monitor and regulate registered organisations; amend the requirements for officers' disclosure of material personal interests and change the grounds for disqualification and ineligibility for office; and increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences
Portfolio	Employment
Introduced	House of Representatives, 31 August 2016
Rights	Presumption of innocence (see **Appendix 2**)

Background

1.338 The committee previously examined the bill in its *First Report of the 44th Parliament*, *Fifth Report of the 44th Parliament*, *Ninth Report of the 44th Parliament*, *Twenty-second Report of the 44th Parliament* and *Thirty-eighth Report of the 44th Parliament*.[1]

1.339 The previous human rights assessment of the bill was able to conclude that most of these provisions were compatible with human rights on the basis of additional information provided by the minister.[2] The minister's response to the committee's requests for information also proposed to introduce amendments to the bill to narrow the breadth of the proposed disclosure requirements.[3] These

1 The measures were originally introduced in the Fair Work (Registered Organisations) Amendment Bill 2013 (2013 bill); see Parliamentary Joint Committee on Human Rights, *First Report of the 44th Parliament* (10 December 2013) 21-28; and *Fifth Report of the 44th Parliament* (25 March 2014) 63-65. The measures were then reintroduced in the Fair Work (Registered Organisations) Amendment Bill 2014 (2014 no. 1 bill) (see *Ninth Report of the 44th Parliament* (11 February 2014) 21-28); the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] (2014 no. 2 bill) (see *Twenty-second Report of the 44th Parliament* (3 May 2016) 47-52); and the Fair Work (Registered Organisations) Amendment Bill 2014 [No. 3] (2014 no. 3 bill) (see *Thirty-eighth Report of the 44th Parliament* (3 May 2016) 2).

2 See Parliamentary Joint Committee on Human Rights, *Fifth Report of the 44th Parliament* (25 March 2014) 64 at [3.28].

3 The 2014 no. 1 bill was introduced without the amendments previously proposed by the minister in correspondence to the committee in relation to the 2013 bill. The committee noted this in conjunction with its consideration of the 2014 no. 1 bill in the *Ninth Report of the 44th Parliament*, and the 2014 no. 1 bill was subsequently amended by the government prior to it being negatived in the Senate. The 2014 no. 2 bill and 2014 no. 3 bill have subsequently been introduced in identical form to the amended 2014 no. 1 bill.

subsequent amendments, along with additional information provided in the statement of compatibility, allowed the committee to conclude that many of the committee's remaining concerns had been addressed.[4]

1.340 The bill was introduced again following the commencement of the 45th Parliament in identical form to the previous iteration of the bill.

1.341 The previous human rights assessment of the bill concluded that the reverse burden offence contained in proposed section 337AC, which relates to the concealing of documents relevant to an investigation, may be incompatible with the presumption of innocence.[5]

Committee comment

1.342 **The committee notes that the previous human rights assessment of the bills concluded that the proposed reverse burden offence may be incompatible with the presumption of innocence.**

1.343 **Accordingly, the committee draws the human rights implications of the bill to the attention of the Parliament.**

4 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (3 May 2016) 47-52.

5 See Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (3 May 2016) 52 at [1.211].

Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

Purpose	The bill makes a range of amendments to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* including extending detention powers, expanding powers to remove persons and other associated amendments
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 1 September 2016
Rights	Liberty; non-refoulement; right to an effective remedy (see **Appendix 2**)

Background

1.344 The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the 2014 bill) expanded visa cancellation powers, and was reported on by the committee in March 2015 and March 2016.[1] The 2014 bill passed both Houses of Parliament on 26 November 2014 and received Royal Assent on 10 December 2014.

1.345 The human rights assessment of the 2014 bill noted that a consequence of a visa being refused or cancelled on character grounds (including under the expanded powers) is that the person is prohibited from applying for another visa;[2] and becomes an unlawful non-citizen subject to mandatory immigration detention prior to their removal or deportation, which must occur as soon as reasonably practicable.[3]

1.346 Pursuant to section 197C of the Migration Act, in exercising the power to remove a person, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 195-234; Parliamentary Joint Committee on Human Rights, *Nineteenth Report of the 44th Parliament* (3 March 2015) 85-88.

2 A person may apply for a protection visa or a Removal Pending Bridging Visa (RPBV). However, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. Similarly, a person may apply for a Removal Pending Bridging Visa only if the minister has invited them to, and this is a personal, non-compellable power. Also, RPBVs are temporary and apply only so long as the minister is satisfied that a person's removal is not reasonably practicable.

3 Section 198 of the *Migration Act 1958* (Migration Act).

1.347 In cases where it is not possible to remove a person because, for example, they may be subject to persecution if returned to their home country or no country will accept them, that person may be subject to indefinite detention.

1.348 Taking into account the preceding considerations, the human rights analysis of the 2014 bill noted that the expanded visa cancellation powers engage and limit multiple human rights, including:

- non-refoulement obligations and the right to an effective remedy;
- the right to liberty;
- the right to freedom of movement;
- the right to freedom of association;
- the right to freedom of opinion and expression; and
- the right to privacy.

1.349 The human rights assessment of the 2014 bill found that the expansion of the visa cancellation powers in the context of the existing framework is likely to be incompatible with a number of these rights.[4]

1.350 The Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (2016 bill) is said to be for the purpose of ensuring the provisions in the 2014 bill are given their full effect.[5]

Detention of a person reasonably suspected of being subject to visa cancelation

1.351 Section 192 of the Migration Act provides that an officer may detain a non-citizen where they know or reasonably suspect that a visa may have been cancelled under particular powers of that Act. The bill amends this section to make reference to the further visa cancellation powers introduced by the 2014 bill and therefore provides additional grounds for detention.

Compatibility of the measure with the right to liberty

1.352 The human rights analysis of the 2014 bill noted that detention of a non-citizen or cancellation of their visa pending deportation will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation.

1.353 However, there may be cases where a person cannot be returned to their home country on protection grounds (due to the obligation of non-refoulement or where there is no other country willing to accept the person). Such circumstances of continuing detention can give rise to instances of arbitrary detention.

4 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016), 195-234.

5 Explanatory memorandum (EM) 1.

1.354 Accordingly, the human rights assessment of the 2014 bill found that detention in these circumstances is likely to be incompatible with Australia's obligations under international human rights law. In particular, the assessment found that it has not been demonstrated that the measure is a proportionate means of achieving the objective of national security (that is, that the measure is the least rights restrictive approach).

1.355 As with the human rights assessment of the 2014 bill, the expansion of immigration detention powers proposed in the 2016 bill raises similar concerns.

Committee comment

1.356 **The committee notes that the expansion of detention powers engages and limits the right to liberty.**

1.357 **The committee observes that the human rights assessment of the 2014 bill found that related measures were likely to be incompatible with the right to be free from arbitrary detention; and that similar concerns arise in relation to the expansion of detention powers in the 2016 bill.**

1.358 **The committee therefore draws the human rights implications of the 2016 bill to the attention of the Parliament.**

Removal powers where there has been a failure to make recommendations

1.359 Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable.

1.360 The bill proposes to introduce new subsection 198(2B) to provide a power to remove a non-citizen following the cancellation of their visa (including when such a cancellation is made by a delegate as opposed to the minister personally).

Compatibility of the measure with non-refoulement obligations and the right to an effective remedy

1.361 Australia has non-refoulement obligations, which means that it must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment. This is an absolute right that can never be justifiably limited.

1.362 The human rights assessment of the 2014 bill noted that there is no statutory protection ensuring that a non-citizen, to whom Australia owes non-refoulement obligations, is not removed from Australia.[6]

6 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection'. This is because they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

1.363 The powers of removal proposed in new subsection 198(2B) also contain no safeguards to ensure that a person is not removed from Australia in circumstances where Australia owes non-refoulement obligations. As set out in the human rights assessment of the 2014 bill, 'independent, effective and impartial' review of decisions to remove or deport an individual are required to comply with Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[7]

Committee comment

1.364 **The committee notes that the human rights assessment of the 2014 bill found that the removal or deportation of non-citizens without effective safeguards, including 'independent, effective and impartial' review of non-refoulement decisions, is incompatible with the obligation of non-refoulement.**

1.365 **Noting that the same human rights concerns apply to the proposed new removal powers, the committee draws the human rights implications of the 2016 bill to the attention of the Parliament.**

7 The requirements for the effective discharge of Australia's non-refoulement obligations were set out in more detail in *Second Report of the 44th Parliament* (2 February 2015) [1.89] to [1.99]. See also *Fourth Report of the 44th Parliament* (18 March 2014) [3.55] to [3.66] (both relating to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013). See *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.7. See also *Arkauz Arana v. France*, Communication No. 63/1997, CAT/C/23/D/63/1997 (2000), [11.5] and [12] and comments on the initial report of Djibouti (CAT/C/DJI/1) (2011), A/67/44, 38, [56(14)], see also: Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003) at [12].

Migration Amendment (Family Violence and Other Measures) Bill 2016

Purpose	The bill seeks to amend the *Migration Act 1958* to introduce an assessable sponsorship framework for family sponsored visas
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 1 September 2016
Rights	Protection of the family; family reunion; privacy; security of person; women's rights; rights of children (see **Appendix 2**)

Approval of persons as sponsors

1.366 The bill proposes to amend the *Migration Act 1958* (Migration Act) to require a proposed sponsor for a family visa to be assessed and approved as a sponsor before a visa application can be made. In essence, a person must satisfy prescribed criteria to be approved as a sponsor (proposed section 104E). The criteria for a person to be approved as a sponsor are to be prescribed in regulations in respect of different classes of visa and are not set out in the bill.[1]

Compatibility of the measure with human rights

1.367 This measure engages multiple human rights including:

- the right to the protection of the family including family reunion;
- the right to security of person;
- women's rights;
- the rights of children; and
- the right to life.

1.368 It is noted that the purpose of the measure, in addition to strengthening the integrity of the sponsored family visa program and placing greater emphasis on the assessment of persons as family sponsors, is stated to be to decrease family violence including violence against women and children. Insofar as the measure pursues this third purpose, it is aimed at promoting the right to security of person; the right to life; the rights of the child and the rights of women.[2] However, the substantive criteria for approval that may relate to the purpose of decreasing family violence are not included in the bill, therefore it is not possible to say at this stage how the measure promotes these rights.

1 See, Migration Act section 140E.

2 Explanatory memorandum (EM) 22.

1.369 By requiring a person to be approved by the Minister for Immigration and Border Protection before they can sponsor a family member, the measure limits the ability of a person to be a sponsor and the effect of this measure may be that individuals are prevented from having their family members join them in Australia. Accordingly, this measure engages and limits the right to protection of the family, which includes family reunion.

1.370 Without knowing the criteria for approval as a sponsor it is difficult to determine whether the measure amounts to a permissible limitation on the right to the protection of the family. In order for the measure to be compatible with this right, criteria for approval as a sponsor must be proportionate to a legitimate objective. An assessment of these criteria (once they are available) is therefore necessary.

Committee comment

1.371 **The committee notes that the measure may promote a range of human rights, but also limits the right to protection of the family.**

1.372 **The committee also notes that, as the criteria for a person to be approved as a family visa sponsor is to be prescribed by regulation, an assessment of these criteria will be necessary to determine whether the measure is a proportionate limit on the right to protection of the family. The committee will examine the criteria once they are prescribed by regulation.**

Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2016

Purpose	The bill proposes to amend the *A New Tax System (Family Assistance) Act 1999* to reduce the rate of Family Tax Benefit Part B for single parent families with a youngest child aged 13 to 16 years of age; to remove it entirely for couple families (other than grandparents) with a youngest child aged 13 or over; and to phase out the Family Tax Benefit Part A and Part B supplements
Portfolio	Social Services
Introduced	House of Representatives, 1 September 2016
Right(s)	Social security; adequate standard of living (see **Appendix 2**)

Background

1.373 The committee previously examined the measures in its *Thirtieth Report of the 44th Parliament*, *Thirty-third Report of the 44th Parliament* and *Thirty-seventh Report of the 44th Parliament*.[1]

1.374 The bill was reintroduced following the commencement of the 45th Parliament.

1.375 The previous human rights assessment of the measures concluded that the reduced rate of Family Tax Benefit Part B and removal of Family Tax Benefit supplements were likely to be compatible with international human rights law, on the basis of additional information provided by the minister.

1.376 The statement of compatibility to the bill has included further information as to the compatibility of the measures with international human rights law, including the additional information previously provided by the minister in correspondence with the committee.

1 The Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill 2015 passed both houses on 30 November 2015 with a number of amendments to remove certain measures; and achieved Royal Assent on 11 December 2015. The Social Services Legislation Amendment (Family Payments Structural Reform and Participation Measures) Bill (No. 2) 2015, containing the removed measures, was subsequently introduced. See Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 53-60; *Thirty-third Report of the 44th Parliament* (2 February 2016) 3; and *Thirty-seventh Report of the 44th Parliament* (19 April 2016) 49-57.

Committee comment

1.377 **The committee notes that the previous human rights assessment of the bill concluded that the bill was likely to be compatible with the right to social security and the right to an adequate standard of living on the basis of further information provided by the minister.**

1.378 **The committee thanks the minister for including this additional information in the statement of compatibility for the new bill.**

Social Services Legislation Amendment (Youth Employment) Bill 2016

Purpose	The bill seeks to remove the access of 22 to 24 year olds to Newstart Allowance and Sickness Allowance and replace it with access to Youth Allowance; and provide for a four-week waiting period for certain persons aged under 25 years applying for Youth Allowance (Other) or Special Benefit
Portfolio	Social Services
Introduced	House of Representatives, 1 September 2016
Right/s	Equality and non-discrimination; social security; adequate standard of living (see **Appendix 2**)

Background

1.379 The committee has previously examined the measures contained in the bill in its *Ninth Report of the 44th Parliament*, *Twelfth Report of the 44th Parliament*, *Fourteenth Report of the 44th Parliament*, *Seventeenth Report of the 44th Parliament*, *Twenty-fourth Report of the 44th Parliament*, *Twenty-eighth Report of the 44th Parliament*, and *Twenty-ninth Report of the 44th Parliament*.[1]

1.380 Following the commencement of the 45th Parliament, the bill was reintroduced to the Senate on 1 September 2016, in identical form to the previous iteration of the bill.

1.381 The previous human rights analysis noted that the proposed changes to the threshold for Newstart eligibility engage the right to equality and non-discrimination because, by reducing access to the amount of social security entitlements for persons of a particular age (in this case, 22 to 24 year olds), the measure directly

1 Measures in the bill were initially included in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 1) Bill 2014 (the No. 1 bill) and the Social Services and Other Legislation Amendment (2014 Budget Measures No. 2) Bill 2014 (the No. 2 bill). The committee reported on the No. 1 bill and No. 2 bill in its *Ninth Report of the 44th Parliament* (15 July 2014) at 71-99; and concluded its examination of the No. 2 bill in its *Twelfth Report of the 44th Parliament* (24 September 2014) at 55-64. A number of measures in the No. 1 bill and No. 2 bill were subsequently reintroduced in the Social Services and Other Legislation Amendment (2014 Budget Measures No. 4) Bill 2014 (the No. 4 bill) (see *Fourteenth Report of the 44th Parliament* (28 October 2014) 94-95; and the committee's concluding remarks on the No. 1 bill and No. 4 bill in *Seventeenth Report of the 44th Parliament* (2 December 2014) 11-13). They were again reintroduced in the Social Services Legislation Amendment (Youth Employment and Other Measures) Bill 2015 (see *Twenty-fourth Report of the 44th Parliament* (24 June 2015) 12-19; and *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 51-63); and subsequently again in the Social Services Legislation Amendment (Youth Employment) Bill 2015 (see *Twenty-ninth Report of the 44th Parliament* (23 June 2015) 34-41).

discriminates against persons of this age group. The committee previously concluded that this measure was compatible with human rights based on further information provided by the minister.[2]

1.382 However, the statement of compatibility for the bill does not include any of the previously provided information which allowed this measure to be assessed as compatible with the right to equality and non-discrimination. Where a measure that the committee has considered is reintroduced, previous ministerial responses to the committee's requests for further information should be used to inform the statement of compatibility for the reintroduced measure. This additional information may assist the committee to determine whether or not the reintroduced measures are compatible with human rights.

1.383 The previous human rights assessment of the measures in the bill also raised concerns in relation to the introduction of a four-week waiting period for individuals under the age of 25. This measure engages and limits the rights to social security and an adequate standard of living, as well as the right to equality and non-discrimination.

Committee comment

1.384 **The previous human rights assessment of the bill considered that the measures engage and limit the right to equality and non-discrimination; right to social security; and right to an adequate standard of living.**

1.385 **The committee's expectation is that statements of compatibility for reintroduced measures include any information provided by the minister in response to the committee's previous requests for further information. Such further information would assist the committee in undertaking a human rights assessment of reintroduced measures.**

1.386 **Noting the concerns raised in the previous human rights assessment of the bill, the committee draws the human rights implications of the bill to the attention of the Parliament.**

2 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth Report of the 44th Parliament* (17 September 2015) 55.

Bills not raising human rights concerns

1.387 Of the bills introduced into the parliament between 30 August and 15 September 2016, the following did not raise human rights concerns:[1]

- Australian Crime Commission Amendment (Criminology Research) Bill 2016;
- Broadcasting Legislation Amendment (Media Reform) Bill 2016;
- Broadcasting Legislation Amendment (Television and Radio Licence Fees) Bill 2016;
- Competition and Consumer Amendment (Country of Origin) Bill 2016;
- Corporations Amendment (Auditor Registration) Bill 2016;
- Customs Tariff Amendment (Tobacco) Bill 2016;
- Excise Tariff Amendment (Tobacco) Bill 2016;
- Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016;
- Great Australian Bight Environment Protection Bill 2016;
- Higher Education Support Legislation Amendment (2016 Measures No.1) Bill 2016;
- Industry Research and Development Amendment (Innovation and Science Australia) Bill 2016;
- International Tax Agreements Amendment Bill 2016;
- Narcotic Drugs (Licence Charges) Bill 2016;
- Narcotic Drugs Legislation Amendment Bill 2016;
- National Cancer Screening Register (Consequential and Transitional Provisions) Bill 2016;
- National Cancer Screening Register Bill 2016;
- National Disability Insurance Scheme Savings Fund Special Account Bill 2016;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Petroleum Pools and Other Measures) Bill 2016;
- Primary Industries Levies and Charges Collection Amendment Bill 2016;
- Registration of Deaths Abroad Amendment Bill 2016;
- Social Services Legislation Amendment (Budget Repair) Bill 2016;

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

- Social Services Legislation Amendment (Simplifying Student Payments) Bill 2016;
- Statute Law Revision (Spring 2016) Bill 2016;
- Statute Law Revision Bill 2016;
- Statute Update Bill 2016;
- Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016;
- Transport Security Amendment (Serious or Organised Crime) Bill 2016;
- Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016;
- Treasury Laws Amendment (Income Tax Relief) Bill 2016; and
- Water Legislation Amendment (Sustainable Diversion Limit Adjustment) Bill 2016.

1.388 The following bills were introduced and passed between 2 and 4 May 2016 (before the dissolution of the parliament) and also do not raise human rights concerns:

- Supply Bill (No. 1) 2016-2017;
- Supply Bill (No. 2) 2016-2017;
- Supply (Parliamentary Departments) Bill (No. 1) 2016-2017; and
- Tax and Superannuation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2016.

1.389 The following private Senators' bills were restored to the notice paper following the commencement of the 45th Parliament and have previously been assessed as not raising human rights concerns:

- Australian Broadcasting Corporation Amendment (Rural and Regional Advocacy) Bill 2015;
- Australian Centre for Social Cohesion Bill 2015;
- Automotive Transformation Scheme (Securing the Automotive Component Industry) Amendment Bill 2015;
- Charter of Budget Honesty Amendment (Intergenerational Report) Bill 2015;
- Commonwealth Electoral Amendment (Donations Reform) Bill 2014;
- Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2016;
- Commonwealth Electoral Amendment (Reducing Barriers for Minor Parties) Bill 2014;

- Competition and Consumer Amendment (Australian Country of Origin Food Labelling) Bill 2015;
- Defence Legislation Amendment (Parliamentary Approval of Overseas Service) Bill 2015;
- End Cruel Cosmetics Bill 2014;
- Environment Protection and Biodiversity Conservation Amendment (Prohibition of Live Imports of Primates for Research) Bill 2015;
- Fair Work Amendment (Gender Pay Gap) Bill 2015;
- Fair Work Amendment (Protecting Australian Workers) Bill 2016;
- Guardian for Unaccompanied Children Bill 2014;
- Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014;
- Interactive Gambling Amendment (Sports Betting Reform) Bill 2015;
- Landholders' Right to Refuse (Gas and Coal) Bill 2015;
- Marriage Equality Amendment Bill 2013;
- Migration Amendment (Free the Children) Bill 2016;
- Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014;
- Motor Vehicle Standards (Cheaper Transport) Bill 2014;
- Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015;
- Private Health Insurance Amendment (GP Services) Bill 2014;
- Recognition of Foreign Marriages Bill 2014;
- Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015;
- Restoring Territory Rights (Dying with Dignity) Bill 2016; and
- Veterans' Entitlement Amendment (Expanded Gold Card Access) Bill 2015.