Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

Report 11 of 2017

17 October 2017

© Commonwealth of Australia 2017

ISSN 2204-6356 (Print)

ISSN 2204-6364 (Online)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

Email: human.rights@aph.gov.au
Website: http://www.aph.gov.au/joint_humanrights/

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Mr Ian Goodenough MP, Chair	Moore, Western Australia, LP
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Mr Russell Broadbent MP	McMillan, Victoria, LP
Senator Carol Brown	Tasmania, ALP
Ms Madeleine King MP	Brand, Western Australia, ALP
Mr Julian Leeser MP	Berowra, New South Wales, LP
Senator Nick McKim	Tasmania, AG
Senator Claire Moore	Queensland, ALP
Senator James Paterson	Victoria, LP
Senator Linda Reynolds CSC	Western Australia, LP

Secretariat

Ms Toni Dawes, Committee Secretary
Ms Zoe Hutchinson, Principal Research Officer
Dr Kate Mitchell, Principal Research Officer
Ms Shennia Spillane, Principal Research Officer
Ms Eloise Menzies, Senior Research Officer
Mr David Hopkins, Legislative Research Officer

External legal adviser

Dr Aruna Sathanapally

Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] **Appendix 2** contains brief descriptions of the rights most commonly arising in legislation examined by the committee.

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

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

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

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

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

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

Table of contents

Membership of the committee iii

Committee information iv

Chapter 1—New and continuing matters 1

Response required

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 2

Electoral and Referendum Amendment (ASADA) Regulations 2017 [F2017L00967] 15

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 19

Treasury Laws Amendment (Housing Tax Integrity) Bill 2017;
Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017 35

Advice only

Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017 [F2017L01031] 42

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) [F2017L00991] 46

Commission of Inquiry (Coal Seam Gas) Bill 2017 49

Marriage Law Survey (Additional Safeguards) Bill 2017;
Advance to the Finance Minister Determination (No. 1 of 2017-2018) [F2017L01005];
Census and Statistics (Statistical Information) Direction 2017 [F2017L01006];
Census and Statistics (Statistical Information) Amendment Direction 2017 [F2017L01041] 54

Bills not raising human rights concerns 60

Chapter 2—Concluded matters 61

Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 [F2017L00743] and Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017 [F2017L00744] 61

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 67

Australian Border Force Amendment (Protected Information) Bill 2017 72

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822] 84

Migration Amendment (Validation of Decisions) Bill 2017 92

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 117

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 126

Social Services Legislation Amendment (Welfare Reform) Bill 2017 138

Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706] 204

Appendix 1—Deferred legislation 211

Appendix 2—Short guide to human rights 213

Appendix 3—Correspondence 227

Appendix 4—Guidance Note 1 and Guidance Note 2 281

Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 11 and 14 September (consideration of 3 bills from this period has been deferred);[1]
- legislative instruments received between 11 August and 14 September (consideration of 10 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.

1.3 The committee has concluded its consideration of three bills and instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[4] Instruments raising human rights concerns are identified in this chapter.

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

---

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

2 The committee examines legislative instruments 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 These are: the AusCheck Regulations 2017 [F2017L00971], the Customs Tariff Amendment (Singapore-Australia Free Trade Agreement Amendment Implementation) Bill 2017, and the Treasury Laws Amendment (2017 Measures No. 5) Bill 2017 (deferred in *Report 10 of 2017*).

4 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

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

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Purpose	To amend the *Crimes Act 1914* to allow parole to be revoked without notice; remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable witness into evidence; remove the requirement for vulnerable witnesses to be available to give evidence at committal proceedings and to be cross examined; strengthen child sexual abuse offences including introducing new offences; introduce increased maximum penalties for child abuse offences; introduce mandatory minimum sentences for certain offences; introduce a presumption against bail for a person alleged to have committed serious child sex offences; introduce matters in respect of which the court must have regard when sentencing an offender; insert a presumption in favour of cumulative sentences; provide child sex offenders serve full terms of imprisonment unless there are exceptional circumstances; provide additional sentencing options; provide that if an offender is refused parole on the basis of information that could prejudice national security this information does not need to be disclosed
Portfolio	Justice
Introduced	House of Representatives, 13 September 2017
Rights	Fair trial; presumption of innocence; liberty (see **Appendix 2**)
Status	Seeking additional information

Mandatory minimum sentencing

1.7 Schedule 6 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the bill) seeks to introduce mandatory minimum sentences of imprisonment if a person is convicted of particular

child sexual abuse offences under the commonwealth *Criminal Code Act 1995* (Criminal Code*)*.[5]

1.8 Where a person has previously been convicted of a Commonwealth child sexual abuse offence and is subsequently convicted of a further child sexual abuse offence, then mandatory minimum sentencing also applies to this subsequent offence.[6]

Compatibility of the measure with the right not to be arbitrarily detained

1.9 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to liberty including the right not to be arbitrarily detained. The United Nations Human Rights Committee has stated that 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability.[7] Depriving an individual of their liberty must be reasonable, necessary and proportionate in all the circumstances in order to avoid being arbitrary.

1.10 An offence provision which requires mandatory minimum sentencing engages the right to be free from arbitrary detention.[8] Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

1.11 The right to liberty may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected (that is, effective to achieve) and proportionate to achieving that objective.

1.12 The statement of compatibility acknowledges that the mandatory minimum sentences engage and limit the right to liberty but argues that this limitation is permissible.[9] The statement of compatibility provides the following information about the objective of the measure as:

---

5 See, Schedule 6, item 2, proposed section 16AAA. Mandatory minimum sentences would apply in relation to sections 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.10, 272.11, 272.18, 272.19, 273.7, 471.22, 474.23A, 474.25A(1), 474.25A(2), 474.25B of the Criminal Code.

6 See, Schedule 6, item 2, proposed section 16AAB.

7 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of person)* (16 December 2014) [12].

8 See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Report of the Human Rights Committee, Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

9 Statement of Compatibility (SOC) 9.

> …ensuring that the courts are handing down sentences for Commonwealth child sex offenders that reflect the gravity of these offences and ensure that the community is protected from child sex offenders. Current sentences do not sufficiently recognise the harm suffered by victims of child sex offences. They also do not recognise that the market demand for, and commercialisation of, child abuse material often leads to further physical and sexual abuse of children.[10]

1.13 Reflecting the gravity of offences generally appears to be a function of the maximum term of imprisonment as set out in legislation. As such, based on the information provided, it is unclear that this identified objective relates to proposed mandatory sentencing. However, the other identified objective of ensuring community protection may be capable of constituting a legitimate objective for the purposes of international human rights law in respect of the measure. While incapacitation through imprisonment could be capable of addressing this objective, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to this objective. It is possible that a mandatory minimum sentence may be unconnected to the specific risk posed by a particular offender and, therefore, it is not evident that a mandatory minimum is effective to achieve community protection.

1.14 Further, the statement of compatibility does not provide any specific information about the scope of the problem or why judicial discretion is insufficient to address these objectives. In particular, there is no analysis as to why the exercise of judicial discretion, by judges who have experience in sentencing, has been or is likely to be inappropriate or ineffective in achieving the objective of reflecting gravity of offences and ensuring community protection. This raises concerns that the measure may not be necessary to address such objectives (that is, it may not be the least rights restrictive way of achieving its stated objectives).

1.15 In relation to the proportionality of the measure, the statement of compatibility states that mandatory sentencing is restricted to serious child sex offenders for a first offence and will only apply to less serious offences following a previous conviction.[11] This may be a relevant factor in relation to the proportionality of the measure. However, regardless of the type of offence, there may be considerable risk that mandatory sentencing could lead to unduly harsh sentencing in cases in which a court is unable to take into account the full circumstances of the offence and the offender. The committee has previously raised concerns in relation to mandatory sentencing on a number of occasions and has addressed this issue in its *Guidance Note 2*.[12]

---

10 SOC 10.

11 SOC 10.

12 See, Appendix 4, *Guidance Note 2*; Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 30-32.

1.16 The statement of compatibility argues that the measure maintains some of the court's discretion as to sentencing:

> ...because they only relate to the length of the head sentence, not the term of actual imprisonment that an offender will serve. Courts will retain discretion as to any term of actual imprisonment, and will retain access to sentencing alternatives that may be appropriate, for example where an offender has an intellectual disability that makes imprisonment inappropriate.[13]

1.17 However, in relation to the discretion as to setting the minimum non-parole period, there is a concern that the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost', which is to say the appropriate sentence for the least serious case, and accordingly may feel constrained to impose a non-parole period that is in the usual proportion to the head sentence. This is generally two-thirds of the head sentence (or maximum period of the sentence to be served).

1.18 The statement of compatibility further explains that mandatory sentencing will not apply to offenders who are under 18 years of age. This is a relevant safeguard in relation to the operation of the measure, however, concerns remain in relation to its application to adult offenders set out above.

Committee comment

1.19 The preceding analysis indicates that there are questions as to the compatibility of the measure with the right not to be arbitrarily detained.

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

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:**
    - **why the exercise of judicial discretion, by judges who have experience in sentencing, is inappropriate or ineffective in achieving the stated objective;**
    - **whether less rights restrictive alternatives are reasonably available;**
    - **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances;**
    - **the scope of judicial discretion maintained by the measures; and**
- **if mandatory minimum sentencing is maintained, whether the bill could be amended to clarify to the courts that the mandatory minimum sentence is**

13 SOC 10.

not intended to be used as a 'sentencing guidepost' and that there may be a significant difference between the non-parole period and the head sentence.

Right to have a sentence reviewed by a higher tribunal

1.21 Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing may prevent review of the severity or appropriateness of a minimum sentence. In this respect, when a trial judge imposes the prescribed mandatory minimum sentence, the appellate court is likely to form the view that there are limited matters in the sentencing processes to review. This is because the trial judge has imposed the mandatory minimum sentence. This was not addressed in the statement of compatibility.

Committee comment

1.22 The preceding analysis raises questions about the compatibility of the measure with the right to have a sentence reviewed by a higher court.

1.23 The committee therefore requests the advice of the minister as to the compatibility of the measure with the right to have a sentence reviewed by a higher court.

Conditional release of offenders after conviction

1.24 Currently, section 20(1)(b) of the *Crimes Act 1914* provides that, following conviction for an offence, the court may sentence a person to imprisonment but direct that the person be released upon giving certain forms of security such as being of good behaviour, paying compensation or paying the commonwealth a pecuniary penalty or other conditions. This is sometimes referred to as a suspended sentence or recognisance order. Schedule 11 of the bill removes this sentencing option for child sex offenders unless there are exceptional circumstances. That is, it will mean that child sex offenders are required to serve a period of imprisonment that is not suspended.[14]

Compatibility of the measure with the right not to be arbitrarily detained

1.25 As noted above, the right to liberty includes the right not to be arbitrarily detained. By restricting sentencing options available to a court and requiring offenders to serve a sentence of imprisonment the measure engages the right not to be arbitrarily detained. The statement of compatibility states that:

> The presumption in favour of a term of actual imprisonment is… reasonable and necessary to achieve the legitimate objective of ensuring that the courts are handing down sentences for child sex offenders that

14 See, proposed section 20(1)(b), schedule 11, item 1.

> reflect the gravity of these offences, and to ensure that the community is protected from child sex offenders.[15]

1.26 As noted above, ensuring community protection may be capable of constituting a legitimate objective for the purposes of international human rights law. While incapacitation through imprisonment could be capable of addressing this objective, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to this objective. It is possible that a mandatory minimum sentence may be unconnected to the specific risk posed by a particular offender and, therefore, it is not evident that a mandatory minimum is effective to achieve community protection.

1.27 The statement of compatibility argues that the measure is proportionate on the basis that it will only apply to child sex offenders who might otherwise be released on recognisance orders.[16] However, this does not explain why the exercise of judicial discretion as to sentencing is insufficient to achieve the stated objective of the measure. It also does not address whether the unavailability of recognisance orders could lead to injustice in a particular case such that a term of imprisonment is applied in circumstances where it amounts to arbitrary detention.

1.28 In relation to the proportionality of the measure, the statement of compatibility further notes that the court retains discretion as to how long the term of imprisonment should be.[17] While this is the case, incarceration and loss of liberty for any length of time is a serious matter and the presumption in favour of a term of actual imprisonment may seriously alter a court's exercise of this discretion. In order for a loss of liberty not to be arbitrary it must generally be reasonable, necessary and proportionate in all the circumstances. By restricting the court's discretion in this respect there is a serious risk that such a deprivation of liberty may not be necessary in all the circumstances of each individual case.

1.29 The court will retain discretion to make a recognisance order in 'exceptional circumstances'. The statement of compatibility does not explain what types of circumstances are anticipated to engage this discretion, and whether this will operate as an effective safeguard in relation to the measure.

Committee comment

1.30 The preceding analysis indicates that there are questions as to the compatibility of the measure with the right not to be arbitrarily detained.

1.31 The committee seeks the advice of the minister as to:

---

15 SOC 11.

16 SOC 11.

17 SOC 11.

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:**
  - **why the exercise of judicial discretion, by judges who have experience in sentencing, is inappropriate or ineffective in achieving the stated objective;**
  - **whether less rights restrictive alternatives are reasonably available;**
  - **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances;**
  - **what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognisance order; and**
  - **the scope of judicial discretion maintained by the measure.**

Presumption against bail

1.32 Schedule 7 of the bill would introduce a presumption against bail for persons charged with, or convicted of, certain Commonwealth child sex offences. Proposed section 15AAA of the *Crimes Act 1914* provides that a bail authority must not grant bail unless satisfied by the person that circumstances exist to grant bail.

1.33 The presumption against bail applies to persons charged with, or convicted of, serious child sex offences to which mandatory minimum penalties apply. It also applies to all offences subject to a mandatory minimum penalty on a second or subsequent offence where the person has been previously convicted of child sexual abuse.[18]

Compatibility of the measure with the right to release pending trial

1.34 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or

18 Explanatory Memorandum (EM) 41.

flee from the jurisdiction.[19] As the measure creates a presumption against bail it engages and limits this right.[20]

1.35 The statement of compatibility argues generally that the measure pursues the objective of 'community protection from Commonwealth child sex offenders whilst they are awaiting trial or sentencing',[21] but does not provide any specific information as to how this measure addresses a pressing and substantial concern as is required in order to constitute a legitimate objective for the purposes of international human rights law. In a broad sense, incapacitation through imprisonment could be capable of addressing community protection, however, no specific information was provided in the statement of compatibility about whether the measure will be rationally connected to (that is, effective to achieve) the stated objective. In particular, it would be relevant whether the offences to which the presumption applies create particular risks while a person is on bail.

1.36 The presumption against bail applies not only to those convicted of child sex offences, but also those who are accused and in respect of which there has been no determination of guilt. That is, while the objective identified in the statement of compatibility refers to 'community protection from child sex offenders' it applies more broadly to those that are accused of particular offences.

1.37 The statement of compatibility reasons that given the nature of online exploitation 'it is particularly important to ensure that any risk is mitigated through appropriate conditions. Where conditions cannot mitigate the risk to the community, witnesses, and victims, bail should not be granted'.[22] However, the presumption against bail goes further than requiring that bail authorities and courts consider particular criteria, risks or conditions in deciding whether to grant bail. It is not evident from the information provided that the balancing exercise that bail authorities and courts usually undertake in determining whether to grant bail would be insufficient to address the stated objective of 'community protection' or that

19 See, UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

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

21 SOC 10.

22 SOC 10.

courts are failing to consider the serious nature of an offence in determining whether to grant bail.[23]

1.38 Further, to the extent that the concern is that issues of community risk are not being given sufficient weight in bail applications, it is unclear why this could not be addressed through adjusting the criteria to be considered in granting bail rather than imposing a presumption against bail. This raises a specific concern that the measure may not be the least rights restrictive alternative reasonably available, as required to be a proportionate limit on human rights.

1.39 In relation to the proportionality of the measure, the statement of compatibility further states that the measure provides courts with a 'starting point of a presumption against bail' but that the presumption is rebuttable.[24] However, the bill does not specify the threshold for rebutting this presumption including what constitutes 'exceptional circumstances' to justify bail.

1.40 While bail may continue to be available in some circumstances, based on the information provided, it is unclear that the presumption against bail is a proportionate limitation on the right to release pending trial.[25] Relevantly, in the context of the *Human Rights Act 2004* (ACT) (ACT HRA), the ACT Supreme Court considered whether a presumption against bail under section 9C of the *Bail Act 1992* (ACT) (ACT Bail Act) was incompatible with section 18(5) of the ACT HRA. Section 18(5) of the ACT HRA relevantly provides that a person awaiting trial is not to be detained in custody as a general rule. However, section 9C of the ACT Bail Act contains a presumption against bail in respect of particular offences and requires those accused of murder, certain drug offences and ancillary offences, to show 'exceptional circumstances' before the usual assessment as to whether bail should be granted is undertaken. *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147, the ACT Supreme Court considered these provisions and decided that section 9C of the ACT Bail Act was not consistent with the requirement in section 18(5) of the ACT HRA that a person awaiting trial not be detained in custody as a general rule.

Committee comment

1.41 The preceding analysis indicates that there are questions as to the compatibility of the measure with the right to release pending trial.

1.42 The committee seeks the advice of the minister as to:

23 See, *Crimes Act 1914* section 15AB.

24 SOC 10.

25 See, *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010);

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective (including whether offences to which the presumption applies create particular risks while a person is on bail);**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:**
    - **why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure;**
    - **whether less rights restrictive alternatives are reasonably available (such as adjusting criteria to be applied in determining whether to grant bail rather than a presumption against bail);**
    - **the existence of adequate and effective safeguards to ensure a person is not deprived of liberty where it is not reasonable, necessary and proportionate in all the circumstances; and**
    - **advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail.**

Power to restrict information provided to offenders

1.43 Usually, in the course of making parole decisions, information adverse to an individual is put to that person for comment prior to making a decision. Schedule 13 of the bill would provide that information does not need to be disclosed to an offender where in the opinion of the Attorney-General this information is likely to prejudice national security.[26]

Compatibility of the measure with the right to a fair hearing

1.44 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings, including where rights and obligations are determined. Withholding information from a person which may be relevant to a decision to refuse that person parole engages and limits the right to a fair hearing. This is particularly because they will not be afforded the opportunity to respond to all adverse information in relation to them.

1.45 The statement of compatibility acknowledges that the right to a fair hearing is engaged but states that 'it is necessary to protect confidential information, such as intelligence information, that would prejudice national security'.[27] It is acknowledged

26 EM 51.

27 SOC 12.

that this is likely in broad terms to constitute a legitimate objective for the purposes of international human rights law.

1.46 In relation to the proportionality of the measure, the statement of compatibility states that the measure is reasonable and proportionate because 'it applies only if the Attorney-General is satisfied that disclosure of the information would be likely to prejudice national security'.[28] However, it is unclear from the information provided that this necessarily ensures that the limitation is proportionate or rationally connected to its stated objective. It is noted that the assessment that information should not be disclosed is based merely on the Attorney-General's 'opinion' rather than objective criteria regarding risks to national security. There is also an absence of any standard against which the need for confidentiality of information is independently assessed or reviewed. There is also no assessment provided in the statement of compatibility as to whether less rights restrictive alternatives would be reasonably available (such as provision of information to a person's lawyer). The committee has previously raised concerns about measures that withhold information related to a decision from the person affected by a decision.[29]

1.47 It is further noted that the withholding of information from offenders in these circumstances may also have consequential impacts on other rights, such as the right to liberty.

Committee comment

1.48 The preceding analysis indicates that there are questions as to the compatibility of the measure with the right to a fair hearing.

1.49 The committee seeks the advice of the minister as to:

- **how the measure is effective to achieve (that is, rationally connected to) its stated objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective including:**
    - **the inability of affected individuals to contest or correct information on which the refusal of parole is based;**
    - **the absence of any standard against which the need for confidentiality of information is independently assessed or reviewed;**
    - **whether a decision to withhold information on the basis that it prejudices national security could be based on objective criteria; and**

28 SOC 12.

29 See, for example, Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) 5-26.

- **whether there are less rights restrictive approaches which are reasonably available.**

Reverse burden offence

1.50 Items 16, 18, 37 and 39 of Schedule 4 propose to introduce new defences or add to existing defences in relation to two new offences being introduced by this bill. The changes would make it a defence for a defendant to a prosecution for certain child sex abuse offences if the defendant proves that at the relevant time the defendant believed that the child was at least 16 years of age or that another person was under 18. Pursuant to section 13.4 of the Criminal Code, the measure would thereby impose a legal burden of proof on the defendant, such that the defendant would need to prove, on the balance of probabilities, their belief at the relevant time.

Compatibility of the measure with the right to be presumed innocent

1.51 Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent usually requires that the prosecution prove each element of the offence beyond reasonable doubt.

1.52 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may effectively reverse the burden of proof and must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

1.53 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence. In other words, such provisions must pursue a legitimate objective, be rationally connected to that objective and be a proportionate means of achieving that objective. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to reverse burden offences. The statement of compatibility has not addressed whether the reverse burden offences in this case are a permissible limit on the right to be presumed innocent. It is noted in particular that it is proposed to impose a legal burden of proof, on the defendant. The imposition of an evidential burden of proof would appear to be an available less-rights restrictive alternative.

Committee comment

1.54 Noting that reverse burden offences engage and limit the right to be presumed innocent, the preceding legal analysis raises questions about whether the reverse burden offence is a permissible limitation on this right.

1.55 The committee therefore requests the advice of the minister as to:

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

Electoral and Referendum Amendment (ASADA) Regulations 2017 [F2017L00967]

Purpose	Seeks to amend the Electoral Referendum Regulation 2016 to include the Australian Sports Anti-Doping Authority (ASADA) on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918,* so as to allow the electoral commission to give ASADA commonwealth electoral roll information
Portfolio	Finance
Authorising legislation	*Commonwealth Electoral Act 1918*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate, 8 August 2017)
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Providing electoral roll information to ASADA

1.56 The Electoral and Referendum Amendment (ASADA) Regulations 2017 (the ASADA regulations) amend the Electoral and Referendum Regulation 2016 (the electoral and referendum regulation) to include the Australian Sports Anti-Doping Authority (ASADA) on the list of prescribed authorities for the purposes of the *Commonwealth Electoral Act 1918.* The effect of the amendment is that the Commonwealth Electoral Commission may give ASADA commonwealth electoral roll information for the purpose of the administration of the National Anti-Doping Scheme within the meaning of the *Australian Sports Anti-Doping Authority Act 2006* (the ASADA Act).[1]

Compatibility of the measure with the right to privacy

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

1.58 The amendments engage and limit the right to privacy by providing for the disclosure of elector's information (which includes personal information such as a person's name and address) from the commonwealth electoral roll to ASADA.

1 Table Item 9A, Clause 1 of Schedule 1 to the *Electoral and Referendum Amendment (ASADA) Regulations 2017.*

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

1.60 The statement of compatibility acknowledges that the right to privacy is engaged, but explains the measure is a permissible limitation as it is reasonable, necessary and sufficiently precise to ensure that it addresses only those matters it is intended to capture under the ASADA Act.

1.61 The statement of compatibility explains the objective of the measure as being 'necessary in the interests of public safety and for the protection of public health'.[2] The statement of compatibility further explains that the measure will assist the work of ASADA in investigating violations under the National Anti-Doping scheme. While generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, the statement of compatibility provides no information about the importance of these objectives in the specific context of the measure. In order to show that the measure constitutes a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required. The statement of compatibility also does not provide any information as to how the measure is rationally connected to (that is, effective to achieve) the objectives.

1.62 As to the proportionality of the measure, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility explains that having access to the electoral roll will 'assist the work of ASADA in investigating violations under the National Anti-Doping scheme'.[3] The statement of compatibility continues:

> Providing access to the Commonwealth electoral Roll to ASADA for the purpose of administering the National Anti-Doping scheme, it would be particularly beneficial:
>
> - for identifying persons who are subject to tip-offs;
> - for locating athletes for testing purposes;
> - for establishing additional information to facilitate additional records checks;
> - for establishing the identity of co-habitants and associations of interest;

2 Statement of Compatibility (SOC) 2.

3 SOC 2.

- for linking seizures of Performance and Imaging Enhancing Drugs to the occupants of the intended destination addresses; and
- for maintaining the confidentiality of ASADA enquiries.

1.63 The statement of compatibility does not provide further information as to whether these reasons for accessing information on the electoral roll are the least rights restrictive means of achieving the stated objectives. For example, based on the information provided it is unclear whether 'establishing the identity of co-habitants and associations of interest' is strictly necessary to achieve the stated objectives of public safety and protection of public health.

1.64 Further, whilst these reasons for access are specifically identified in the statement of compatibility, the amendment itself is drafted more broadly, stating that information can be accessed for 'the administration of the National Anti-Doping Scheme (within the meaning of the *Australian Sports Anti-Doping Authority Act 2006*)'.[4]

1.65 'Administration' appears to be broad in scope, particularly in contrast to the purposes identified for access to the electoral roll for other prescribed authorities. For example, the identified purposes for access to the electoral roll for the Australian Federal Police is detailed in Clause 7 of Schedule 1 to the electoral and amendment regulation, and is more prescriptive, as follows:

(a) identifying or locating offenders, suspects or witnesses; or

(b) deciding whether suspects can be eliminated from an investigation; or

(c) target development; or

(d) intelligence checks; or

(e) protecting the safety of officers, staff members, AFP employees and special members; or

(f) law enforcement; or

(g) surveillance; or

(h) identification or potential or actual disaster victims, and notification of victims' families; or

(i) security vetting of AFP officers or potential AFP officers.

1.66 The broad wording of the amendment raises questions as to whether the measure as currently drafted is sufficiently circumscribed and therefore whether it imposes a proportionate limitation on the right to privacy in the pursuit of the stated objective.

4 Table Item 9A, Clause 1 of Schedule 1 to the Electoral and Referendum Amendment (ASADA) Regulations 2017.

1.67 Another relevant factor in assessing the proportionality of a measure is whether there are adequate safeguards in place to protect the right to privacy. In this respect the statement of compatibility states:

> The disclosure of such information is protected in the first instance by the discretion of the Electoral Commission who can decide when and how to give this information, to the prescribed authority.[5]

1.68 No further information is provided in the statement of compatibility as to the scope of the discretion of the Electoral Commission, including any relevant safeguards. In any event, while the existence of a discretion is a relevant factor, it often is not, by itself, an effective human rights safeguard. No other information is provided about whether there are adequate and effective safeguards in place to protect against unintended use of information or on-disclosure to third parties.

Committee comment

1.69 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the right to privacy.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).**

5 SOC 2.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

Purpose	Seeks to enable the Minister for Immigration and Border Protection to prohibit certain items in immigration detention facilities. The bill also amends the search and seizure powers in immigration detention, including the use of strip searches to identify and seize prohibited items
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 13 September 2017
Rights	Privacy; family; freedom of expression; cruel, inhuman and degrading treatment; humane treatment in detention, children's rights (see **Appendix 2**)
Status	Seeking additional information

Prohibiting items in relation to persons in immigration detention and the immigration detention facilities

1.71 The Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to regulate the possession of certain items in immigration detention facilities. Proposed section 251A(2) enables the minister to determine, by legislative instrument, whether an item is a 'prohibited thing'[1] if the minister is satisfied that:

> (a) possession of the thing is prohibited by law in a place or places in Australia; or
>
> (b) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility.

1.72 The bill includes a note which states that examples of things that might be considered to pose a risk for the purposes of section 251(2)(b) are mobile phones, SIM cards, computers and other electronic devices such as tablets, medications or health care supplements in specific circumstances, or publications or other material that could incite violence, racism or hatred.

1 Section 251A(1) provides that a thing is a *prohibited thing* in relation to a person in detention, or in relation to an immigration detention facility, if: (a) both: (i) possession of the thing is unlawful because of a law of the Commonwealth, or a law of the State or Territory in which the person is detained, or in which the facility is located; and (ii) the thing is determined under paragraph (2)(a); or (b) the thing is determined under paragraph (2)(b).

Compatibility of the measure with the right to privacy

1.73 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home. This includes a requirement that the state does not arbitrarily interfere with a person's private and home life.

1.74 A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons under Article 10(1) of the ICCPR.[2] Article 10 provides extra protection for persons in detention who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[3] Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[4] For immigration detention, supervision of detainees' correspondence must be understood in the context that detainees are not being detained whilst serving a term of imprisonment but rather are in administrative detention pending removal from Australia.

1.75 The bill states that the items that will be declared as 'prohibited things' will be set out in a legislative instrument. However, as noted earlier, both the bill itself and the explanatory memorandum state that examples of items that might be considered to be a 'prohibited thing' includes mobile phones and SIM cards. Therefore, while the precise items to be prohibited remain to be determined by legislative instrument,[5] by setting up the mechanism in which the minister may declare certain items to be prohibited (including mobile phones), the bill engages and limits the right to privacy. In particular, this aspect of the bill may interfere with detainees' private life and right to correspond with others without interference.

1.76 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary,

2 *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc. CCPR/C/18/D/74/1980 (1983) [9.2].

3 See UN Human Rights Committee, *General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992)

4 *Angel Estrella v Uruguay,* UN Human Rights Committee Communication No. 74/80, UN Doc. CCPR/C/18/D/74/1980 (1983) [9.2].

5 The committee will consider the human rights compatibility of the proposed legislative instrument once it is received.

they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

1.77 The statement of compatibility does not specifically acknowledge the engagement of the right to privacy in relation to the prohibition of items in immigration detention. However, the statement of compatibility acknowledges that the bill engages and limits the right to privacy in relation to the new search and seizure powers, which includes the power to search and seize 'prohibited things'.[6] In this respect, the statement of compatibility notes that the objective of the bill is to 'provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility'.[7] The statement of compatibility states that the limitation on the right to privacy is proportionate as it is 'commensurate to the risk that currently exists in immigration detention facilities',[8] and further states that:

> These amendments are also proportionate to the serious consequences of injury to staff and detainees, and the greater Australian community if these risks are not properly managed. Any limitations on this right, through the search and seizure for things which are prohibited in immigration detention facilities, are reasonable, necessary and proportionate and are directed at the legitimate objective of protecting the health, safety and security of people in immigration detention and or to the order of the facility.[9]

1.78 The risk that is said to exist in immigration detention is described by the minister in the statement of compatibility as follows:

> More than half of the detainee population consists of high-risk individuals who do not hold a visa, pending their removal from Australia. This includes members of outlaw motorcycle gangs and other organised crime groups whose visas have been cancelled or refused.
>
> The change to the demographics of the detention population is due to the Government's successful border protection policy and the increase in visa refusal or cancellation on character grounds resulting from implementing the Government's commitment to protecting the Australian community from non-citizens of serious character concern. However, the changing nature of the detention population has seen an increase in illegal activities in immigration detention facilities across Australia…

---

6 Statement of Compatibility (SOC) 25. The human rights compatibility of the search and seizure powers are discussed further below.

7 SOC 24.

8 SOC 25.

9 SOC 25.

> Currently mobile phones are enabling criminal activity within the immigration detention network. Activity facilitated or assisted by mobile phone usage includes:
>
> - drug distribution
> - maintenance of criminal enterprises in and out of detention facilities
> - commodity of exchange or currency
> - owners of mobile phones being subjected to intimidation tactics (including theft of the phone)
> - threats and /or assaults between detainees including an attempted contract killing.
>
> In addition to the above mobile phones have been used to coordinate disturbances and escapes.[10]

1.79 Protecting the health, safety and security of people in immigration detention and/or to the order of the facility is likely to be a legitimate objective for the purposes of international human rights law. Prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

1.80 To be a proportionate limitation on the right to privacy, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. There are questions as to whether the limitation on the right to privacy that arises from the bill is proportionate to the stated objective.

1.81 First, prohibiting items in immigration detention for *all* detainees in immigration detention appears to be broader than necessary to address the stated objective. The minister's explanatory memorandum notes that immigration detention facilities accommodate a number of higher risk detainees who have entered immigration detention directly from a correctional facility, including child sex offenders and members of outlaw motorcycle gangs.[11] However, the bill applies to all detainees regardless of whether or not they pose a risk. This appears to include, for example, persons detained while awaiting determination of refugee status who may not pose any risk of the kind described in the statement of compatibility yet may have items that allow them to communicate with family and friends, such as mobile phones, prohibited. It is also noted that the requisite threshold for whether an item constitutes a risk is low, as the minister need only be satisfied that an item *might* pose a risk before making that item prohibited for all detainees. These matters raise serious concerns that the measure is overbroad and

10 SOC 24.

11 Explanatory Memorandum 2.

may not be the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

1.82 Further, another relevant consideration in determining the proportionality of a measure is whether there are adequate safeguards or controls over the measures. In particular, laws that interfere with the right to privacy must specify in detail the precise circumstances in which such interferences may be permitted.[12] As noted earlier, proposed section 251A(2) provides that the minister may determine a thing be prohibited if she or he is 'satisfied' that (relevantly) possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility. No information is provided in the statement of compatibility as to how, and under what circumstances, the minister may be 'satisfied' that an item may pose a risk. For example, it is not clear whether the minister's state of satisfaction is subject to any objective criteria, such as that of reasonable satisfaction, or that the risk is common to all detainees such that prohibition of the item is warranted in all cases.

Committee comment

1.83 The preceding analysis raises questions whether the prohibition of certain items, including mobile phones, from immigration detention facilities, is compatible with the right to privacy.

1.84 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on the right to privacy, in particular:

- **whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective for the purposes of international human rights law; and**
- **whether the measure is accompanied by adequate safeguards to protect against arbitrary application (including whether the minister's state of satisfaction when determining whether an item is to be prohibited must be 'reasonable' or that the risk arises in relation to all detainees).**

Compatibility of the measure with the right not to be subjected to arbitrary or unlawful interference with family

1.85 The right to respect for the family is protected by articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). An important element of protection of the family, discussed above in relation to the right to privacy, includes the right to correspond with families when in detention. By providing that the minister will specify by legislative instrument that mobile phones and SIM cards will be 'prohibited things', the measure engages and

12 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988) [8].

limits the right to respect for the family. The statement of compatibility acknowledges that the right to respect for the family is engaged and limited by the bill. However, the statement of compatibility states that the measures 'do not represent an interference with family' on the following bases:

> The Department acknowledges that regular contact with family and friends supports detainee resilience and mental health and is committed to ensuring detainees have reasonable access to means of maintaining contact with their support networks. This contact will continue to be facilitated through the availability of landline telephones, internet access, access to facsimile machines and postal services. Additionally, immigration detention facilities will continue to facilitate visits by detainees' family members and other visitors.
>
> The Department has, and continues to, review the availability of telephone, internet and facsimile facilities for use by detainees across the immigration detention network, to ensure these facilities are adequate to contact and be contacted by family, friends and legal representatives. As a result of reviews, additional landline telephones have been installed at most immigration detention facilities. This has meant that detainees have even greater and more readily available access to means of communication with their families.
>
> The amendments do not represent an interference with family, given detainees have other readily available communication channels at their disposal to communicate with their families.[13]

1.86 However, it is noted that a mobile telephone, for example, may be an important mechanism for detainees and families to maintain regular and ongoing contact with each other. In this context, prohibiting this item would appear to limit the right to respect for the family.

1.87 As noted earlier, the stated objective of the measure (protecting the health, safety and security of people in immigration detention and/or to the order of the facility) is likely to be a legitimate objective for the purposes of international human rights law and the measure appears to be rationally connected to that objective. However, there are questions as to whether the measure is a proportionate interference with the right to respect for the family.

1.88 In particular, while the minister states in the statement of compatibility that detainees have other available communication channels at their disposal to communicate with their families, the extent of that access is not clear from the information provided. For example, whereas the use of a mobile telephone could occur at any time of day and in a private setting (such as in a detainee's room), it is not clear that the availability of landline telephones, internet access, access to facsimile machines and postal services would provide a similar degree of privacy. In

13 SOC 26.

particular, no information is provided as to the ease, frequency and cost of access to landline telephones and the internet (and any restrictions upon that access), and the extent of supervision when accessing those facilities (including whether detainees can speak with family members in a private room or in a more public area). This raises questions as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

Committee comment

1.89 The prohibition of certain items, including mobile phones, from immigration detention facilities, engages and limits the right not to be subjected to arbitrary or unlawful interference with family.

1.90 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on this right, in particular whether the measure is the least rights restrictive way to achieve the stated objective. Information regarding the extent of access to landline telephones, internet access, access to facsimile machines and postal services (including any restrictions on access, and the privacy afforded to detainees when accessing) will assist in determining the proportionality of the measure.

Compatibility of the measure with the right to freedom of expression

1.91 The right to freedom of expression is protected by article 19 of the ICCPR. The right to freedom of expression includes the freedom to seek, receive, and impart information and ideas of all kinds, either orally, in writing or in print or through any other media of a person's choice.[14] By restricting access to 'prohibited things' including mobile phones and SIM cards, the bill engages and limits the freedom of expression insofar as it limits the ability of detainees to seek, receive and impart information.

1.92 The minister acknowledges in the statement of compatibility that the freedom of expression is engaged by the bill. However, the minister considers that the freedom of expression is not limited on the following bases:

> Although mobile phones and SIM cards will be specified as 'prohibited things', a number of alternative communication avenues will remain available to detainees. These include landline telephones, access to the internet, access to facsimile machines and postal facilities. The Department has, and continues to, review the availability of these communication facilities for use by detainees across the immigration detention network to ensure these facilities are adequate to contact and be contacted by family, friends and legal representatives. As a result of reviews, additional landline telephones have been installed at most immigration detention facilities. Detainees therefore have even greater access to means of communication. Additionally, immigration detention

14 ICCPR, article 19(2).

> facilities will continue to facilitate visits by detainees' family members and other visitors.
>
> The amendments do not limit the right to freedom of expression, given the various other avenues of communication that are readily available to detainees.[15]

1.93 Under article 19(3) of the ICCPR, freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of and proportionate to that objective.[16]

1.94 As noted earlier, the stated objective of the measure includes the preservation of health, safety and security within immigration detention facilities, which appears to fall within the permissible limitations on the freedom of expression in Article 19(3).

1.95 In determining whether limitations on the freedom of expression are proportionate, the UN Human Rights Committee has previously noted that restrictions on the freedom of expression must not be overly broad.[17] In particular, the UN Human Rights Committee has observed:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[18]

1.96 As noted above in relation to the right to privacy, the restrictions on certain items in immigration detention appears to apply to all detainees regardless of whether or not those detainees pose a risk. While some alternative means of communication may be available (in some detention centres), it does not appear that these will be equivalent to current mechanisms. For example, mobile telephones have a range of functions such as taking photos and video that may be used to exercise freedom of expression including in relation to conditions of detention. Access to a mobile telephone may also allow detainees more ready access to legal advice or other support persons than alternative means of communication. This raises questions as to whether the measure is sufficiently circumscribed and the least

---

15 SOC 26.

16 See generally UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011), [21]-[36].

17 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34].

18 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011), [35].

rights restrictive way to achieve the stated objective for the purposes of international human rights law.

Committee comment

1.97 The right to freedom of expression is engaged and limited by the bill.

1.98 The committee seeks the advice of the minister as to whether the measure is a proportionate limitation on the freedom of expression, in particular whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

Amended search and seizure powers in relation to prohibited things in relation to detainees and detention facilities

1.99 At present, searches on detainees may only be undertaken for limited purposes. For example, at present a strip search may only be conducted to find out whether a detainee has a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.[19]

1.100 The bill seeks to strengthen the search and seizure powers in the Migration Act to allow for searches for a 'prohibited thing'. This includes the ability to search a person, the person's clothing and any property under the immediate control of the person for a 'prohibited thing',[20] the ability to take and retain possession of a 'prohibited thing' if found pursuant to search,[21] the ability to use screening equipment or detector dogs to screen a detainee's person or possessions to search for a 'prohibited thing',[22] and the ability to conduct strip searches to search for a 'prohibited thing'.[23] There is also an amendment to the powers to search and screen persons entering the immigration detention facility (such as visitors), including a power to request persons visiting centres to remove outer clothing (such as a coat) if an officer suspects a person has a prohibited thing in his or her possession, and to leave the prohibited thing in a place specified by the officer while visiting the immigration detention facility.[24]

1.101 A further search power introduced by the bill is the power for an authorised officer to, without warrant, conduct a search of an immigration detention facility including accommodation areas, common areas, detainees' personal effects, detainees' rooms, and storage areas.[25] In conducting such a search, an authorised

19 Section 252A of the Migration Act.

20 Proposed section 252(2)(c).

21 Proposed section 252(4A).

22 Proposed amendment to sections 252AA(1),(3A),(3AA).

23 Proposed amendment to section 252A(1).

24 Proposed amendment to section 252G(3),(4).

25 Proposed section 252BA.

officer who conducts a search 'must not use force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.[26]

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

1.102 Article 7 of the ICCPR provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[27] This right is an absolute right, and thus no limitations on this right are permissible under international human rights law. The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.[28] Article 10 of the ICCPR, which guarantees a right to humane treatment in detention, complements article 7 such that there is a positive obligation on Australia to take actions to prevent the inhumane treatment of detained persons.[29]

1.103 The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the ICCPR.[30] In this respect, the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules) state that intrusive searches (including strip searches) should be undertaken only if absolutely necessary, that prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches, and that intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.[31] Further, the European Court of Human Rights (ECHR) has found that strip searching of detainees may violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment where it involves an element of suffering or humiliation going beyond what is inevitable for persons in detention.[32] While the Court accepted that strip-searches may be necessary on occasion to ensure prison

---

26 Proposed section 252BA(6).

27 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is also protected by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

28 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) [2].

29 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [3].

30 UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [10].

31 Rule 52(1) of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules*).

32 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007 [35]-[49].

security or to prevent disorder or crime, the Court emphasised that prisoners must be detained in conditions which are compatible with respect for their human dignity.[33] While the jurisprudence of the ECHR is not binding on Australia, the views of the Court in relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment may be instructive in determining the scope of Australia's human rights obligations.

1.104 The statement of compatibility does not acknowledge whether the right to freedom from torture, cruel, inhuman and degrading treatment or punishment is engaged. However, by providing the minister with the power to conduct strip searches to find out whether there is a 'prohibited thing' hidden on a detainee, it appears that this right is engaged. The right also appears to be engaged by the power in section 252BA to use force where reasonably necessary to conduct searches of immigration detention facilities.

1.105 The amended search and seizure powers also appear to engage the right to humane treatment of persons in detention in article 10 of the ICCPR. In this respect, the statement of compatibility acknowledges that the amendments to the search and seizure powers may engage article 10. The minister emphasises a number of current provisions and additional safeguards in place in relation to strip searches:

> ***Current provisions***
>
> With regard to strip searches under section 252A of the Migration Act, authorisation must continue to be obtained from the departmental Secretary or Australian Border Force Commissioner (or a Senior Executive Service Band 3 level delegate) prior to a strip search being undertaken. Strip searches will also remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to):
>
> (1) A strip search of a detainee under section 252A:
>
> - must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search;
> - must be conducted in a private area;
> - must not be conducted on a detainee who is under 10;
> - must not involve a search of the detainee's body cavities;
> - must not be conducted with greater force than is reasonably necessary to conduct the strip search.
>
> ***Additional protections***
>
> Additionally, the amendments seek to introduce a number of provisions to protect detainees and their property. These include section 252BA -

33 *Frerot v France,* European Court of Human Rights Application No.70204/01, 12 June 2007 [35]-[49].

> Searches of certain immigration detention facilities - general. This section includes sub-paragraph 252BA(6) - an authorised officer who conducts a search under this section must not use more force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search.
>
> The use of detector dogs will be subject to a number of protections. For example, section 252AA(3A) provides that if an authorised officer uses a dog in conducting a screening procedure, the officer must:
>
> (a) take all reasonable precautions to prevent the dog touching any person (other than the officer); and
>
> (b) keep the dog under control while conducting the screening procedure.
>
> The amendments also set out a number of provisions that seek to return certain 'prohibited things' to detainees on their release from detention. For example, section 252CA(2) will provide that an authorised officer must take all reasonable steps to return a 'prohibited thing' seized during a screening procedure, a strip search or a search of an immigration detention facility to the detainee on their release from detention, if it appears that the thing is owned or was controlled by the detainee.

1.106 The statement of compatibility contends that the amendments are consistent with the right under Article 10 as there are sufficient protections provided by law to ensure that respect for detainees' inherent dignity is maintained during the conduct of searches.[34]

1.107 The safeguards set out in the statement of compatibility and contained in section 252A of the Migration Act indicate that there is oversight over the conduct of strip searches. However, it is noted that the current power to conduct strip searches is limited to circumstances where there are reasonable grounds to suspect a detainee may have hidden in his or her clothing a weapon or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention.[35] The amendments will extend this power to where an officer suspects on reasonable grounds that a person may have hidden on the person a 'prohibited thing', including a mobile telephone. Given the broad power of the minister to declare an item a 'prohibited thing' (discussed above), this considerably expands the bases upon which strip searches can be conducted, which raises questions as to whether the expanded powers to conduct strip searches are consistent with the requirement under international human rights law that strip searches only be conducted when absolutely necessary.

---

34 SOC 28.

35 Section 252A(1) of the Migration Act.

1.108 Further, in relation to the power of authorised officers to use force to conduct searches of immigration detention facilities, while the power limits the use of force to 'not…more force…than is reasonably necessary in order to conduct the search', no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the detainee who is subjected to the use of force, and any access to review to challenge the use of force.

Committee comment

1.109 The preceding analysis raises questions as to whether the proposed amendments to the search and seizure powers are compatible with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and right to humane treatment in detention.

1.110 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee seeks the advice of the minister in relation to the compatibility of the measure with this right (including the sufficiency of any relevant safeguards, whether strip searches to seize 'prohibited items' are only conducted when absolutely necessary, and any monitoring and oversight over the use of force by authorised officers).

1.111 In relation to the right to humane treatment in detention, the committee seeks the advice of the minister as to:

- **the adequacy of the safeguards in relation to strip searches, in particular whether conducting strip searches to seize 'prohibited items' are conducted only when absolutely necessary; and**
- **whether there exists any monitoring and oversight over the use of force by authorised officers in section 252BA(6), including access to review for detainees to challenge the use of force.**

Compatibility of the measures with the right to bodily integrity

1.112 The right to privacy extends to protecting a person's bodily integrity. Bodily searches, and in particular strip searches, are an invasive procedure and may violate a person's legitimate expectation of privacy. The amendments to allow searches of persons, including strip searches, to seize prohibited items therefore engage and limit the right to bodily integrity. The UN Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.[36]

36 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* (1988) [8].

1.113 As noted above, limitations on the right to privacy and to bodily integrity may be permissible where it is pursuant to a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to achieve that objective.

1.114 As noted at [1.77] above, the statement of compatibility acknowledges that the amended search and seizure powers engage and limit the right to privacy, but considers that any limitation on this right is proportionate 'to the serious consequences of injury to staff and detainees, and the greater Australian community if these risks are not properly managed'.[37] As noted above in relation to the right to freedom from torture, cruel, inhuman and degrading treatment or punishment and the right to humane treatment in detention, the statement of compatibility also identifies a number of safeguards that are in place when conducting strip searches, quoted in full at [1.105] above.

1.115 Limitations on the right to bodily integrity should only be as extensive as is strictly necessary to achieve the legitimate objective (that is, the limitation must be appropriately circumscribed). In relation to the power to strip search to locate and seize a 'prohibited thing', no information is provided in the statement of compatibility as to whether consideration is given to alternative and less-intrusive methods of searching for prohibited items prior to conducting a strip search. For example, in relation to mobile telephones, it is unclear why it would be necessary to undertake a strip search when alternative and less intrusive screening methods, such as a walk-through metal detector, may adequately identify if a mobile phone is in a person's possession. It would appear that a strip search is not necessarily a method of last resort, as section 252A(7) provides that strip searches may be conducted irrespective of whether a search or screening procedure is conducted under sections 252 and 252AA (which are less intrusive). This raises concerns as to whether this aspect of the bill is the least rights restrictive option available.

1.116 It is also noted that while there are limitations placed on the power to conduct strip searches (such as a requirement that an officer must suspect 'on reasonable grounds' that a person may have items hidden on them, and it is 'necessary' to conduct a strip search to recover the item[38]), the bases on which an officer may form a suspicion on reasonable grounds are broad. In particular, one of the bases upon which an officer may form a suspicion on reasonable grounds is based on 'any other information that is available to the officer'.[39] The statement of compatibility does not explain what 'any other information' may entail. In light of the

37 SOC 25.

38 Section 252A(3)(a) and (b) of the Migration Act.

39 Section 252A(3A)(c). The other grounds upon which suspicion on reasonable grounds may be formed are based on a search conducted under section 252 or a screening procedure conducted under section 252AA: section 252A(3A)(a) and (b).

broad nature of the power to prohibit, search for and seize 'prohibited things' that is introduced by the bill, and the obligation under international human rights law that limitations on privacy are appropriately circumscribed, there are concerns as to whether this aspect of the bill is a proportionate limitation on the right to privacy.

Committee comment

1.117 The preceding analysis raises questions as to whether the amended search and seizure powers are a permissible limitation on the right to bodily integrity.

1.118 The committee seeks the advice of the minister as to whether the limitation on the right to bodily integrity is proportionate, in particular whether the power to conduct strip searches to locate and seize a 'prohibited item' is the least rights restrictive measure available, and whether the power to conduct a strip search is appropriately circumscribed.

Compatibility of the measures with the rights of children

1.119 While the Migration Act prohibits strip searches of children under the age of 10,[40] children detained in immigration facilities between the ages of 10 and 18 may be subject to the search and seizure powers, including strip searches, under specified conditions.[41] In this respect, a number of Australia's obligations under the Convention on the Rights of the Child (CRC) are engaged. In particular, the amended search and seizure powers may engage article 16 of the CRC, which provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. The bill may also engage article 37 of the CRC which provides (relevantly) that children must not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,[42] and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.[43]

1.120 While the statement of compatibility discusses the right to privacy, the right to freedom from torture, cruel, inhuman or degrading treatment and the right to humane treatment in detention as they apply to all persons, the statement of compatibility does not specifically acknowledge that the rights of the child in particular are engaged or limited by the bill.

Committee comment

1.121 The preceding analysis raises questions as to whether the bill is compatible with the rights of the child.

---

40 Section 252B(1)(f) of the Migration Act.

41 For example, for a detainee who is at least 10 but under 18, only a magistrate may order a strip search: section 252A(3)(c)(ii).

42 Article 37(a).

43 Article 37(c).

1.122 The committee seeks the advice of the minister as to whether the amended search and seizure powers (in particular the power to strip search) are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child.

Treasury Laws Amendment (Housing Tax Integrity) Bill 2017; Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017

Purpose	The bills seek to introduce a range of measures including amendments to the *Foreign Acquisitions and Takeovers Act 1975* to implement an annual vacancy charge on foreign owners of residential real estate where the property is not occupied or genuinely available on the rental market for at least six months in a 12 month period
Portfolio	Treasury
Introduced	House of Representatives, 7 September 2017
Rights	Equality and non-discrimination; criminal process rights (see **Appendix 2**)
Status	Seeking additional information

Introduction of an annual vacancy charge on foreign owners of residential real estate

1.123 The Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 (the bill) amends the *Foreign Acquisitions and Takeovers Act 1975* to implement an annual vacancy fee payable by 'foreign persons'[1] who own residential property where the property is not occupied or genuinely available on the rental market for at least six months in a 12 month period. The Foreign Acquisitions and Takeovers Fees Imposition Amendment (Vacancy Fees) Bill 2017 amends the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* to set the level of vacancy fee payable.

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

1.124 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people

1 "foreign person" is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975* to mean: (a) an individual not ordinarily resident in Australia; or (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or (e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or (f) a foreign government; or (g) any other person, or any other person that meets the conditions, prescribed by the regulations.

are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

1.125 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[2] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionality affects people with a particular personal attribute.[3]

1.126 While 'residency' is not a personal attribute protected under article 26, Australia has obligations not to discriminate on grounds of nationality or national origin. Although states enjoy some discretion in differentiating between nationals and non-nationals, human rights are in principle to be enjoyed by all persons, and states are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of human rights to the extent recognised under international law.[4]

1.127 The statement of compatibility acknowledges that, while an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person', the majority of individuals directly affected by the bill will not be Australian citizens.[5] Insofar as the operation of the scheme will introduce a fee that will primarily affect non-citizens, Australia's obligations in relation to non-discrimination on grounds of nationality and national origin may therefore be engaged and limited. In particular, the measure may indirectly discriminate on these bases insofar as the measure would have a disproportionate impact on individuals who are not Australian citizens. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[6] In this respect, it is noted that in 2015, the Victorian Scrutiny of Acts and Regulations Committee referred to the Victorian Parliament for its consideration whether a law, which imposed higher property taxes on foreign citizens than on Australian and New Zealand citizens for the purpose of ensuring that a larger number of local homebuyers remain

---

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

3 *Althammer v Austria,* Human Rights Committee Communication no. 998/01, [10.2].

4 See UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens* (2004).

5 Statement of Compatibility (SOC) [3.109]-[3.110].

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

competitive in the housing market, reasonably limited the rights against discrimination on the basis of nationality.[7]

1.128 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if that treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[8]

1.129 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged and limited, stating:

> The Bill limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Bill only apply to a 'foreign person'. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.[9]

1.130 The statement of compatibility identifies the objective of the measure as follows:

> This Schedule aims to create a larger stock of available housing in Australia by creating an incentive for foreign persons who own residential property to either occupy that property or make it available for rent on the rental market through the creation of a vacancy fee…[10]

1.131 The explanatory memorandum further explains that the measure is part of a number of initiatives to address housing affordability.[11]

1.132 The right to an adequate standard of living is guaranteed by article 11(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR) and requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. In this respect, the UN Special Rapporteur on adequate housing has recently emphasised the importance of the right to adequate housing and noted that it is a human right which is interdependent with other human rights, particularly the right to equality

---

7 Victorian Scrutiny of Acts and Regulations Committee, *Alert Digest No.5 of 2015* (2015) 4-6.

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

9 SOC [3.109].

10 SOC [3.99].

11 Explanatory Memorandum [3.8].

and non-discrimination and the right to life.[12] Therefore, the stated objectives of creating more available housing in Australia and addressing housing affordability are likely to be legitimate objectives for the purposes of international human rights law. Introducing a vacancy fee to encourage occupying residential property or making property available on the rental market appears to be rationally connected to these objectives.

1.133 In relation to the proportionality of the measure, the statement of compatibility states that the limitation on the right to non-discrimination is justified:

> While the bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Accordingly those limitations are reasonable, necessary and proportionate.[13]

1.134 The statement of compatibility does not address why it is necessary to impose the vacancy fee only on foreign persons, as opposed to all persons who may own residential property. Further, while the statement of compatibility states that the measure is the least restrictive means of achieving the stated objectives, there is no further information provided to support this statement, including any information to explain the rationale for differential treatment between foreign persons (the majority of whom will be non-nationals) and residents. In these respects, information regarding the number of foreign persons who leave properties vacant in contrast with Australian residents is likely to be relevant to the proportionality analysis.

Committee comment

1.135 The measure would appear to have a disproportionate negative effect on non-nationals, raising questions about whether this disproportionate negative effect (which indicates *prima facie* indirect discrimination) amounts to unlawful discrimination.

1.136 The committee therefore seeks the advice of the treasurer as to whether the measure is reasonable and proportionate for the achievement of the stated objectives (including how it is based on reasonable and objective criteria; any evidence regarding the number of foreign persons who leave properties vacant in contrast with Australian residents; or any other information to explain the rationale for the differential treatment between nationals and non-nationals; and whether there are other less rights restrictive ways to achieve the stated objective).

12 *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* A/HRC/34/51, (2017), [11].

13 SOC [3.110].

Civil penalty provisions

1.137 Schedule 3 of the bill provides that a civil penalty may apply where a foreign person fails to submit a 'vacancy fee return'[14] or keep the required records.[15] The civil penalty for failing to submit a vacancy fee return and for failing to keep required records is 250 penalty units (currently $52,500).[16]

Compatibility of the measure with criminal process rights

1.138 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities).

1.139 However, civil penalty provisions engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty is regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is described as 'civil' under Australian domestic law.

1.140 A penalty that qualifies as 'criminal' for the purposes of international human rights law is not necessarily illegitimate, rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice, apply.[17] The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

1.141 The statement of compatibility does not discuss whether the civil penalty provisions engage human rights and has not addressed whether they may be classified as 'criminal' for the purposes of international human rights law. The committee's general expectations in relation to the preparation of statements of compatibility are set out in its *Guidance Note 1.*

---

14 The return must be in the approved form within the meaning of section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*. The amount of the vacancy fee is in Part 2 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*.

15 See proposed section 115D(1) of Schedule 3 (vacancy fee return), and proposed section 115G(1) of Schedule 3 (requirement to keep records).

16 See section 4AA of the *Crimes Act 1914*.

17 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) of the ICCPR are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.142 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

1.143 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). Here, the purpose of the penalty appears to be to punish and deter non-compliance, however the penalty applies only to those foreign persons who fail to submit a vacancy fee return or keep the required records. However, no information addressing the nature and purpose of the penalty is provided in the statement of compatibility.

1.144 The third step is to consider the severity of the penalty. In this case an individual could be exposed to a significant penalty of up to $52,500. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. Potential concerns arise as the severity of penalties in this particular regulatory context is unclear due to the lack of information in the statement of compatibility.

1.145 As described above, if the penalty is considered to be 'criminal' for the purposes of international human rights law, the 'civil penalty' provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. In this case the measure does not appear to be consistent with criminal process guarantees. For example, the application of a civil rather than a criminal standard of proof raises concerns about the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

Committee comment

1.146 The preceding analysis raises questions as to the compatibility of the civil penalty with criminal process rights.

1.147 The committee draws the attention of the treasurer to its *Guidance Note 2* and seeks advice as to whether:

- **the civil penalty in the bill is 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and**

- **if the penalty is considered 'criminal' for the purposes of international human rights law, whether the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).**

Advice only

1.148 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.

Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017 [F2017L01031]

Purpose	The instrument declares Jabhat Al-Nusra 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	15 sitting days after tabling (tabled in the House of Representatives 15 August 2017 and the Senate 16 August 2017)
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**)
Status	Advice only

Background

1.149 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).

1.150 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

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.

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]

1.151 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 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]

1.152 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.

1.153 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.

1.154 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 in fact may be contested, which means

---

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.

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].

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

1.155 Australian Citizenship (IMMI 17/073: Declared Terrorist Organisation—Jabhat Al-Nusra) Declaration 2017 [F2017L01031] (the declaration) declares Jabhat Al-Nusra as a terrorist organisation for the purpose of section 35AA and section 33AA of the Citizenship Act. 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.

1.156 However, the declaration of a terrorist organisation 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

1.157 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.

1.158 Accordingly, the declaration engages and limits the range of human rights set out above at [1.151].

1.159 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.[6]

---

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

6 See, Explanatory Statement (ES), Statement of Compatibility (SOC) 1-7.

1.160 The committee has also raised concerns in relation to the declaration of other organisations for the purposes of section 33AA of the Citizenship Act.[7]

Committee comment

1.161 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, concluded that the measure was likely to be incompatible with multiple human rights.

1.162 The effect of the current instrument is to expand the class of persons to which these provisions may apply. The preceding analysis indicates that 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.

1.163 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*.

1.164 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.

7 See, Parliamentary Joint Committee on Human Rights, *Report 7 of 2016*, 51-54.

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) [F2017L00991]

Purpose	Replaces schedule 1 of the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to provide a new list of specified 'UN sanction enforcement laws' to reflect the making of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment (2017 Measures No.1) Regulations 2017
Portfolio	Foreign Affairs and Trade
Authorising legislation	*Charter of the United Nations Act 1945*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and the Senate 8 August 2017)
Rights	Fair trial; quality of law; liberty (see **Appendix 2**)
Status	Advice only

Background

1.165 The committee previously examined offence provisions arising out of sanctions regulations on a number of previous occasions.[1] The previous human rights assessment of such regulations noted that proposed criminal offences arising from the breach of such regulations raised concerns in relation to the right to a fair trial and the right to liberty. Specifically, the offences did not appear to meet the quality of law test, which provides that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

Offences dealing with export and import sanctioned goods.

1.166 Schedule 1 of the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 (the 2008 Declaration), defines various regulations as 'UN sanction enforcement laws'. The effect of this is to make a breach of those regulations a criminal offence under the *Charter of the United Nations Act 1945* (the United Nations Act). Accordingly, a person commits an offence under the United Nations Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the regulations set out in schedule 1 of the 2008 Declaration. This is

1 See, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 11; *Thirty-Seventh Report of the 44th Parliament* (19 April 2016); *Report 9 of 2016* (22 November 2016) 56; *Report 7 of 2017* (8 August 2017) 21.

then punishable by up to 10 years' imprisonment and/or a fine of up to 2500 penalty units (or $450 000).

1.167 The Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 2) (the 2017 declaration) amends schedule 1 of the 2008 Declaration and the list of regulations defined as 'UN sanction enforcement laws'.

Compatibility of the measure with human rights

1.168 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings. Article 9 of the ICCPR protects the right to liberty including the right not to be arbitrarily detained. The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.169 Human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

1.170 By amending the list of regulations which constitute 'UN sanction enforcement laws' and consequently making a breach of those regulations a criminal offence under the United Nations Act, the measure engages and may limit the right to liberty. This is because they may result in a penalty of imprisonment.

1.171 As the definition of 'UN sanction enforcement laws' may lack sufficient certainty, the measure engages the right not to be arbitrarily detained and the right to a fair trial. For example, the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 (2008 DPRK regulations) is listed in schedule 1 as a 'UN sanction enforcement law'. Breach of these 2008 DPRK regulations is accordingly a criminal offence under the United Nations Act. However, the definition of 'export sanctioned goods', which is an important element of whether a person has engaged in prohibited conduct such as export, import or supply under the 2008 DPRK regulations, may be determined by reference to goods 'mentioned' in five listed documents.[2]

1.172 Alternatively, the Minister for Foreign Affairs may by legislative instrument specify other 'goods mentioned in a document' to be prohibited for export to, or importation from, the Democratic People's Republic of Korea (DPRK).[3] The Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents)

2 2008 Korea regulations section 5.

3 2008 Korea regulations section 5(1)(c).

Instrument 2017 [F2017L00539] (DPRK list) is such an instrument. The previous human rights assessment of the DPRK list noted that the list incorporates documents, including letters and information circulars, into the definition of 'export and import sanctioned goods' for the purposes of prohibited conduct in the 2008 DPRK regulations. Accordingly, the previous human rights analysis stated that as the definition of an important element of offences is determined by reference to goods 'mentioned' in the listed documents, the offence appears to lack a clear legal basis as the definition is vaguely drafted and imprecise.[4] This raises specific concerns that, by making a breach of such regulations a criminal offence, the application of such an offence provision may not be a permissible limitation on the right to liberty as it may result in arbitrary detention.

1.173 In this respect it is noted that measures limiting the right to liberty must be precise enough that persons potentially subject to the offence provisions are aware of the consequences of their actions.[5] The United Nations Human Rights Committee has also noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.[6]

1.174 Despite the human rights concerns raised in the committee's previous reports, the statement of compatibility merely states that the measures in the declaration 'do not engage, and are therefore compatible with, the human rights'.[7] The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

1.175 The committee notes that the statement of compatibility for the declaration provides no assessment of compatibility with the right to a fair trial, the right to liberty, and quality of law test.

1.176 The committee requests that statements of compatibility for such regulations going forward contain assessment of human rights compatibility in accordance with *Guidance Note 1*.

1.177 Noting the human rights concerns identified in the preceding analysis in relation to the Declaration, and the committee's previous assessment of related regulations, the committee draws the human rights implications of the Declaration to the attention of the Parliament.

---

4 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) 21.

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

6 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of persons)*, (16 December 2014) [22].

7 Statement of compatibility 1.

Commission of Inquiry (Coal Seam Gas) Bill 2017

Purpose	Seeks to establish a Commission of Inquiry into the coal seam gas industry in Australia
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives, 4 September 2017
Rights	Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see **Appendix 2**)
Status	Advice only

Requirement to provide evidence that may incriminate an individual

1.178 The Commission of Inquiry (Coal Seam Gas) Bill 2017 (the bill) seeks to establish a Commission of Inquiry (Commission) into the coal seam gas industry in Australia and for related purposes. The bill would invest the commission with the full powers of a royal commission, as set out in the *Royal Commissions Act 1902* (RC Act).[1]

1.179 Section 6A of the RC Act provides that a person appearing as a witness for a commission is not excused from answering a question on the ground that the answer might tend to incriminate that person. Section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies, including the police and the Director of Public Prosecutions.

Compatibility of the measure with the right not to incriminate oneself

1.180 Specific guarantees of the right to a fair trial in the determination of a criminal charge, guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR), include the right not to incriminate oneself (article 14(3)(g)).

1.181 These rights are directly relevant where a person is required to give information to a commission of inquiry which may incriminate them and that incriminating information can be used either directly or indirectly by law enforcement agencies to investigate criminal charges. Adopting the powers of a royal commission, which include a power to require a witness to answer questions even if it may incriminate them, engages and limits the right not to incriminate oneself. The right not to incriminate oneself may be subject to permissible limitations where the measure pursues a legitimate objective, and is rationally connected to, and proportionate to achieving, that objective.

1.182 On a number of occasions previously, the committee has outlined serious human rights concerns in relation to the powers of royal commissions including in

1 See proposed section 11.

relation to a previous bill introduced by the legislation proponent.[2] However, the statement of compatibility does not address the limitation on the right not to incriminate oneself, but instead states that, by applying the provisions of the RC Act, the bill:

> …imports the same rights and protections that are given to witnesses in Commonwealth Royal Commissions and judicial trials generally, which have been found to be compatible with human rights and freedoms.

1.183 It is therefore unclear on what basis the statement of compatibility claims that these powers have been found to be compatible with human rights. It is further noted that powers of royal commissions are different to judicial processes where ordinarily a person is not required to provide information that may tend to incriminate themselves.

1.184 Additionally, while section 6A of the RC Act provides a 'use' immunity for witnesses compelled to answer questions, the bill does not appear to provide a 'derivative use' immunity in relation to self-incriminating evidence. Use and derivative use immunities prevent compulsorily disclosed information (or anything obtained as an indirect consequence of making a compulsory disclosure) from being used in evidence against a witness.[3] While the inclusion of both use and derivative use immunities is relevant to an assessment of the proportionality of any measure that limits the right not to incriminate oneself, they are not the only factors that may be relevant to whether the limitation is the least rights restrictive approach to achieving a legitimate objective.

Compatibility of the measure with the right to privacy

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

1.186 By applying the RC Act offence for failure to appear as a witness and answer questions, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy.

1.187 While the right to privacy may be subject to permissible limitations in a range of circumstances, this particular limitation on the right to privacy was not addressed

---

2 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 14-18; *Thirty-Eight Report of the 44th Parliament* (3 May 2016) 21-26; *Report 4 of 2017* (9 May 2017), 28-34, 42-45, 66-69.; *Report 6 of 2017* (20 June 2017) 35-48.

3 A derivative use immunity prevents the use of material that has been compulsorily disclosed to 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.' See *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

in the statement of compatibility. 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.

Contempt of Commission

1.188 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.[4]

1.189 Section 6O of the RC Act provides that a person commits an offence if they:

- intentionally insult or disturb a royal commission;
- interrupt the proceedings of a royal commission;
- use any insulting language towards a royal commission;
- by writing or speech use words false and defamatory of a royal commission; or
- are in any manner guilty of any intentional contempt of a royal commission.

1.190 The penalty for the offence is two hundred dollars or imprisonment for three months.

Compatibility of the measure with the right to freedom of expression and the right to freedom of assembly

1.191 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate. It protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression. The right to peaceful assembly is the right of people to gather as a group for a specific purpose.

1.192 On a number of occasions previously, the committee has outlined potential human rights concerns in relation to the contempt of commission powers.[5] As applied by the bill, the prohibition of any wilful disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of expression and the right to freedom of assembly. These rights may be subject to permissible limitations where the measure pursues a legitimate objective, is rationally connected to, and proportionate to achieving, that objective. However, the statement of compatibility

4 See proposed section 11.

5 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) 14-18; *Thirty-Eight Report of the 44th Parliament* (3 May 2016) 21-26; *Report 4 of 2017* (9 May 2017), 28-34, 42-45, 66-69.; *Report 6 of 2017* (20 June 2017) 35-48.

does not provide any analysis or justification for the limitation on the freedom of expression and the right to freedom of assembly.

1.193 It is not clear whether the restriction imposed may have the effect of criminalising legitimate expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger that the provisions may limit legitimate criticism of or objection to the Commission and its activities.

Issue of arrest warrants by the Commission

1.194 As set out above, the bill would invest the commission with the full powers of a royal commission, as set out in the RC Act.[6]

1.195 Section 6B of the RC Act provides that if a person served with a summons to attend before a royal commission as a witness fails to attend in accordance with the summons, a President, Chair or Commissioner may issue a warrant to arrest the person. This warrant authorises the arrest of the witness, the bringing of the witness before the Commission and the detention of the witness in custody for that purpose until the witness is released by order of the member.

Compatibility of the measure with the right to liberty

1.196 The right to liberty, which prohibits arbitrary detention, requires that the state should not deprive a person of their liberty except in accordance with law. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability.

1.197 Empowering the Commission to issue arrest warrants and to authorise the detention of a witness, rather than requiring application to a court, engages and limits the right to liberty. As noted above, the committee has previously raised serious human rights concerns in relation to the powers of royal commissions on a number of occasions.[7] The statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures.

---

6 See proposed section 11.

7 The committee has previously sought further information as to whether the arrest powers in the *Royal Commissions Act 1902* are compatible with the prohibition against arbitrary detention; see Parliamentary Joint Committee on Human Rights, *Third Report of 2013* (13 March 2013) 48; and *Seventh Report of 2013* (5 June 2013) 91-92; *Report 4 of 2017* (9 May 2017), 42-45. See also the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework (ALRC Report 111)* (10 February 2010) [11.48] and Recommendation 11-3.

Committee comment

1.198 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the parliament.

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

Marriage Law Survey (Additional Safeguards) Bill 2017;

Advance to the Finance Minister Determination (No. 1 of 2017‑2018) [F2017L01005];

Census and Statistics (Statistical Information) Direction 2017 [F2017L01006]; and

Census and Statistics (Statistical Information) Amendment Direction 2017 [F2017L01041]

Purpose	Introduces the framework for the marriage law postal survey including a range of additional safeguards to support the conduct of the Australian marriage law postal survey; an advance to the Finance Minister which will be made available to the Australian Bureau of Statistics to undertake the marriage law survey; and a direction by the treasurer to the Australian Statistician to conduct the marriage law survey
Portfolio	Treasury; Finance
Introduced	Marriage Law Survey (Additional Safeguards) Bill 2017: House of Representatives and Senate, 13 September 2017. The bill was passed in the House of Representatives and Senate, and received Royal Assent, on 13 September 2017. Advance to the Finance Minister Determination: Tabled in House of Representatives 9 August 2017, Senate 10 August 2017 (exempt from disallowance). Census and Statistics (Statistical Information) Direction 2017 (as amended): Tabled in House of Representatives 17 August 2017, Senate 4 September 2017 (exempt from disallowance).
Rights	Multiple rights (see **Appendix 2**)
Status	Advice only

Engagement of human rights in the marriage law survey

1.200 The Marriage Law Survey (Additional Safeguards) Bill 2017 (the bill) introduces a range of measures to support the conduct of the Australian marriage law postal survey. The bill was passed in the House of Representatives and Senate, and received Royal Assent, on 13 September 2017. The Advance to the Finance Minister Determination (No. 1 of 2017-2018) provides for an advance to the Minister for Finance of $122 million which is to be made available to the Australian Bureau of Statistics (ABS) to conduct a marriage law survey in which Australians will be asked to

express a view about whether the law should be changed to allow same sex couples to marry. The Census and Statistics (Statistical Information) Direction 2017 and the Census and Statistics (Statistical Information) Amendment Direction 2017 make directions to the Australian Statistician to collect and publish on or before 15 November 2017 statistical information on the marriage law survey.

1.201 In relation to the bill, as acknowledged in the statement of compatibility, a number of the measures in the bill engage human rights, including the right to freedom of expression and the right to equality and non-discrimination.[1] A number of the limitations the bill places on these rights are likely to be permissible under international human rights law insofar as they are prescribed by law, pursue a legitimate objective, are rationally connected to the achievement of that objective, and are proportionate. For example, the requirement in section 6 requiring all advertisements to identify the person or entity authorising the advertisement restricts anonymous political speech and may limit the right to privacy, but is likely to be a proportionate limitation to the legitimate objectives of facilitating transparency and public confidence in the survey process.[2]

1.202 Similarly, in prohibiting conduct which may vilify, intimidate or threaten to cause harm to persons on the basis of their expression of views in relation to the marriage law survey, or their religious conviction, sexual orientation, gender identity or intersex status, section 15 of the bill engages and promotes the right to equality and non-discrimination and the right to freedom of religion. It also engages and limits the right to freedom of expression, however this aspect of the bill is likely to be a permissible limitation on the right to freedom of expression as it pursues a legitimate objective of protecting rights and freedoms of others, and appears to be rationally connected with and proportionate to that objective.[3] As the committee has previously reported, there is scope under international law for Australia to determine the appropriate balance between the obligation to provide protections against serious forms of discriminatory speech and the right to freedom of expression.[4]

1.203 In relation to the legislative instruments, the statement of compatibility for each of the instruments states that the instruments do not engage or otherwise

---

1 Statement of Compatibility (SOC) 5.

2 See SOC 5.

3 The Committee has recently considered the issue of freedom of speech in the context of racial discrimination, which includes a general discussion on the international human rights law framework on freedom of expression: see Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017).

4 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 50.

affect any applicable rights or freedoms. However, the question in the marriage law survey concerns possible amendments to the definition of 'marriage' in the *Marriage Act 1961,* specifically whether the *Marriage Act 1961* should be changed so as to allow same-sex couples to marry. The committee has previously noted that by restricting marriage to being between a man and a woman, the existing law[5] appears to directly discriminate against same-sex couples on the basis of sexual orientation.[6] As the advance to the finance minister provides the funding through which the marriage law survey can be undertaken, and the process through which the ABS may collect data on the question of whether same-sex couples should be able to marry, the right to equality and non-discrimination may be engaged. In this respect, the committee notes that it has previously considered how the funding of a plebiscite in relation to same-sex marriage may engage and limit these rights.[7]

1.204 The remainder of the analysis below addresses specific human rights issues that arise from the bill.

Obligations on broadcasters to give reasonable opportunities to broadcast opposing views on marriage law survey matters

1.205 The bill introduced a series of obligations on broadcasters to give reasonable opportunities to broadcast opposing views in relation to the marriage law survey for a specified time. Section 11 requires that, during the limitation period,[8] broadcasters which broadcast 'marriage law survey matter' expressing a view in relation to the 'marriage law survey question'[9] must give a reasonable opportunity to a representative of an organisation that holds the opposite view. 'Marriage law survey matter' is defined in section 5 to mean the following:

> (a) matter commenting on same-sex marriage, the marriage law survey process or the marriage law survey question (other than matter printed or published by the Statistician);

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

6 See Parliamentary Joint Committee of Human Rights, *Report 7 of 2016* (11 October 2016) 25; *Report 8 of 2016* (9 November 2016) 66-67. See also the discussion of the international human rights law position in relation to same-sex marriage in Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 113-114; and *Report 8 of 2016* (9 November 2016) 35-44.

7 See Parliamentary Joint Committee of Human Rights, *Report 7 of 2016* (11 October 2016) 26; *Report 8 of 2016* (9 November 2016) 67-68.

8 'Limitation period' means the period beginning on the day the Act commenced (13 September 2017), and ending on either 15 November 2017 or, if the results are published prior to that date, the day the information is published: section 5 of the bill.

9 'Marriage law survey question' is defined in section 5 to mean the question of whether the law should be changed to allow same-sex couples to marry.

(b) matter stating or indicating the marriage law survey question (other than matter printed or published by the Statistician);

(c) matter referring to a meeting held or to be held in connection with same-sex marriage, the marriage law survey process or the marriage law survey question.

1.206 According to the explanatory memorandum, the effect of section 11 is to require broadcasters to give representatives from both sides of the same-sex marriage debate a reasonable opportunity to broadcast material while the marriage law survey is underway.[10]

1.207 The requirements are similar to those imposed on broadcasters during elections by the *Broadcasting Services Act 1992* (Broadcasting Act). Under the Broadcasting Act, broadcasters must give reasonable opportunities for the broadcasting of election matter to all political parties contesting the election period. However, this is limited to political parties that were represented in either House of Parliament immediately before the election.[11] 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 to matters being put to the electors.[12]

Compatibility of the measure with multiple rights

1.208 The statement of compatibility states that the bill would promote the right to freedom of opinion and expression 'by ensuring that broadcasters cannot selectively broadcast only one side of the debate, allowing both sides of the debate the opportunity to broadcast in relation to the survey'.[13]

1.209 The right to freedom of expression requires states parties to the International Covenant on Civil and Political Rights (ICCPR) to ensure that broadcasting services to the public operate in an independent manner and should guarantee their editorial freedom.[14] While enabling both sides of the same-sex marriage debate to have a reasonable opportunity to broadcast material may serve a legitimate objective of promoting freedom of expression and the right to participate in public affairs, it is a limitation on editorial freedom and therefore is a limitation on the right to freedom of expression.

1.210 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public

10 Explanatory Memorandum (EM) [60].

11 Clause 3 of Schedule 2 to the *Broadcasting Services Act 1992.*

12 Clause 1 of Schedule 2 to the *Broadcasting Services Act 1992*

13 SOC [8].

14 See Human Rights Committee, *General Comment No.34, Article 19: Freedom of Opinion and Expression*, [16].

order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.

1.211 The limitation on the freedom of expression is acknowledged by the minister in the statement of compatibility as follows:

> While this requirement may affect 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 opinion and expression.[15]

1.212 In determining the proportionality of a measure, it is relevant whether there are effective safeguards or control over the measures. In this respect, the statement of compatibility cites the time-limited nature of the measure. In contrast, in addition to a time-limit, the requirements under the Broadcasting Act during elections include an additional safeguard insofar as broadcasting opportunities are only required for political parties already represented in parliament, the consequence of which is that broadcasters are not required to broadcast the advertisements of organisations unlikely to be elected. No equivalent safeguard is included in the bill. It is also noted that the definition of 'marriage law survey' is quite broad as it is not restricted to the question of whether the law should be amended, but also includes any matter commenting on same-sex marriage more broadly.

1.213 Further, while the statement of compatibility acknowledges that the rights of equality and non-discrimination are engaged by the bill, there is no specific discussion of the limitations on the right to equality and non-discrimination that arise from the obligations imposed on broadcasters. In this respect, the committee has previously reported that requiring broadcasters to give a reasonable opportunity to representatives of organisations opposed to same sex marriage may limit the right to equality and non-discrimination.[16] The committee noted as an example that the requirement 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.[17] The committee has previously noted that campaigns in favour of changing the law to allow same-sex marriage could lead to vilification of persons on

15 SOC [8].

16 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 25; *Report 8 of 2016* (9 November 2016) 66-67. It is noted that concluding remarks on the Plebiscite (Same-Sex Marriage) Bill 2016 in *Report 8 of 2016* are based on the information available at the time of finalising the committee's report, as the Attorney-General did not provide a response to the committee's request for advice in *Report 7 of 2016* by 26 October 2016.

17 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 28.

the basis of religious belief.[18] It is noted that the bill includes a safeguard in the form of a provision prohibiting vilification on the basis of a person's expression of views in relation to the marriage law survey, or their religious conviction, sexual orientation, gender identity or intersex status (discussed above), which may provide an effective safeguard or control over the measure.

Committee comment

1.214 The committee notes that the obligations on broadcasters to give reasonable opportunities to broadcast opposing views on marriage law survey matters engage the right to freedom of expression and the right to equality and non-discrimination.

1.215 The committee draws the human rights implications of the bill to the attention of parliament.

18 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 26; *Report 8 of 2016* (9 November 2016) 67-68.

Bills not raising human rights concerns

1.216 Of the bills introduced into the Parliament between 11 and 14 September, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017;
- Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017;
- Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Bill 2017;
- Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017;
- Customs Amendment (Anti-Dumping Measures) Bill 2017;
- Customs Amendment (Safer Cladding) Bill 2017;
- Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017;
- Fair Work Amendment (Terminating Enterprise Agreements) Bill 2017;
- Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017;
- Lands Acquisition Amendment (Public Purpose) Bill 2017;
- Medicinal Cannabis Legislation Amendment (Securing Patient Access) Bill 2017;
- Parliamentary Business Resources Amendment (Voluntary Opt-out) Bill 2017;
- Renewable Fuel Bill 2017;
- Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017;
- Therapeutic Goods Amendment (2017 Measures No. 1) Bill 2017;
- Therapeutic Goods (Charges) Amendment Bill 2017;
- Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2017;
- Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017;
- Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 6) Bill 2017.

Chapter 2

Concluded matters

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

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

Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 [F2017L00743]; and Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017 [F2017L00744]

Purpose	To implement a pause in the indexation of the amounts of the basic subsidy payable to approved providers of aged care services during 2017-2018
Portfolio	Aged Care
Authorising legislation	*Aged Care Act 1997; Aged Care (Transitional Provisions) Act 1997*
Last day to disallow	15 sitting days after tabling (tabled 8 August 2017). Notice of motion to disallow currently must be given by 16 October 2017.
Rights	Health; adequate standard of living (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 [F2017L00743] and the Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017 [F2017L00744] in its *Report 9 of 2017*, and requested a response from the Minister for Aged Care by 20 September 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 5 October 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 2-5.

Pause in the indexation of the subsidy payments to aged care providers

2.5 Under the *Aged Care Act 1997* persons approved to provide aged care services (approved providers) may be eligible to receive subsidy payments in respect of aged care services they provide.

2.6 The Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 amends the Aged Care (Subsidy, Fees and Payments) Amendment Determination 2014 so as to implement a pause in the indexation of Aged Care Funding Instrument (ACFI) amounts of basic subsidy payable to approved providers of aged care services during 2017-2018. The Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination implements the same pause in the indexation for continuing care recipients.[2]

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

2.7 The right to health includes the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life. The right to an adequate standard of living requires that the state take steps to ensure the adequacy and availability of food, clothing, water and housing for all people in Australia.

2.8 Australia also has obligations under the Convention on the Rights of Persons with Disabilities to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, and to take appropriate steps to safeguard and promote the right of persons with disabilities to an adequate standard of living.

2.9 Australia has obligations to progressively realise the right to health and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. A retrogressive measure is a type of limitation on an economic, social or cultural right.

2.10 The initial analysis stated that the effect of pausing the indexation of the amount of the subsidy will be to reduce over time the value of the subsidy in real terms, which could consequently increase the cost of aged care services. This may represent a limitation on, or backward step in, the level of attainment of the right to the enjoyment of the highest attainable standard of physical and mental health. For example, reducing the value of the subsidy over time to aged care providers may

2 Continuing care recipients are those who entered a care service before 1 July 2014 and since that time have not left the service for a continuous period of more than 28 days (other than because the person is on leave), or before moving to another service, have not made a written choice to be subject to the new rules relating to fees and payments that took effect on 1 July 2014.

impact on the ability of those providers to provide care and services to persons who require assistance. As those receiving aged care from approved providers may be in a condition of frailty or disability, Australia's human rights obligations to protect the right to health and adequate standard of living of persons with disabilities are also relevant.

2.11 A limitation on the right to health and the right to an adequate standard of living may be permissible provided that it is justified; that is, it addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

2.12 The statement of compatibility for each of the determinations provides that the pause in the indexation of the amount of the aged care subsidy is compatible with human rights 'as it promotes the human right to an adequate standard of living and the highest attainable standard of physical and mental health'.[3] The statement of compatibility further states that:

> The legislative instrument continues the rate of payment of the amount of basic subsidy payable to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.[4]

2.13 As the initial analysis noted, the statement of compatibility does not address whether pausing the indexation of the amount of the subsidy constitutes a retrogressive measure, and does not provide any information to justify such a limitation.

2.14 In relation to the objective of the measure, the statement of compatibility explains the measure is 'to ensure the sustainability of existing funding arrangements'.[5] It is recognised that ensuring that funding for aged care is sustainable is an important objective and that the state must give priority to ensuring the right to health of the least well-off members of society.

2.15 However, no evidence has been provided in the explanatory statement or statement of compatibility that demonstrates why the existing funding arrangement is not sustainable.

2.16 Further, no information is provided in the statement of compatibility as to whether the limitation is proportionate to the achievement of the stated objective, and whether the measure is the least rights restrictive alternative. In this respect, it was also noted that information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any

---

3 Statement of Compatibility (SOC) 4

4 SOC 4.

5 SOC 4.

anticipated financial impact on the provision of aged care services, are likely to be relevant.

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

- what effect the pausing of indexation will have on the level of attainment of the right to health and the right to an adequate standard of living;
- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the measure is otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) the objective; and
- whether the limitation is reasonable and proportionate for the achievement of that objective (including whether there are any safeguards in relation to the measure, information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any anticipated financial impact on the provision of aged care services).

Minister's response

2.18 In relation to what effect the pausing of indexation will have on the level of attainment of the right to health and the right to an adequate standard of living, the minister's response states:

> The Australian Government remains the principal funder of aged care, providing estimated funding of $17.5 billion in 2016-17 to support aged care consumers and the sector. Furthermore, Government spending on aged care will continue to grow over future years and is expected to reach over $22.3 billion by 2020-21, which will protect residential aged care recipients' rights to health and their rights to an adequate standard of living.
>
> Funding to the residential aged care sector will continue to grow in aggregate at an average of 5.1 per cent per annum over the forward estimates.
>
> Furthermore, legislation requires Government-subsidised aged care homes meet standards to ensure that quality care and services are provided to all residents, including that there are adequate numbers of appropriately skilled staff to meet the care needs of residents. These requirements are monitored by the Australian Aged Care Quality Agency in its assessment of an aged care facility against the standards.

2.19 The minister's response indicates that, while the pausing of the indexation of the subsidy appears to be a retrogressive measure, the funding of residential aged care overall appears to be growing and there is monitoring in place to ensure that quality care and services standards are met. This indicates that, on balance, it

appears that the effect of pausing indexation does not appear to impact the level of attainment of the right to health and the right to an adequate standard of living.

2.20 In response to whether there is evidence or reasoning that establishes the stated objective of 'ensur[ing] the sustainability of existing funding arrangements' addresses a pressing or substantial concern, the minister's response states:

> The indexation pause, as legislated by the two Determinations, was announced at the Mid Year Economic Outlook 2016, and was in response to sector concerns that savings measures announced at Budget would have a disproportionate impact across the aged care sector. Following consultation with the sector, the Government replaced some of the previously announced changes relating to the delivery of complex pain management with an indexation pause for all Aged Care Financing lnstrume[n]t (ACFI) domains in 2017-18, and a 50 per cent indexation pause on the Complex Health Care domain in 2018-19. This change was to ensure the impacts of the original Budget measures were more evenly distributed amongst the aged care sector.
>
> The original changes were precipitated by an increase over the forward estimates for residential care expenditure by $3.8 billion up to 2019-20 due to higher than estimated growth in ACFI claiming (in the context of total estimated residential care expenditure to 2019-20 of just over $50 billion).
>
> As a responsible fiscal manager, Government had to take action to ensure future growth in expenditure occurred at a sustainable rate. The 2016-17 Budget measures reduced the unexpected growth by $2 billion over the forward estimates. This was less than the $3.8 billion amount that Government had increased its previous estimated expenditure. This is reflected in continuing expenditure growth going forward.
>
> Similar measures, including an indexation freeze, were taken in 2012-13 to attempt to bring ACFI expenditure back in line with estimates.

2.21 As noted in the initial analysis, it is likely that ensuring that funding for aged care is sustainable would be a legitimate objective under international human rights law, and priority must be given to ensuring the right to health of the least well-off members of society. Further, the minister's response indicates that there had been unexpected growth in expenditure (initially $3.8 billion, but reduced to $2 billion), which provides reasoning and evidence that the stated objective addresses a pressing or substantial concern.

2.22 In relation to how the measure is effective to achieve the stated objective, the minister's response states:

> The ACFI measures were designed to help protect the integrity of the residential aged care sector funding model, while ensuring the highest levels of funding continued to be allocated to the residents with the highest care needs.

> Removing some original components of the ACFI changes and replacing them with a two staged indexation pause meant that the impact on the average ACFI subsidy was more evenly distributed across providers, as the indexation pause applies across all three ACFI domains. The revised package provides more certainty for the sector and will deliver sustainable expenditure growth over the short term while paving the way for longer term reform options. The Government has commenced consulting with the sector on long term options.

2.23 As to whether the limitation is reasonable and proportionate for the achievement of the objective, the minister's response states:

> All Commonwealth funded residential aged care providers will be impacted by the indexation pause of the ACFI basic subsidy. The Government recognised that small rural and remote, and homeless providers may be disproportionately affected by the impacts of the ACFI changes, and increased the viability supplement as a safeguard. As a result around 350 eligible services received a flat rate increase of an additional $2.12 per care recipient per day from 1 July 2017. For a 40 bed service, this equates to around $30,000 a year.
>
> The measures are reasonable and proportionate in that they aim to reduce the rate of growth in funding to sustainable levels, with the $2 billion impact of the 2016-17 Budget measure less than the $3.8 billion increase in forward estimates expenditure. Funding to the residential care sector will continue to grow in aggregate at an average of 5.1 per cent over the forward estimates.

2.24 The minister's response indicates that the measure was enacted in a manner designed to ensure that the changes would be evenly distributed and would not disproportionately impact small rural and remote and homeless providers. Further, the minister's response has clarified that funding to the residential care sector will continue to grow in aggregate over the forward estimates. On balance, therefore, it appears that the measure is likely to be compatible with the right to health and the right to an adequate standard of living.

Committee response

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

2.26 In light of the further information provided, the committee considers that the measure is likely to be compatible with the right to health and the right to an adequate standard of living. This information would have been of assistance in the statement of compatibility.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

Purpose	Seeks to introduce various amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Financial Transaction Reports Act 1988*, including the introduction of civil penalty provisions for failing to notify Australian Transaction Reports and Analysis Centre (AUSTRAC) of a change in circumstances, failing to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia, or providing a registrable digital currency exchange service if not registered
Portfolio	Justice
Introduced	House of Representatives, 17 August 2017
Rights	Criminal process rights; fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see **Appendix 2**)
Previous report	10 of 2017
Status	Concluded examination

Background

2.27 The committee first reported on the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 (the bill) in its *Report 10 of 2017*, and requested a response from the Minister for Justice by 27 September 2017.[1]

2.28 The minister's response to the committee's inquiries was received on 26 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.29 The bill proposes making four provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML Act) into civil penalty provisions. Section 175 of the AML Act states that the maximum pecuniary penalty payable by an individual for a civil penalty provision is 20,000 penalty units (or $4.2 million).

2.30 Specifically, the proposed amendments would mean that an individual could be liable to a civil penalty of up to $4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's

1 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) 2-4.

registration;[2] a failure to declare an amount of currency or a bearer negotiable instrument when leaving or entering Australia;[3] or providing a registrable digital currency exchange service if not registered.[4]

Compatibility of the measure with criminal process rights

2.31 Civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, if a civil penalty provision is in substance regarded as 'criminal' for the purposes of international human rights law, it will engage criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.32 It is settled that a penalty or sanction may be 'criminal' for the purposes of the ICCPR, even where it is classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties. The classification of a penalty as 'criminal' under human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

2.33 As noted in the initial human rights analysis, the statement of compatibility does not identify that any rights are engaged by the civil penalty provisions and has not addressed whether they may be classified as 'criminal' for the purposes of international human rights law.

2.34 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, the penalty is classified as 'civil' in the bill, however as stated above, this is not determinative of its status under international human rights law.

2.35 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be criminal if the purpose of the penalty is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). In this instance, the purpose of the penalty is identified as to deter, however it appears to be restricted to the specific regulatory context of financial regulation.[5]

---

2 See Schedule 1, item 20, proposed subsection 76P(3).

3 See Schedule 1, item 73, proposed subsection 199(13) and item 75, proposed subsection 200(16).

4 See Schedule 1, item 20, proposed subsection 76A(11).

5 Explanatory Memorandum (EM) 19.

2.36 The third step is to consider the severity of the penalty. It is here, as the previous analysis stated, that potential concerns arise. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual could be exposed to a penalty of up to $4.2 million. It was noted that these are very significant penalties and raise the concern that the provisions set out in [2.30] may be 'criminal' for the purposes of international human rights law.

2.37 As set out above, the consequence of this would be that the civil penalty provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. However, in this case the measure does not appear to be consistent with criminal process guarantees. For example, the application of a civil rather than a criminal standard of proof raises concerns in relation to the right to be presumed innocent. The right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

2.38 The committee therefore drew the attention of the minister to its *Guidance Note 2* and sought the advice of the minister as to whether:

- the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and
- if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measures could be amended to accord with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1))).

Minister's response

2.39 In relation to the civil penalties in the bill, the minister's response states:

> It is well recognised that money laundering can be a very lucrative crime, and therefore penalties for behaviour that may allow money laundering to occur need to be sufficiently high to be an effective deterrent. All civil penalty provisions in the AML/CTF Act carry a maximum fine of 100,000 penalty units for corporations and 20,000 penalty units for individuals. Section 175 of the AML/CTF Act, containing the civil penalties framework, applies uniformly across the Act; as such, the severity of the maximum

penalty is not determinative but rather its application to the circumstances of the offence. The scope of the civil penalties framework reflects the range of factors (e.g. the amount of money laundered through a reporting entities' services) that could be present in relation to a particular offence. For this reason, the appropriate penalty is a matter for judicial discretion. In determining the penalty, the Federal Court must consider a range of factors in section 175, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

The significance of the offences that have been highlighted by the Committee should not be understated. For example, failure to notify AUSTRAC of changes in circumstances that could materially affect a person's registration can have serious consequences. Changes in key personnel or beneficial ownership of a digital currency exchange could expose the business to money laundering and terrorism financing risks. Proper notification ensures that AUSTRAC has correct information to consider the ongoing suitability for that business to provide designated services, to consider whether the risk of ML/TF continues to be sufficiently mitigated and also to ensure that valuable information that may be of relevance to law enforcement and other relevant agencies is accurate.

The proposed civil penalty provisions in the Bill are consistent with other existing provisions in the Act. This is in accordance with the Guide to Framing Commonwealth Offences (The Guide), which notes that 'a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question'. These businesses have the potential to generate significant criminal proceeds far exceeding the

maximum penalties available under the standard ratio. The Guide contemplates the use of higher penalties to combat corporate or white collar crime to counter the potential financial gains from committing an offence.

2.40 The minister's response provides further information as to the nature and purpose of the penalty. It is noted that the primary purpose of the relevant penalties is to deter what may be lucrative crime. However, it is also relevant that the penalties are limited to a specific regulatory context of financial regulation and relate to conduct that creates the potential for significant financial gains. Notwithstanding this regulatory context, the potential application of such a large penalty ($4.2 million) on an individual continues to raise significant questions about whether this particular measure would be considered 'criminal' for the purposes of international human rights law. As noted in *Guidance Note 2,* even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered. The purpose of the penalties of deterring crime, coupled with the severity of the penalties, suggests that the civil penalties may be characterised 'criminal' under international human rights law.

2.41 As noted in *Guidance Note 2* and in the initial analysis, this does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply. As noted in the initial analysis, the application of a civil rather than a criminal standard of proof may be incompatible with the right to be presumed innocent, as the right to be presumed innocent generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. The minister's response does not address these criminal process rights, and whether the limitations on these rights are permissible.

Committee response

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

2.43 The committee considers that the civil penalty may be characterised as 'criminal' for the purposes of international human rights law.

2.44 This means that the criminal process rights contained in articles 14 and 15 of the ICCPR may apply. The minister's response did not address this issue, and therefore the committee is unable to conclude that the measure is compatible with these rights.

Australian Border Force Amendment (Protected Information) Bill 2017

Purpose	This bill seeks to amend the *Australian Border Force Act 2015* to repeal the definition of 'protected information' in subsection 4(1) of the Act; remove the current requirement for bodies to which information can be disclosed and classes of information to be prescribed in the Australian Border Force (Secrecy and Disclosure) Rule 2015; and add new permitted purposes for which 'Immigration and Border Protection information' can be disclosed
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 9 August 2017
Rights	Freedom of expression; effective remedy (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.45 The committee previously examined the Australian Border Force Bill 2015 (now Act) in its *Twenty-Second Report of the 44th Parliament* and its *Thirty-Seventh Report of the 44th Parliament*.[1]

2.46 The committee first reported on the Australian Border Force Amendment (Protected Information) Bill 2017 (the bill) in its *Report 9 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 20 September 2017.[2]

2.47 The minister's response to the committee's inquiries was received on 27 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Secrecy provisions

2.48 Currently, section 42 of the *Australian Border Force Act 2015* (the Border Force Act) provides that a person commits an offence if they are, or have been, an 'entrusted person' such as an immigration and border protection worker and they

1 Parliamentary Joint Committee on Human Rights, *Twenty-Second Report of the 44th Parliament* (13 May 2015) 5 -23; *Thirty-Seventh Report of the 44th Parliament* (2 May 2016) 5 -35.

2 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 6-12.

disclose protected information.[3] 'Protected information' includes any information that was obtained by the person in their capacity as an immigration and border protection worker.[4] The offence includes limited exceptions and is subject to up to two years imprisonment.

2.49 The bill proposes replacing the current definition of 'protected information' in the Border Force Act with a new definition of 'Immigration and Border Protection Information' the disclosure of which would constitute an offence. The proposed definition of 'Immigration and Border Protection information' under proposed section 4(1) includes:

(a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;

(b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;

(c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;

(d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;

(e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;

(f) information of a kind prescribed in an instrument under subsection (7).[5]

2.50 Accordingly, the new definition narrows the type of information which, if recorded or disclosed, would make a person liable to prosecution under section 42 of the Border Force Act. However, the offence of recording or disclosing such information continues to apply to all those defined as 'entrusted persons'.

2.51 Proposed section 4(5) provides that the kind of information which is taken to prejudice security, defence or international relations includes 'information that has a

---

3 'Entrusted person' means: (a) the Secretary; or (b) the Australian Border Force Commissioner (including in his or her capacity as the Comptroller-General of Customs); or (c) an Immigration and Border Protection worker: Border Force Act section 4.

4 'Immigration and Border Protection worker' is defined broadly to include APS employees in the department; officers of state and territory governments; a person providing services to the department; a contractor performing services for the department: Border Force Act section 4.

5 See item 1, proposed section 4(1) definition of 'Immigration and Border Protection information', paragraph (a).

security classification'.[6] There is no definition in the bill of what a 'security classification' means.

Compatibility of the measure with the right to freedom of expression

2.52 The right to freedom of expression requires the state not to arbitrarily interfere with freedom of expression, particularly restrictions on political debate.

2.53 As noted in the initial human rights analysis, in the time since section 42 of the Border Force Act was introduced, concerns have been raised by United Nations (UN) supervisory mechanisms about its operation and its chilling effect on freedom of expression. The UN special rapporteur on human rights defenders indicates that the provisions are incompatible with the right to freedom of expression:

> I urge the Government to urgently review the Border Force Act's provisions that seem to be in contravention with human rights principles, including those related to the freedom of expression, and substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers.[7]

2.54 A determination in September 2016, by the secretary of the Department of Immigration and Border Protection, which exempted medical professionals from secrecy provisions, provided greater scope for such professionals to exercise freedom of expression about issues in immigration detention centres including potential human rights violations.[8]

2.55 However, the UN Special Rapporteur on the human rights of migrants, in his recent report on his mission to Australia, explains that despite this exemption, section 42 of the Border Force Act continues to have a serious impact on freedom of expression:

> Civil society organizations, whistleblowers, trade unionists, teachers, social workers and lawyers, among many others, may face criminal charges under the Australian Border Force Act for speaking out and denouncing the violations of the rights of migrants. The Special Rapporteur welcomes the fact that health professionals have recently been excluded from these provisions and hopes that this will also extend to other service providers

6 See item 5, proposed section 4(5)(a).

7 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E

8 See, Determination of Immigration and Border Protection Workers – Amendment No. 1, 30 September 2016. This amendment was made under sections 5(1)-(2) of the Border Force Act and section 33(3) of the *Acts Interpretation Act 1901* and is not required to be registered or tabled in parliament and therefore is not subject to parliamentary scrutiny.

who are working to defend the rights of migrants in a vulnerable situation.[9]

2.56 The previous analysis stated that, by narrowing the type of information the disclosure of which would constitute an offence, the proposed measures and framework in the bill appear to provide a greater scope to freedom of expression than is currently the case under section 42 of the Border Force Act. This was noted as a positive step. That the new scheme will apply retrospectively so that persons who may otherwise have committed a criminal offence will not have done so, was also noted as positive from this perspective.

2.57 However, by continuing to criminalise the disclosure of information, the proposed secrecy provisions continue to engage and limit the right to freedom of expression.

2.58 Measures limiting the right to freedom of expression may be permissible where the measure pursues a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

2.59 As identified in the initial analysis, the statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that the limitations are 'in line with the exceptions specifically envisaged… such as protection of national security, public order, or public health or morals'.[10] While generally these matters are capable of constituting legitimate objectives for the purposes of international human rights law, the statement of compatibility provides no specific information about the importance of these objectives in the context of the measure. In order to show that the measure constitutes a legitimate objective for the purposes of international human rights law, a reasoned and evidence-based explanation of why the measure addresses a substantial and pressing concern is required.

2.60 The initial analysis also stated that the statement of compatibility provides limited information as to whether the limitation imposed by the measure is rationally connected to (that is, effective to achieve) and proportionate to, these stated objectives.

2.61 In relation to the proportionality of the measure, the initial analysis raised concerns as to whether the measure is sufficiently circumscribed in respect of its stated objectives. The range of 'Immigration and Border Protection information' subject to the prohibition on disclosure remains broad, criminalising expression on a broad range of matters by a broad range of people, including Australian Public Service employees in the department; officers of state and territory governments;

---

9 François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, Thirty-fifth session, Human Rights Council, A/HRC/35/25/Add.3 (24 April 2017) [86].

10 Statement of compatibility (SOC) 16.

people providing services to the department; and contractors performing services for the department such as social workers, teachers or lawyers. As set out above at [2.49], 'Immigration and Border Protection information' is defined to include 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia' as well as a broad range of other matters including a broad power to define other types of documents as 'Immigration and Border Protection information' by legislative instrument.[11] The breadth of the current and possible definitions of 'Immigration and Border Protection information' raises concerns as to whether the limitation is proportionate.

2.62 Further, proposed section 4(5) provides that the kind of information which is taken to prejudice security, defence or international relations, includes 'information that has a security classification'.[12] The explanatory memorandum states that this 'picks up the Australian Government's *Protective Security Policy Framework*' and the security classifications 'reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information'.[13] The explanatory memorandum provides some examples of the broad range of information that has a security classification:

- new policy proposals and associated costing information marked as Protected or Cabinet-in-Confidence;
- other Cabinet documents, including Cabinet decisions;
- budget related material, including budget related material from other government departments; and
- adverse security assessments and qualified adverse security assessments of individuals from other agencies.[14]

2.63 No information is provided in the statement of compatibility as to how the application of the prohibition on disclosure to this type of information is necessary to achieve the stated objective of the measure. The initial analysis stated that this raises a concern that the measure may not be the least rights restrictive way of achieving its stated objectives and may be overly broad.

2.64 Additionally, proposed section 50A provides that if an offence against section 42 relates to information that has a security classification, a prosecution must not be initiated 'unless the Secretary has certified that it is appropriate that the

11 See item 1, proposed section 4(1) definition of 'Immigration and Border Protection information', paragraph (a).

12 See item 5, proposed paragraph 4(5)(a).

13 Explanatory memorandum (EM) 15.

14 EM 15.

information had a security classification at the time of the conduct'.[15] The explanatory memorandum states that the purpose of the provision is to ensure that a person cannot be prosecuted where 'it was not appropriate that the information had a security classification'.[16] As the initial analysis noted, this suggests that there may be circumstances where information has a security classification which was not appropriately applied. As such, proposed section 50A appears to be a relevant safeguard in relation to the operation of the measure.

2.65 However, if the Secretary does certify that the information was appropriately classified, there does not appear to be any defence on the basis that the information was inappropriately classified. As such, it does not appear that an inappropriate security classification would be a matter that a court could consider in determining whether a person had committed an offence under section 42.

2.66 Accordingly, the breadth of the measure in criminalising expression by 'entrusted persons' on the full range of topics set out in the new definition of 'Immigration and Border Protection information' raises concerns that the measure is not a proportionate limitation on freedom of expression.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and
- whether it is possible to narrow the range of information to which the offence in section 42 applies or provide greater safeguards including in relation to whether a document is inappropriately classified.

Minister's response

2.68 In relation to the objectives of the proposed legislation, the minister's response states:

> The proposed amendments in the Australian Border Force (Protected Information) Bill 2017 (the Bill) clarifies Part 6 of the *Australian Border Force Act 2015* (ABF Act), and related provisions, to reflect the original intention of the legislation. That intention was to prevent the

15 See item 21, proposed section 50A.

16 EM 18.

> unauthorised disclosure of specific types of information—the disclosure [of] which could cause harm to the public interest.
>
> The secrecy and disclosure provisions in Part 6 of the ABF Act were adapted from the now repealed *Customs Administration Act 1985* (the Customs Administration Act). Those provisions prohibited the unauthorised making of a record or disclosure of information, and was incorporated into the ABF Act. The ABF Act was designed to regulate an increasingly complex and dynamic modern border environment. The ABF Act sets a different regulatory framework to the Customs Administration Act, by seeking to prevent the unauthorised disclosure of harmful material to preserve the secrecy provisions of that earlier legislation.
>
> The amendments do not alter the original intention of the provisions but rather clarify the original intent by recalibrating the information disclosure model to make it more efficient and better suited to address the needs of the Department and its officers. Specifically, the amendments make it clear that protection is not required unless the information is a specified category of information, the disclosure of which would, or foreseeably could, cause harm to a public interest of a kind that is reasonably apparent from the particular category of that information. Crucially, the Bill provides assurance to the Australian public, business, government and our foreign partners that sensitive information provided to the department will be appropriately protected without unnecessarily hindering robust and informed public debate.

2.69 The minister's explanation that the purpose of the measure is to protect sensitive information, the disclosure of which could cause harm to the public interest, is capable of constituting a legitimate objective for the purposes of international human rights law. Introducing provisions that specify circumstances in which such disclosure can and cannot occur appears also to be rationally connected to that objective.

2.70 In relation to the compatibility of the proposed legislation with the right to freedom of expression, the minister's response states:

> The Australian Law Reform Commission Secrecy Laws and Open Government in Australia, Report 112 (December 2009) identified 506 secrecy provisions across the Commonwealth in 176 different pieces of legislation. Of those provisions, 70 per cent created criminal offences. There was either a blanket or full prohibition in 15 per cent of those pieces of legislation. The fact that there is an offence provision attached to an unauthorised or improper disclosure of information is not unique.
>
> Since the ABF Act came into effect in 2015, the law has been developing and emerging, most importantly with the additional tests added by the High Court in the McCloy test, which postdates the introduction of the legislation. The High Court's view is that freedoms of expression need to be attended to in a way that is not necessarily a blanket freedom of expression—it can be limited by legislation, but that legislation has to

balance the interests of the information to be protected with the freedom for communication.

The Department has moved to a series of six categories, rather than the previous model, which commenced with a prohibition against information sharing unless it fell into a series of permissions or exemptions. The Bill has identified, in the broad business of the Department, the types of information that warrant legitimate protection:

a) Information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;

b) Information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;

c) Information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;

d) Information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of duty of confidence;

e) Information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;

f) Information of a kind prescribed in an instrument under subsection (7).

In determining whether disclosure of information is prohibited under the amendments, a number of tests must be applied. The first test is to whom the ABF Act applies. Currently, the ABF Act applies to employees of the Department, but it also extends to Immigration and Border Protection workers including people providing a contracted service who have access to Departmental premises or systems. Since October 2016, the ABF Act has not applied to medical professionals.

The second test is consideration of the type of information that is protected. Under the amendments, there is free access and egress of information unless it comes within the above six categories of information specified in the Bill.

The third test examines whether the information falls within any of the exceptions provided for in the ABF Act. These exceptions provide a lawful means of disclosing information, even if the information is of a kind that is otherwise protected. In these circumstances, it is not an offence to disclose that information. This approach maintains the approach provided for in the ABF Act.

Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court, and the

> offence in no way limits a defendant's right to a fair trial nor limits their right to be presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. That is, any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the Criminal Code, not Part 6 of the ABF Act. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
>
> Having acknowledged that the amendment engages in the right to freedom of expression, the limitation is reasonable and proportionate to ensure Immigration and Border Protection Information is provided with the necessary level of protection, in a targeted manner, but is also able to disclose when it is appropriate to do so.

2.71 It is acknowledged that the proposed definition of 'Immigration and Border Protection information' introduced by the bill is narrower than the current definition of 'protected information' under the existing legislation. Accordingly, to this extent, the amendments introduced by the bill present a less rights-restrictive limitation on the freedom of expression than the existing law. However, as noted above, the proposed measure, by criminalising the disclosure of 'Immigration and Border Protection Information' still imposes a significant limitation on the right to freedom of expression. The minister has not provided any information in his response to address the committee's concerns in relation to the breadth of the definition of 'Immigration and Border Protection information' and the class of persons to whom the criminal offences apply.

2.72 In particular, concerns remain in relation to the broad power given to the minister by sections 4(1)(f) and 4(7) to prescribe information as 'Immigration and Border Protection information'. Specifically, the power contained in section 4(7) that the minister may, by legislative instrument, prescribe a kind of information as falling within the definition of 'Immigration and Border Protection information' if the minister is satisfied that disclosure may '(a) prejudice the effective working of the Department' appears to be overly broad in relation to the stated objective. It is not clear what is meant by 'prejudice' to the 'effective working of the Department' and whether it could potentially include, for example, a contracted service provider criticising the Department's handling of a response to incidents (including incidents

that may raise serious human rights concerns).[17] It is also not clear how information that may prejudice the effective working of the *Department* is rationally connected to the legitimate objective of protecting sensitive information from public disclosure where such disclosure may harm the *public* interest.

2.73 Further, concerns remain in relation to section 4(5) that provides that 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia' in section 4(1)(a) includes 'information that has a security classification'. Notwithstanding the minister's description of the evidential burden of proof, the minister has not addressed the committee's queries as to whether there are adequate safeguards to address circumstances where a document may have been inappropriately classified (such as being misclassified or over-classified). In particular, while there is a power in section 50A for the minister to certify that information has a security classification, there does not appear to be any defence available to a person on the basis that information has been inappropriately classified or a means through which a court could otherwise review the appropriateness of a security classification.[18]

2.74 In respect of the class of persons to whom the limitation on freedom of expression applies, a wide category of people fall within the definition of 'entrusted persons', including APS staff, officers of state and territory governments, persons providing services to the department and contractors performing services for the department (such as teachers and social workers). Therefore, while medical professionals have been specifically exempted from the bill, concerns remain that the breadth of the definition of 'entrusted persons' is not sufficiently circumscribed.

Committee response

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

2.76 By narrowing the type of information the disclosure of which would constitute an offence, the proposed measures and framework in the bill appear to provide a greater scope to freedom of expression than is currently the case under section 42 of the Border Force Act.

2.77 However, the proposed measure, by criminalising the disclosure of 'Immigration and Border Protection Information', still engages and limits the right to freedom of expression.

---

17 This issue was also raised by several submissions to the Legal and Constitutional Affairs inquiry into the Bill: see Legal and Constitutional Affairs Committee, *Australian Border Force Amendment (Protected Information) Bill 2017* [2.60] and [2.61].

18 This issue was raised also by several submissions to the Legal and Constitutional Affairs inquiry into the Bill: see Legal and Constitutional Affairs Committee, *Australian Border Force Amendment (Protected Information) Bill 2017,* [2.40]-[2.45].

2.78 The preceding analysis indicates that this new definition and offence may be overly broad in relation to the stated objective of the measure, and does not appear to be accompanied by adequate safeguards. Accordingly, the measure is likely to be incompatible with the right to freedom of expression.

Compatibility of the measure with the right to an effective remedy

2.79 The right to an effective remedy requires states parties to the ICCPR to ensure a right to an effective remedy for violations of human rights. The initial analysis identified that the prohibition on disclosing information may also affect human rights violations coming to light and being addressed as required by the right to an effective remedy. That is, the prohibition on disclosing information may adversely affect the ability of individual members of the public to know about possible violations of rights and seek redress. This may be particularly the case in the immigration detention context where other mechanisms for such issues to be addressed may be limited.

2.80 The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.

2.81 The committee therefore sought the advice of the minister as to whether the measure is compatible with the right to an effective remedy.

Minister's response

2.82 In relation to the compatibility of the proposed legislation with the right to an effective remedy, the minister's response states:

> The measure is compatible with the right to an effective remedy, as it does not affect an individual's ability to seek redress.
>
> The *Public Interest Disclosure Act 2013* (PIO Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the ABF Act, where the disclosures are made in accordance with the PIO Act. This protection mirrors section 16 of the now repealed Customs Administration Act.
>
> The PIO Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act (for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act). Under the PIO Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 [of] the PIO Act.
>
> The PIO Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance [with] the PIO Act. Therefore, even if the disclosure breaches Part 6 of the ABF Act, the

entrusted person would not be subject to criminal liability for the offence under Part 6.

2.83 The minister's response indicates that there is an existing mechanism available through the *Public Interest Disclosure Act 2013* (PIO Act) which may provide an avenue through which human rights violations may come to light, consistent with the right to an effective remedy. For example, the definition of 'disclosable conduct' in section 29 of the PIO Act includes conduct engaged in by an agency, public official or contracted service provider for a commonwealth contract that:

(a) is based, in whole or in part, on improper motives; or

(b) is unreasonable, unjust or oppressive; or

(c) is negligent.[19]

2.84 It is noted, however, that the UN Special Rapporteur on human rights defenders has recently urged the government to 'substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers',[20] noting that 'many potential whistleblowers will not take the risk of disclosing because of the complexity of the laws, severity and scope of the penalty, and extremely hostile approach by the Government and media to whistleblowers'.[21] Indeed, it may be unclear to individuals the extent to which the PIO Act would provide adequate protection to those who disclose information on human rights grounds (particularly where conduct may be in accordance with Australian law but not international human rights law).

Committee response

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

2.86 In light of the safeguards identified in the minister's response, the committee notes that the measure may be compatible with the right to an effective remedy. However, the committee draws to the parliament's attention the recent comments of the United Nations Special Rapporteur on the situation of human rights defenders on the adequacy of the Public Interest Disclosure framework.

---

19 Item 4, Section 29 of the *Public Interest Disclosure Act 2013.*

20 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E

21 Michel Forst, *End of mission statement by United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia*, 18 October 2016 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822]

Purpose	Establishes legislative authority for the government to fund the National Facial Biometric Matching Capability
Portfolio	Finance
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives and in the Senate on 8 August 2017)
Right	Privacy (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.87 The committee first reported on the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 (the regulations) in its *Report 9 of 2017*, and requested a response from the Minister for Finance by 20 September 2017.[1]

2.88 The Minister for Justice responded to the committee's inquiries. The response, received on 26 September 2017, is discussed below and is reproduced in full at **Appendix 3**.

Funding of National Facial Biometric Matching Capability

2.89 The regulations establish legislative authority for the government to fund the National Facial Biometric Matching Capability (the Capability).

2.90 The Capability will allow the sharing and matching of facial images as well as biometric information between agencies through a central interoperability Hub (the Hub). It will also allow participating agencies to access the National Driver Licence Facial Recognition Solution (the Solution) which will make driver licence facial images available.[2]

2.91 The explanatory statement states that the Hub and the Solution are being built to support a range of face matching services:

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 25-27.

2 Explanatory Statement (ES) 2.

- the Face Verification Service (FVS) enables a facial image and associated biographic details of a person to be compared on a one-to-one basis against an image held on a specific government record for that same individual; and
- the Face Identification Service (FIS) searches or matches facial images on a one-to-many basis to help determine the identity of an unknown person, or detect instances where a person may hold multiple fraudulent identities.[3]

Compatibility of the measure with the right to privacy

2.92 The right to privacy includes respect for informational privacy, including the right to respect private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life. The previous analysis stated that the collection, use and disclosure of identity information, including photographs, through the Capability, engages and limits the right to privacy.[4] By permitting government funds to be allocated towards this Capability, the measure also engages and limits this right.

2.93 Limitations on the right to privacy will be permissible where they are prescribed by law and are not arbitrary, they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective. The previous analysis noted, however, that the statement of compatibility does not acknowledge the limitation on the right to privacy and merely states that the regulations 'do not engage any of the applicable rights or freedoms'.[5] Accordingly, no assessment is provided as to whether the limitation on the right to privacy is permissible.

2.94 It was noted that, in this case, the extent of interference with the right to privacy appears to be potentially extensive. For example, the FIS would appear to allow images of unknown individuals to be searched and matched against government repositories of facial images. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where.

2.95 In order to be proportionate, the limitation needs to be sufficiently circumscribed to ensure that it is only as extensive as is strictly necessary to achieve its objective. This includes having adequate and effective safeguards in relation to a limitation.

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

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

---

3 ES 2.

4 See, for example, *Peck v United Kingdom* (2003) 36 EHRR 41.

5 Statement of compatibility (SOC) 1.

- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether there are adequate and effective safeguards, the scope of facial image databases, who can access information and the extent of interference).

Minister's response

2.97 In relation to the compatibility of the regulations with the right to privacy, the minister's response states:

> The face matching services provided by the Capability enable access to facial images used by Australian Government agencies to issue passports, citizenship certificates and immigration visas, which are held within the databases of the document issuing agencies (i.e. the Department of Foreign Affairs and Trade and the Department of Immigration and Border Protection). Subject to the agreement of the states and territories, facial images used on driver licences will also be made available, via a National Driver Licence Facial Recognition Solution.
>
> The face matching services provided by the Capability engage and limit the right to privacy as they involve the collection, use and disclosure of personal information. This includes biographic details such as name, date of birth and gender and facial images used for biometric matching purposes which are considered to be sensitive information under the *Privacy Act 1988*. This collection, use and disclosure of personal information may only occur where it is authorised by law and is consistent with objectives which are consistent with the ICCPR. The Capability facilitates, rather than authorises information sharing. The operation of the Capability is premised upon the legislative authorities and permissions to collect, use and disclose personal information that apply to those agencies which will use the Capability's face matching services.
>
> The collection, use and disclosure of personal information through the face matching services will only be conducted where it is authorised by law, including the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs permit the collection (APP 3) and the use and disclosure (APP 6) of personal information in a range of circumstances, including where this is done with a person's consent or where it is authorised or required by an Australian law. Other relevant legislation which authorises the collection, use or disclosure of personal information, includes the *Crimes Act 1914*, the *Australian Passports Act 2005*, the *Migration Act 1958* and the *Australian Citizenship Act 2007*.
>
> The Capability is designed to facilitate the secure, automated and accountable sharing and matching of facial images and related information amongst relevant government agencies for the purposes of identity security (including the prevention of identity crime), national security and

law enforcement, while maintaining robust privacy safeguards. This sharing already occurs under existing legislative authority - the Capability will introduce a technical system to enable more efficient and auditable sharing.

The Capability's Face Verification Service (FVS) is designed to help prevent identity theft by strengthening the tools available to government agencies to verify a person's identity and help prevent identity crime.

Identity crime is one of the most common crimes in Australia. Research conducted by the Attorney-General's Department, in conjunction with the Australian Institute of Criminology, indicates that identity crimes affect around 1 in 20 Australians every year (and around 1 in 5 Australians throughout their lifetime), with an estimated annual cost of over $2.2 billion. In addition to financial losses, the consequences experienced by victims of identity crime can range from mental health impacts, to wrongful arrest, to significant emotional distress when attempting to restore a compromised identity.

The use of fraudulent identities is also a key enabler of organised crime and terrorism. Australians previously convicted of terrorism related offences are known to have used fake identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives and mobile phones to communicate anonymously in order to evade detection by police and security agencies. A joint operation by the joint Australian Federal Police and New South Wales Police Identity Security Strike Team found that the fraudulent identities seized from just one criminal syndicate were linked to: 29 high profile criminals who were linked to historic or ongoing illicit drug investigations; more than $7 million in losses associated with fraud against individuals and financial institutions, and more than $50 million in funds that were discovered to have been laundered offshore and were likely to be proceeds of crime.

The Capability's Face Identification Service (FIS) will assist law enforcement and intelligence agencies to detect and prevent the use of fraudulent identities by terrorist or organised crime groups. It will also assist in identifying people involved in other serious criminal activity.

The FIS compares identity information across multiple records and may disclose the image and other personal information of people who were not the subject of the initial search. The service is being designed to limit the disclosure of images and other personal information of multiple people as far as is practicable, achieving the legitimate objective of identifying persons in accordance with existing legislative authority while balancing the privacy of unrelated persons. The service will only be available to agencies with criminal law enforcement or national security functions. Access will be further limited to users who have been trained in facial recognition, to help minimise the risk of false matches.

Other privacy safeguards include formal data sharing agreements amongst agencies participating in the face matching services and annual auditing of

> agencies' use of the services. These privacy safeguards have been informed by the 'Privacy by Design' approach that is being taken to the implementation of the Capability. As part of this approach the Attorney-General's Department has commissioned multiple privacy impact assessments to obtain independent advice on the potential privacy risks posed by the face matching services and how these can be mitigated in the design, implementation and governance of the Capability. These assessments are conducted in accordance with guidelines issued by the Office of the Australian Information Commissioner.
>
> The face matching services will provide significant benefits in combatting terrorism and organised crime, and in reducing the privacy and associated financial and health impacts that are experienced by victims of identity crime. To the extent that the Capability can limit the right to privacy beyond the existing legislative authorities to collect, use and disclose personal information on which it relies, that intrusion is reasonable and proportional to the objectives of this measure.

2.98 The minister's response refers to a number of objectives, including that the Capability intends to facilitate the secure, automated and accountable sharing and matching of facial images and related information for the purposes of identity security (including the prevention of identity crime), national security and law enforcement. These objectives are likely to be legitimate for the purposes of international human rights law.[6] Through funding the capability to facilitate this, the measure appears to also be rationally connected to that legitimate objective.

2.99 However, concerns remain as to whether the Capability is a proportionate limitation on the right to privacy. To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. In relation to whether there are adequate and effective safeguards, the minister's response indicated that use of the facial identification service will be limited to agencies with criminal law enforcement or national security functions, and that within those agencies access would be limited to users trained in facial recognition. Those who can access images and other biometric data, and in what circumstances, is relevant to whether the measure is sufficiently circumscribed. In this respect, the commitment to restrict access to particular agencies with law enforcement or national security functions assists with the proportionality of the measure. Further,

---

6 See *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [100], where the Court held in relation to the retention of fingerprint and DNA information that such a measure "pursues the legitimate purpose of the detection and, therefore, prevention of crime. While the original taking of this information pursues the aim of linking a particular person to the particular crime of which he or she is suspected, its retention pursues the broader purpose of assisting in the identification of future offenders".

the commissioning of independent privacy impact assessments may be relevant, however, the minister has not provided any information as to what impacts those assessments identified and how it is proposed to mitigate those impacts by way of safeguards. Nor is it evident from the response whether these potential safeguards will be provided as a requirement of law or policy, or in what circumstances facial images and biometric data may be accessed and disclosed.

2.100 It is noted that the power to collect, use, disclose and retain images is to occur under current laws. In this respect, the measures introduced by the instrument may provide the committee's only opportunity to examine the human rights compatibility of the Capability in the course of its regular work. There are related serious questions as to whether there are adequate and effective safeguards under current laws to ensure that facilitating the matching and disclosure of facial images and other biometric data under this measure is a proportionate limit on the right to privacy. While facial images are a type of personal information protected by the Australian Privacy Principles (APPs) and the *Privacy Act* 1988 (Privacy Act),[7] it is noted that compliance with the APPs and the Privacy Act generally does not necessarily provide an adequate safeguard for the purposes of international human rights law in all circumstances. This is because the APPs contain a number of exceptions to the prohibition of use or disclosure of personal information, including (as noted by the minister) where its use or disclosure is authorised under an Australian Law,[8] which may be broader than the scope permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[9] Accordingly, setting funding for the Capability without new primary legislation which circumscribes the Capability's operation raises concerns as to the adequacy of safeguards to ensure that the measure is compatible with the right to privacy.

2.101 The minister's response indicates that the scope of facial images to be subject to the Capability and shared will include those held by commonwealth government agencies as well as potentially state and territory driver licences. It is unclear from the response that there are specific protections in relation to the scope of images to be subject to the scheme (including the potential that social media images may be used).[10] Having specific safeguards in relation to the scope of images that may be subject to the Capability is relevant to the proportionality of the measure. In this respect, it is noted that international human rights case law has

7 See, Privacy Act section 6.

8 APP 9; APP 6.2(b).

9 APP; 6.2(e).

10 See, for example, Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee, 20 October 2015, 120.

raised concerns as to the compatibility of biometric data retention programs with the right to privacy. In *S and Marper v United Kingdom,* the European Court of Human Rights held that laws in the United Kingdom that allowed for fingerprints, cellular samples and DNA profiles to be indefinitely retained despite the affected persons being acquitted of offences was incompatible with the right to privacy. The court expressed particular concern about the 'indiscriminate and open-ended retention regime' which applied the same retention policy to persons who had been convicted to those who had been acquitted.[11] The court considered that the 'blanket and indiscriminate nature of the powers of retention' failed to strike 'a fair balance between the competing public and private interests'.[12]

2.102 Similarly, the United Kingdom (UK) Court of Appeal in *Wood v Commissioner of Police for the Metropolis,*[13] concluded that the retention of photographs which had been taken by police of a person in circumstances where the person had not committed any criminal offence had a disproportionate impact on the right to privacy under the UK *Human Rights Act.*[14] Collectively, these authorities suggest that the indiscriminate retention of a person's data (including biometric information and photographs) may not be a proportionate limitation on the right to privacy. The interpretation of the human right to privacy under the European Convention of Human Rights in those cases is instructive in informing Australia's international human rights law obligations in relation to the corresponding right to privacy under the ICCPR.

2.103 In this respect, it is also noted that it is unclear what the scope of historical facial images that will be subject to the Capability will be. This raises a further concern about whether the Capability will provide adequate and effective protection against misuse and in respect of vulnerable groups. For example, it is unclear the extent to which there are specific safeguards for survivors of domestic or gender-based violence who may have changed their identity and the risks of unintended consequences. If historical facial images are available, it is also possible that it may reveal that a person has undergone a change in gender identity.

2.104 As noted in the initial analysis, the FIS would appear to allow images of unknown individuals to be searched and matched against government repositories of facial images. It may not only reveal the identity of the individual but, depending on the circumstances, may reveal who a person is in contact with, when and where.

---

11 See *S and Marper v United Kingdom,* European Court of Human Rights Application Nos.30562/04 and 30566/04 (2008) [119].

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

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

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

For example, this could be the case with matching unidentified CCTV images of people with facial images held by government agencies. This in turn could potentially allow conclusions to be drawn about the person's political opinions, sexual habits, religion or medical concerns. If the Capability is extended to facial images used on driver licences, this could conceivably include a significant proportion of the adult Australian population whose personal information may be retained. The extent of interference therefore has the potential to be very extensive, depending on the authorisation that is provided to the relevant agency. The extent of the limitation heightens concerns regarding whether the measure is over broad and insufficiently circumscribed.

Committee response

2.105 The committee thanks the minister for his response and has concluded its examination of the regulations.

2.106 The preceding analysis indicates that there is a risk of incompatibility with the right to privacy through the use of the existing laws as a basis for authorising the collection, use, disclosure and retention of facial images. Setting funding for the National Facial Biometric Matching Capability (Capability) without new primary legislation which circumscribes the Capability's operation raises serious concerns as to the adequacy of safeguards to ensure that the measure is a proportionate limitation on the right to privacy.

Migration Amendment (Validation of Decisions) Bill 2017

Purpose	Seeks to ensure that visa cancellations or refusals based on information gained from gazetted law enforcement officers under section 503A of the *Migration Act 1958* remain valid at law
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 21 June 2017
Rights	Prohibition on expulsion without due process; liberty; protection of the family; non-refoulement; freedom of movement; and effective remedy (see **Appendix 2**)
Previous reports	8 of 2017 and 10 of 2017
Status	Concluded examination

Background

2.107 The committee first reported on the Migration Amendment (Validation of Decisions) Bill 2017 (the bill) in its *Report 8 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 28 August 2017.[1]

2.108 The bill passed in the House of Representatives on 16 August 2017 and in the Senate on 4 September 2017 and received Royal Assent on 5 September 2017.

2.109 The minister's initial response to the committee's inquiries was received on 29 August 2017 and discussed in *Report 10 of 2017*.[2] In light of the High Court's decision on 6 September 2017 in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33, the committee requested further information from the minister by 27 September 2017.

2.110 The minister's response to the committee's inquiries was received on 27 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Validation of decisions

2.111 Section 503A of the *Migration Act 1958* (the Migration Act) provides that information communicated to an authorised migration officer by a gazetted agency (such as law enforcement or intelligence agencies or a war crimes tribunal) for the

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 32-43.

2 Parliamentary Joint Committee on Human Rights, *Report 10 of 2017* (12 September 2017) 5-26.

purposes of making a decision to refuse or cancel a visa on character grounds, is protected from disclosure, not only to the person whose visa is refused or cancelled, but also to any court or tribunal reviewing that decision, and to parliament or a parliamentary committee. The minister has the non-compellable discretion to allow the disclosure after consulting the gazetted agency.

2.112 Section 503A(2) was found to be invalid by the High Court on 6 September 2017.[3] Section 503A(2) was found to be invalid to the extent that it prevented the minister from being required to divulge or communicate information to the High Court and the Federal Court when those courts engaged in judicial review of the minister's exercise of power to cancel or refuse to grant a visa. This was considered to amount 'in practice to shield the purported exercise of power from judicial scrutiny'[4] and to a 'substantial curtailment of the capacity of a court exercising jurisdiction… to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed'.[5] The High Court therefore considered that the minister made the decisions on the erroneous understanding as to what the exercise of the statutory power entailed, and quashed the decisions.

2.113 The bill seeks to ensure that, notwithstanding their reliance upon or regard to confidential information purportedly protected by section 503A, the minister or delegate's decisions regarding visa refusal or cancellation will remain valid.

Compatibility of the measure with the prohibition on expulsion without due process

2.114 The right not to be expelled from a country without due process is protected by article 13 of the International Covenant on Civil and Political Rights (ICCPR). It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

2.115 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[6] which protects the right to a fair hearing.[7] As stated in the initial human

3 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

4 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [53]

5 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [64].

6 See UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007), [17], [62].

rights analysis, to the extent that domestic law gives authority to courts or tribunals to decide on expulsion or deportation decisions, the guarantees of fairness and equality of arms apply.[8] These demand that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[9] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[10]

2.116 Under section 503A, both the person whose visa is refused or cancelled and any authority outside the department reviewing the decision are unable to require production of particular information on which the decision is based. The person is therefore prevented from effectively contesting or correcting potentially essential information and the reviewing authority is unable to scrutinise whether the decision was correct or reasonably made, thereby engaging and limiting the right of an alien to due process prior to expulsion.

2.117 The initial analysis noted that article 13 does contain an exception to the requirement to afford due process where 'compelling reasons of national security' exist. However, section 503A is broader than this exception. It does not require the minister to be satisfied that compelling national security reasons exist, but merely that the information relied upon is communicated to an authorised migration officer by a gazetted agency on the condition that it be treated as confidential. Indeed, there is no requirement to assess whether confidentiality is necessary against any standard. This raises serious questions as to whether section 503A is compatible with article 13.

2.118 In seeking to validate decisions which relied upon section 503A information, which has been found to be constitutionally invalid on the grounds and to the extent

---

7 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v. Denmark* (2288/2013), 23 July 2015, [6.4]; *Chadzjian et al. v. Netherlands* (1494/2006), 22 July 2008, [8.4]; and *K. v. Canada* (1234/2003), 20 March 2007, [7.4]-[7.5].

8 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [62] ['the procedural guarantees of article 13 incorporate notions of due process also reflected in article 14 and thus should be interpreted in light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'].

9 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial* (2007) [13], citing *Jansen-Gielen v. The Netherlands* (846/1999) Human Rights Committee, 3 April 2001 [8.2] and *Äärelä and Näkkäläjärvi v. Finland* (779/1997) Human Rights Committee, 24 October 2001 [7.4].

10 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant* (1986) [10].

set out in [2.112], the measure further limits the right to due process prior to expulsion under article 13.

2.119 The initial analysis stated that the right to due process prior to expulsion was not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether the limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at [2.144] to [2.145], there are serious questions as to whether the measure is effective to achieve, and proportionate to, the stated objectives.

2.120 The committee therefore requested the advice of the minister as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed.

Minister's initial response

2.121 The minister's response emphasised that the bill only applies to visa cancelation or refusal decisions that have already been made, and that the bill 'does not affect the ability to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion'. The minister's response further stated:

> The High Court of Australia is considering the validity of section 503A in *Graham* and *Te Puia*. The construction of section 503A, including the ability of individuals to contest information on which a refusal or cancellation decision is based and the standard against which the need for confidentiality of information is independently assessed, is outside the scope of this Bill. Should the High Court determine that all or part of section 503A is invalid, the Department of Immigration and Border Protection (the Department) will consider the Court's findings in the context of future decision-making. In any event, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law. The amendments seek only to validate the visa cancellation or visa application refusal decision, rather than the construction of section 503A or the ability for section 503A to protect certain sensitive information.
>
> The amendments will maintain the status quo for individuals who have already had their case thoroughly assessed and considered under migration legislation and affected individuals will continue to have review

> rights prior to expulsion. At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions.

2.122 While the right to judicial review (and, in some circumstances, merits review) remains, the bill appears to preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. This issue seems to be acknowledged in the explanatory memorandum which notes that the bill does 'not affect a person's ability to seek judicial review of a decision described in paragraph 9 *on any other ground*, that is, on a ground *not mentioned* in paragraphs 10 and 11'.[11] Paragraphs 9, 10 and 11 of the explanatory memorandum summarise the content and operation of section 503E(1) and provide:

> New subsection 503E(1) applies to decisions made by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA before this item commences.
>
> Such a decision made by the Minister is not invalid, and is taken never to have been invalid merely because the Minister:
>
> - relied on; or
> - had regard to; or
> - failed to disclose in accordance with any applicable common law or statutory obligation;
>
> information that was protected, or purportedly protected, by subsection 503A(1) or (2) of the Act.
>
> Further, such a decision is not invalid, and is taken never to have been invalid merely because the Minister made the decision based on an erroneous understanding of section 503A or the protection that section would provide against an obligation to disclose information.

2.123 Furthermore, the effect of the measure is to prevent an affected individual from effectively contesting or correcting potentially essential information, and a Court or reviewing authority is unable to scrutinise whether the decision was correct or reasonably made. This limits the right to due process prior to expulsion under article 13 of the ICCPR, as set out in the initial analysis.

2.124 In relation to the committee's request for information regarding the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed, the minister's response stated:

---

11 Explanatory Memorandum 4 (emphasis added).

> The High Court's deliberations in the cases of *Graham* and *Te Puia* centre on whether the ability to protect information under section 503A is invalid in that it allows information to be withheld from judicial proceedings based on criteria that are not evaluative. The construction of section 503A and the nature of determining which information requires protection is outside the scope of this Bill.
>
> Section 503A was introduced by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act 1998* to facilitate law enforcement and intelligence agencies providing relevant information to the Department while ensuring that the content and sources will be protected. This includes protecting the information from disclosure to a court, tribunal, a parliament or parliamentary committee or any other body or person.
>
> In practice, law enforcement and intelligence agencies provide information to the Department, on the basis it can be protected from disclosure to any other person or body.
>
> The High Court is considering whether this protective power impairs the independence and impartiality of a court. Should the High Court determine that all or part of section 503A is invalid, the Department will consider the Court's findings in the context of future decision-making.

2.125 While, as the minister stated, the construction of section 503A and the nature of determining which information requires protection is outside the scope of the bill, affected individuals whose visas have been cancelled or refused relying on information protected under section 503A will have their decisions retrospectively validated with no apparent assessment of whether confidentiality of matters that were kept from them pursuant to section 503A is necessary against any standard. The absence of any standard against which the need for confidentiality is independently assessed or reviewed further limits the right to due process prior to expulsion.

2.126 As the minister did not acknowledge this limitation, the minister did not undertake an assessment of whether that limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below, whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, it cannot be concluded based on the evidence available that the measures are effective to achieve, and proportionate to, those objectives.

2.127 The committee therefore sought the minister's further advice as to the compatibility of the measure with the right to due process prior to expulsion in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.128 The minister's further response stated that the High Court's decision did not affect the minister's previous advice, and restated the substance of the minister's earlier advice in relation to the right to due process and the right to judicial review. The minister further emphasised the importance of the ability to protect information, and the assessment by the department and the government of their trust in their assessment of the confidentiality of the information. The minister's further response otherwise did not address the committee's concerns outlined above in relation to the limitation on the right to due process prior to expulsion. As the minister did not acknowledge this limitation, the minister did not undertake an assessment of whether that limitation was permissible. For the reasons stated in the initial and subsequent analysis, the measure is likely to be incompatible with the prohibition on expulsion without due process.

Committee response

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

2.130 The preceding analysis indicates that the measure is likely to be incompatible with the prohibition on expulsion without due process.

Compatibility of the measure with the right to liberty

2.131 The right to liberty, contained in Article 9 of the ICCPR, prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law, but the concept of arbitrariness also extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.[12] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered as arbitrary may vary depending on context.

2.132 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[13] The previous analysis stated that by validating decisions to cancel a visa which may otherwise be invalid, the measure engages and limits the right to liberty.

2.133 However, the statement of compatibility argues that the bill does not limit the right to liberty as it:

12 See, for example, Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [11]-[12].

13 See *Migration Act 1958*, sections 189, 198.

> introduces a legislative amendment that preserves the grounds upon which certain non-citizen's visas were cancelled, or their applications refused, the result of which may be subsequent detention, supporting existing laws that are well-established, generally applicable and predictable.[14]

2.134 The initial analysis noted that the concept of 'non-arbitrariness' under international law is not limited to general applicability and predictability, although it includes both those concepts. The detention of a non-citizen on cancellation of their visa will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. Detention may however become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention without knowing or being able to contest the information on which their detention is based before an independent body.[15]

2.135 In relation to section 503A, arbitrariness may arise because a person is prevented from accessing and addressing evidence upon which the visa cancellation, and therefore detention pending removal, is based. In seeking to broadly validate decisions which had regard to section 503A information, the bill would perpetuate the existing serious concerns in relation to section 503A.

2.136 In relation to the risk of indefinite detention, the statement of compatibility states that '[t]he determining factor [in whether detention is arbitrary] is not the length of detention, but whether the grounds for the detention are justifiable'.[16] However, as stated by the United Nations Human Rights Committee (UNHRC) '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[17] The risk of arbitrariness in this situation is exacerbated where a person is deprived of legal safeguards to

14 Statement of compatibility (SOC) 6.

15 See *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5]; *M.M.M et al v Australia* (2136/2012) Human Rights Committee, 25 July 2013 [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

16 SOC 6.

17 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

effectively challenge the basis of their detention, such as access to information relied upon in refusing or cancelling a visa.[18]

2.137 A measure may permissibly limit the right to liberty where it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

2.138 The statement of compatibility identifies the objectives of the measure as being:

> …[to ensure] the safety of the Australian community and integrity of the migration programme — as it seeks to uphold certain character refusal or cancellation decisions in the event of a High Court ruling on the validity of section 503A. These non-citizens pose an unacceptable risk to the Australian community if their cancellation decisions are overturned and they are required to be released from immigration detention into the community.[19]

2.139 The statement of compatibility indicates that the measures are reasonable as:

> This Bill will not prevent the affected non-citizens from individually challenging their decisions in a court. The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law.[20]

2.140 However, as the initial analysis noted, it is unclear upon what basis an affected non-citizen would be able to challenge their visa cancellation or refusal in a court. Indeed, the intent of the measure appears to be to preclude affected persons from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to section 503A, notwithstanding the invalidity of section 503A(2).

2.141 With particular reference to the risk that a person may be arbitrarily detained, the statement of compatibility states:

> The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal

---

18 *F.K.A.G v. Australia* (2094/2011) Human Rights Committee, 20 August 2013 [9.5] [The authors of the communication were detained in Australia as they were refused visas to stay following adverse security assessments from ASIO, but were unable to be returned to their country of origin due to their refugee status. The Committee held in relation to five of the authors: 'Given the vague and too general justification provided by the State party as to reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2 of the Covenant'].

19 SOC 6.

20 SOC 6.

> administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[21]

2.142 As considered in a previous human rights assessment of visa cancellation powers,[22] ensuring the safety of Australians and the integrity of the immigration system are capable of constituting legitimate objectives for the purposes of international human rights law.

2.143 However, the measure seeks to validate administrative decisions made with regard to information which was not disclosed to the affected person, and could not be effectively tested in a court for reliability, relevance or accuracy. The effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system is therefore questionable.

2.144 Moreover, in order for a measure to be a proportionate limitation on a right, it must be the least rights restrictive means of achieving the legitimate objective of the measure. The previous analysis stated that it is difficult to see how validating decisions to cancel visas based on information that is kept from the person affected, broadly as a class, is the least rights restrictive means of achieving the stated objectives. It would appear to be possible for the minister to make a renewed decision to refuse or cancel the visa of an affected person on an individual basis. Insofar as information is sought to be kept from the affected person for reasons of national security, the statement of compatibility does not address alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal. More broadly, it is not clear from the statement of compatibility why existing criminal justice or national security mechanisms are insufficient to counter any risk a person may pose should the cancellation of their visa be invalid as a consequence of the High Court's decision.

2.145 No detail was provided regarding the functioning or effectiveness of internal review processes, or the oversight processes referred to in the statement of compatibility. While the administrative and discretionary processes identified may in some circumstances mitigate the risk of arbitrary or indefinite detention, they are unlikely to constitute sufficient safeguards under international law, due to their discretionary nature.[23]

---

21 SOC 6.

22 Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament* (3 March 2015) 18.

23 For example, the Commonwealth Ombudsman cannot override the decisions of agencies it deals with, but tries to resolve disputes through consultation and negotiation.

2.146 The committee therefore requested the advice of the Minister for Immigration and Border Protection as to the compatibility of the measure in relation to the right to liberty, particularly regarding:

- why the broad legislative validation of a class of decisions is required, when it appears that the minister could make a renewed decision to refuse or cancel the visa of an affected person on an individual basis;
- any alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal; and
- the availability of less rights restrictive criminal justice or national security mechanisms to address any risk posed by affected individuals.

Minister's initial response

2.147 In relation to the compatibility of the measure with the right to liberty, the minister's response stated:

> **Broad legislative validation**
>
> These measures ensure that non-citizens affected will not have their visas reinstated as a result of the High Court decision in the cases of *Graham* or *Te Puia*. Reinstatement of such visas could result in either release from immigration detention or the ability to return to Australia. These non-citizens have had their cases thoroughly assessed and considered under migration legislation. At the time of this consideration, these persons failed the character test due to them being of serious character concern, and range from being members of outlawed motorcycle gangs to those with serious criminal records. The safety of the Australian community has been integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia.
>
> In the event that the High Court finds that all or part of section 503A is invalid, the resultant release of affected individuals from immigration detention, or their ability to enter Australia, while their cases are being reconsidered puts the Australian community at an unacceptable risk and would understandably undermine public confidence in the integrity of Australia's migration framework. The broad application of this Bill is appropriate given the high risk to the Australian community if these measures are not taken and is effective and proportionate to the legitimate objective of protecting the Australian community.
>
> **Alternative means to protect information**
>
> The need for an alternative means to protect information may be considered should the High Court find all or part of section 503A invalid. However, possible amendments to s503A are outside the scope of this Bill.

Alternative mechanisms to address risks posed by affected individuals

The availability of less rights restrictive criminal justice or national security mechanisms to address the risk posed by affected individuals is outside the scope of this Bill. Individuals affected by the measures in this Bill have been assessed as being a risk to the Australian community and do not meet the migration programme's character requirements. As such, these individuals have no lawful right to hold a visa allowing them to enter or remain in Australia, and if they are in Australia this means they must be detained under the Migration Act. The use of protected information under section 503A in cancellation decisions does not alter the risk to the community posed by persons who have failed the character test.

If this measure is not passed by the parliament, there is a risk that following the High Court's decision those affected individuals will have visas reinstated or granted, which means those who are onshore may be released back into the Australian community, and those who are offshore will be able to return to Australia. The Australian Government cannot detain persons who have a valid visa, and therefore there are no currently available alternative mechanisms to address the risks posed by the affected individuals.

2.148 As noted in the initial human rights analysis, ensuring the safety of Australians and the integrity of the immigration system are capable of constituting legitimate objectives for the purposes of international human rights law. However, the minister's statement that these individuals have 'failed the character test' and thereby pose a risk to the Australian community such as to warrant their detention must be understood in the context that the legislation at the time allowed these administrative decisions to be made without the person knowing, or a court being able to test, information disclosed pursuant to section 503A for reliability, relevance or accuracy. The minister's response therefore did not address the serious concerns identified in the initial analysis as to the effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system.

2.149 As the minister considered that the committee's questions as to whether there are any alternative means available to protect the information, or whether any less restrictive measures are available to address the risks posed by the affected individuals, were outside the scope of the bill, the minister's response did not substantively address these concerns. However, as the effect of the bill is to retrospectively validate the minister's decisions based on information provided pursuant to section 503A, the bill in effect upholds the process facilitated by section 503A, notwithstanding the constitutional invalidity of section 503A(2). The concerns raised in the initial human rights analysis as to whether there are alternative and less restrictive means available to protect information and to protect the community against risk, which arise as a consequence of validating the minister's reliance on section 503A, therefore remain. Even if it were to be accepted that detention is an appropriate response to the risk posed by particular individuals, it is not possible to

conclude that validating decisions that result in mandatory detention, of a class of persons rather than on an individual basis, on information that is kept from each person, is the least restrictive means of achieving the stated objectives.

2.150 Based on the information provided and the previous human rights analysis, the measure may give rise to arbitrariness and there are serious concerns that the measure is likely to be incompatible with the right to liberty.

2.151 The committee therefore sought the minister's further advice as to the compatibility of the measure with the right to liberty in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.152 The minister's further response stated that the High Court's decision did not affect the minister's previous advice, and the minister relied upon and reiterated his previous advice. The minister further stated that the measure was proportionate on the following bases:

> Should the Government have not passed the Act, the resultant release of affected individuals from immigration detention, or their ability to return to Australia, while their cases were being reconsidered would have put the Australian community at an unacceptable risk. This would understandably undermine public confidence in the integrity of Australia's migration framework. Less rights restrictive criminal justice or national security mechanisms to address the risk to the Australian community posed by affected individuals is unavailable. Since section 503A was introduced in 1998 by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act*, protected information has been provided to the Department by law enforcement agencies. Validation of visa cancellation and refusal decisions that utilised this protected information is essential given the risk to the Australian community, and there are no alternative criminal justice or national security mechanisms available to address the risk posed by these individuals. As such, the measure is proportionate and effective in ensuring safety of the Australian community and integrity of Australia's migration framework.

2.153 While the minister's response engages in a proportionality analysis and concludes that the measure is proportionate and effective in ensuring safety of the Australian community and integrity of Australia's migration framework, the minister's further response does not overcome the committee's earlier concern that the bill in effect upholds the process facilitated by section 503A, notwithstanding the constitutional invalidity of section 503A(2). In other words, the minister's response does not address the significance of a finding of constitutional invalidity of section 503A(2) which, as the High Court described, amounted to a 'substantial curtailment

of the capacity of a court exercising jurisdiction… to discern and declare whether or not the legal limits of power conferred on the Minister by the Act have been observed'.[24] This concern remains, notwithstanding that many decisions have been made pursuant to section 503A(2) over the years. The minister's further response otherwise did not address the committee's concerns outlined above in relation to the right to liberty.

Committee response

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

2.155 The preceding analysis indicates that the measure is likely to be incompatible with the right to liberty.

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

2.156 The right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family life.[25] The initial human rights analysis stated that the measure engages and limits the right to protection of the family as the validation of a visa cancellation could operate to separate family members.

2.157 The statement of compatibility reasons that the amendments cannot be said to give rise to arbitrary interference with family life as they do not 'expand visa cancellation powers or impact the grounds upon which a person may have had their visa cancelled'.[26]

2.158 However, the bill seeks to validate decisions to cancel or refuse a visa which had regard to information protected under section 503A, that may now be affected by the invalidity of section 503A(2). In each such individual case, the measure has potential for arbitrary interference with family life, due to a lack of due process provided to the affected person.

2.159 As noted in the initial analysis, of relevance in this respect is the case of *Leghaei v Australia*, in which the author of the communication to the UNHRC was denied a permanent visa to remain in Australia on the basis that the author had been assessed by the Australian Security Intelligence Organisation (ASIO) as being a threat to national security. His wife and four children were either Australian citizens or permanent residents. The UNHRC found a violation of article 17 of the ICCPR read in conjunction with article 23:

---

24 *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33 at [64].

25 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015.

26 SOC 7.

> While his legal representatives were provided with information on evidence held against him, they were prevented, by a decision by the judge, from communicating to the author any information that would permit him to instruct them in return and to refute the threat that he allegedly posed to national security.
>
> In light of the author's 16 years of lawful residence and long-settled family life in Australia and absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for 'compelling reasons of national security', the Committee finds that the State party's procedure lacked due process of law… the Committee considers that the State Party has violated the author's rights under article 17, read in conjunction with article 23…[27]

2.160 Section 503A goes further than the provision at issue in *Leghaei v Australia* in withholding the information from not only the person, but also their lawyer and the court. There is therefore a serious risk that decisions based on information protected by section 503A limit the right to freedom from arbitrary interference in family life. The statement of compatibility did not address the matters raised in *Leghaei v Australia*.

2.161 The committee therefore requested the advice of the minister as to:

- any safeguards in relation to the particular circumstances of families; and
- the concerns outlined in *Leghaei v Australia*, including the inability of affected individuals to contest or correct information on which the refusal or cancellation is based.

Minister's initial response

2.162 In relation to the compatibility of the measure with the right to protection of the family, the minister's initial response stated:

> Australia acknowledges its obligations under the ICCPR not to subject individuals to arbitrary or unlawful interference with the family, and accordingly the Department takes all matters concerning interference with families seriously. It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> The rights relating to protection from arbitrary interference with family are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the impact on family members affected by the decision is a consideration, which will be weighed against factors such as the risk the person presents to the Australian community.

27 *Leghaei v Australia* (1937/2010) Human Rights Committee, 26 March 2015 [10.4]-[10.5].

> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to family remain unchanged in the cancellation of visas or refusal of visa application on character grounds.
>
> **The concerns outlined in *Leghaei* v *Australia***
>
> The Australian Government respectfully disagreed with the views of the Human Rights Committee in *Leghaei* v *Australia*, that Australia's procedures lacked due process of law and that Dr Leghaei's rights were violated under article 17, read in conjunction with article 23, of the ICCPR. The Australian Government did not accept that there was a lack of due process leading up to Dr Leghaei's removal and considers that interference with the family was not arbitrary, given that his removal was on the basis that he was lawfully assessed as being a direct risk to Australia's national security.
>
> The concerns of the Parliamentary Joint Committee on Human Rights highlighted at 1.199 of the Report, relate to the ability of affected individuals to contest information on which refusal or cancellation is based. As discussed above, this concerns the construction of section 503A, which is currently being considered by the High Court. The amendment does not change considerations relating to interference with family in the cancellation or refusal of visas on character grounds. As such, the inquiry into due process and the resulting impact on article 17 is outside the scope of this Bill.

2.163 The effect of the bill is to validate decisions made based on information provided pursuant to section 503A. In this respect, the construction and effect of section 503A is directly relevant to the individuals affected by the measure. An effect of the bill is that those individuals may be precluded from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to that section, notwithstanding that section 503A(2) is invalid.

2.164 The minister's response did not identify any safeguards beyond the indication that a person’s family circumstances are a consideration when deciding whether or not to cancel or refuse a visa. However, at the time the visa cancellation or refusal decisions were made, the consideration of any other factors would potentially have been informed by information protected by section 503A. In light of the concerns earlier expressed as to the lack of due process provided to the affected person through the operation of section 503A, the minister's response did not adequately address the serious concerns raised in the initial analysis as to the adequacy of any safeguards to protect against the arbitrary interference with family life.

2.165 As to the minister's response to the committee's question concerning *Leghaei v Australia,* the UNHRC's views are not binding on Australia as a matter of international law. Nevertheless, as the UN body responsible for interpreting the ICCPR, the UNHRC's views are highly authoritative interpretations of binding

obligations under the ICCPR and should be given considerable weight by the government in its interpretation of Australia's obligations. Moreover, these statements of the UNHRC are persuasive as interpretations of international human rights law that are consistent with the proper interpretation of treaties as set out in the Vienna Convention on the Law of Treaties.[28] In this respect, as a principle of international law, it is not open for a state party to a treaty to unilaterally interpret its treaty obligations.[29]

2.166 The committee therefore sought the minister's further advice as to the compatibility of the measure with the right to family life in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.167 The minister's response provides no further advice on this issue, stating that the High Court's decision does not affect the minister's previous advice. In the absence of further information, for the reasons stated in the initial and subsequent analysis, the measure is likely to be incompatible with the right to protection of the family.

Committee response

2.168 The committee has concluded its examination of this issue.

2.169 The preceding analysis indicates that the measure is likely to be incompatible with the right to protection of the family.

Compatibility of the measure with the right to non-refoulement in conjunction with the right to an effective remedy

2.170 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or

28 Australia is a party to this treaty and has voluntarily accepted obligations under it. Article 31 of the treaty provides that treaties are to be interpreted in good faith, according to ordinary meaning, in context, in light of object and purpose. Subsequent practice in the application and interpretation of the treaties is to be taken together with context in the interpretation of treaty provisions. The views of human rights treaty monitoring bodies may be considered an important form of subsequent practice for the interpretation of Australia's treaty obligations. More generally, statements by human rights treaty monitoring bodies are generally seen as authoritative and persuasive for the interpretation of international human rights law.

29 Articles 26, 27 31(1) of the Vienna Convention on the Law of Treaties.

punishment.[30] Non-refoulement obligations are absolute and may not be subject to any limitations.

2.171 As the committee has previously stated on numerous occasions, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[31]

2.172 The statement of compatibility acknowledges that the bill may 'engage [the right to non-refoulement] because one eventual consequence of confirming the validity of decisions to refuse or cancel a visa may be removal from Australia'. However, it goes on to state that the amendments do not set out that the automatic consequence of validating the decision will be removal from Australia and that consideration of non-refoulement obligations is undertaken 'before a non-citizen is considered to be available for removal from Australia. Any removal from Australia is conducted in accordance with Australia's non-refoulement obligations'.[32]

2.173 Under section 501E of the Migration Act, a person whose visa is refused or cancelled on character grounds is prohibited from applying for another visa.[33] 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. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is

30 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

31 ICCPR, article 2; *Alzery v Sweden* (1416/2005), UN Human Rights Committee, 25 October 2006. See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Report 2 of 2017* (21 March 2017) 10.

32 SOC 7-8.

33 A person may apply for a protection visa or, if formally invited by the minister to do so, a Bridging R (Class WR) Visa. 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. The Bridging R (Class WR) Visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonably practicable.

not a sufficient safeguard under international law.[34] Therefore concerns remain that the measure may engage and limit the right to non-refoulement in conjunction with the right to an effective remedy.

2.174 The committee noted that the obligation of non-refoulement is absolute and may not be subject to any limitations.

2.175 The committee further noted that the measure does not provide a non-discretionary bar to refoulement, nor merits review of decisions relating to the validation of visa cancellation or refusal decisions, and is therefore likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture.

Minister's initial response

2.176 In relation to these concerns, the minister's initial response stated:

> The Department recognises that non-refoulement obligations are absolute and does not seek to resile from or limit Australia's obligations. *Non-refoulement* obligations are considered as part of a decision to cancel or refuse a visa under character grounds. Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. As noted above, this amendment upholds the validity of visa cancellation or visa application refusal decisions made with regard to information protected by section 503A. It does not affect the consideration of visa cancellations or visa refusals under character grounds generally, and *non-refoulement* obligations will continue to be considered as part of this process.
>
> There are mechanisms within the Migration Act which provide the Government with the ability to address *non-refoulement* obligations before consideration of removal. For example, Australia's *non-refoulement* obligations are met through the protection visa application process or the use of the Minister's personal powers in the Migration Act. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power. The revalidation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.
>
> As previously stated, this Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non-refoulement* remains unchanged in the cancellation of visas or refusal of visa application on character grounds.

34 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

2.177 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to non-refoulement that arise from the operation of section 503A are upheld and perpetuated. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[35]

2.178 The committee therefore sought the minister's further advice as to the compatibility of the measure with the obligation of non-refoulement in conjunction with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.179 In relation to these concerns, the minister's further response reiterates and refers to the minister's previous advice, and indicates that the High Court decision does not affect his previous advice. The minister's further response therefore does not address the committee's concerns outlined in the initial and subsequent analysis in relation to the obligation of non-refoulement in conjunction with the right to an effective remedy.

Committee response

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

2.181 The preceding analysis indicates that the measure is likely to be incompatible with the obligation of non-refoulement in conjunction with the right to an effective remedy.

Compatibility of the measure with freedom of movement (right to enter one's own country)

2.182 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[36]

2.183 The reference to a person's 'own country' is not restricted to the formal status of citizenship. It includes a country to which a person has very strong ties, such

35 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

36 Article 12 of the ICCPR.

as the country in which they had resided for a substantial period of time and established their home.[37]

2.184 The initial analysis stated that the right to freedom of movement is engaged by this measure as an eventual consequence of validating visa cancellation decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'.

2.185 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited, however in the context of other rights, states that the measure is a reasonable response to a legitimate objective. As discussed above at [2.144] to [2.145], whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, there are serious questions as to whether the measure is effective to achieve, and proportionate to, those objectives.

2.186 The preceding analysis raised questions as to the compatibility of the measure with the right to freedom of movement (the right to enter one's own country).

2.187 The committee therefore sought further information from the minister as to the proportionality of the measure, in particular regarding any safeguards applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

Minister's initial response

2.188 In relation to the compatibility of the measure with the right to freedom of movement and the existence of applicable safeguards, the minister's initial response stated:

> It is important to note that all visa cancellation and visa application refusal decisions affected by this Bill were made prior to the Bill's commencement.
>
> An individual's ties to Australia are taken into account as part of any request for visa revocation where the visa is mandatorily cancelled without notice, or where a decision to cancel or refuse a visa on character grounds is made. In both circumstances the individual's ties to Australia are not a primary consideration, whereas factors such as the risk the person presents to the Australian community does constitute a primary

37 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007 [explaining that a person may have stronger ties with a country of which they are not a national, than a country of which they hold citizenship]; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th parliament* (23 February 2016) 46-50.

> consideration. Delegates making a decision on character grounds are bound by a relevant Ministerial Direction, which requires a balancing of these countervailing considerations. While an individual's ties to Australia can be considered, there will be circumstances where this will be outweighed by the risk to the Australian community due to the seriousness of the person's criminal record or past behaviour or associations.
>
> Decisions by the Minister to refuse to grant or to cancel a visa under subsection 501(3) of the Act (the power to cancel without notice) are not subject to the rules of natural justice. However, under these parts of the Act, the Minister may only refuse to grant or cancel a visa where he or she is satisfied that it is in the national interest to do so. In circumstances where natural justice does not apply, any information about a person's personal circumstances that is before the Minister at the time of consideration must be taken into account in the making of the decision.
>
> This Bill introduces no new decision-making capability or power, seeking only to uphold decisions already made, which have already considered ties to Australia as detailed above. As set out above, decisions to cancel or refuse a visa on character grounds takes into account a person's ties to the Australian community and weighs them against other relevant considerations.

2.189 While the bill introduces no new decision-making capability or power, the effect of upholding decisions already made is that the concerns relating to freedom of movement that arise from the operation of section 503A are upheld and perpetuated. An eventual consequence of validating visa cancellation or refusal decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'. As such, the bill engages and limits freedom of movement. While the minister's response outlined the existing processes for taking into account a person's ties to the Australian community when deciding whether to cancel or refuse a visa on character grounds, to the extent that those processes may have been informed by information provided pursuant to section 503A, the minister's response did not adequately address the concerns raised in the previous human rights analysis as to whether the measure is compatible with the right of a person to remain in their 'own country'. In this respect, it was further noted that the committee has previously concluded that visa cancellation powers may be incompatible with the right to return to and remain in one's own country in relation to Australian permanent residents with longstanding or otherwise strong ties to Australia.[38]

38 See Parliamentary Joint Committee on Human Rights, *Thirty-Fourth Report of the 44th Parliament* (23 February 2016) 50; *Thirty-Six Report of the 44th Parliament* (16 March 2016) 195-217.

2.190 The committee therefore sought the minister's further advice as to the compatibility of the measure with the right to freedom of movement in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.191 The minister's response provides no further advice on this issue, stating that the High Court's decision does not affect the minister's previous advice. The minister's response therefore does not address or overcome the concerns raised by the committee in its initial and subsequent analysis. For the reasons stated in the initial and subsequent analysis, the measure is likely to be incompatible with the right to freedom of movement.

Committee response

2.192 The committee has concluded its examination of this issue.

2.193 The preceding analysis indicates the measure is likely to be incompatible with the right to freedom of movement (right to enter or remain in one's own country).

Compatibility of the measure with the right to an effective remedy

2.194 Should section 503A impermissibly limit a human right, those affected have the right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The right to an effective remedy may take many forms, however it is not able to be limited according to the usual proportionality framework.

2.195 As stated in the initial analysis, in relation to the human rights implications of section 503A, the right to an effective remedy would likely include a fresh review of the expulsion decision, where the person affected is entitled to access and challenge adverse evidence, including section 503A protected information.

2.196 It is unclear whether the bill would allow affected persons to challenge the decision anew and access the information previously protected by section 503A in those proceedings in light of the invalidity of section 503A(2).

2.197 The statement of compatibility does not acknowledge that the right to an effective remedy was engaged by the measure.

2.198 The committee therefore sought the advice of the minister as to whether in the event that section 503A is held to be invalid, a person whose decision is validated under the amendments will be able to challenge the refusal or cancellation decision anew and access information previously protected under section 503A, in those proceedings.

Minister's initial response

2.199 In relation to the compatibility of the measure with the right to an effective remedy, the minister's initial response stated:

> The ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of this Bill. While affected individuals have had, and will continue to have, review rights for their visa cancellation or application refusal decisions, how this might change following the decision of the High Court will be dependent on the Court's findings.

2.200 As stated at [2.122], the explanatory memorandum notes the bill does not affect a person's ability to seek judicial review of a decision on a ground '*not mentioned*' in section 503E(1).[39] The bill therefore appears to potentially preclude an affected individual from being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. It was therefore not clear the basis upon which the minister considers that the ability to challenge visa cancellation or visa application review decisions anew and access information previously protected under section 503A is outside the scope of the bill. It was noted that there has been no explanation of how this review might operate and the scope of the review.

2.201 The committee therefore sought the minister's further advice as to the compatibility of the measure with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection* [2017] HCA 33.

Minister's further response

2.202 In relation to these concerns, the minister's further response states that the High Court's decision does not affect the minister's previous advice, and restates the minister's earlier advice that the bill does not impact on the ability of affected non-citizens to challenge their visa cancellation or visa application review decisions as provided under law.

2.203 As noted in the initial and subsequent analysis, as confirmed by the language of the explanatory memorandum, the bill appears to potentially preclude an affected individual from specifically being able to challenge the lawfulness of the visa cancellation or refusal decision on the basis that the decision was made in reliance on information protected by section 503A. Therefore, the minister's response that persons may continue to challenge visa refusal or cancellation decisions 'as provided under law' does not overcome the committee's concern in relation to the right to an

39 EM 4 (emphasis added).

effective remedy. The minister's further response otherwise did not address the committee's concerns outlined in the initial and subsequent analysis.

Committee response

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

2.205 The preceding analysis indicates the measure is likely to be incompatible with the right to an effective remedy.

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Purpose	The bill seeks to amend the *Migration Act 1958* so as to authorise the public disclosure of sponsor sanction details and remove merits review in circumstances where a nomination application has been lodged but is not yet approved at the time the decision to refuse to grant a visa is made. The bill further seeks to amend the *Migration Act 1958,* the *Tax Administration Act 1953* and the *Income Tax Assessment Act 1936* to enable the Department of Immigration and Border Protection to collect, record, store and use tax file numbers of applicants and holders of specified visas for prescribed purposes in relation to prescribed visas
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 16 August 2017
Right	Privacy (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.206 The committee first reported on the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (the bill) in its *Report 9 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 20 September 2017.[1]

2.207 The minister's response to the committee's inquiries was received on 27 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Public disclosure of sponsor sanctions

2.208 Section 140K of the *Migration Act 1958* (the Migration Act) sets out actions that may be taken against approved sponsors for failing to satisfy sponsorship obligations. The bill inserts new subsections 140K (4), (5), (6) and (7) into the Migration Act so as to require the minister to publish information prescribed by the regulations, including personal information, of sponsors who have been sanctioned for failing to satisfy sponsorship obligations imposed on them. The amendments to

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 28-33.

section 140K apply in relation to actions taken under that section on or after 18 March 2015.

Compatibility of the measure with the right to privacy

2.209 The right to privacy includes the right not to have one's private, family and home life or correspondence unlawfully or arbitrarily interfered with, and includes the right to protection by law of one's reputation. The right to privacy also includes respect for informational privacy, including the respect for private information, and particularly the storing, use and sharing of personal information.

2.210 The initial human rights analysis stated that, by requiring the minister to publish information, including personal information, if an action is taken under section 140K in relation to an approved sponsor or former approved sponsor who fails to satisfy sponsorship obligations, the measure engages and limits the right to privacy. The statement of compatibility explains that there will be limited circumstances where personal information of individuals will be involved, as disclosure of information is limited to the name of the business, the Australian Business Number, and the relevant legal requirements that have been breached. However, the statement of compatibility acknowledges that information disclosed may be linked to individuals within an organisation, as in the case of sole proprietors. To this extent, the statement of compatibility acknowledges that the right to privacy is engaged.[2]

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

2.212 The explanatory statement to the bill explains that the purpose of the measure 'is to deter businesses from breaching their sponsorship obligations, and to allow Australians and overseas workers to inform themselves about a sponsor's breaches'.[3] This was noted as likely to be a legitimate objective for the purposes of international human rights law.

2.213 As to the proportionality of the measure, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility explains that publication of details of sponsor sanctions will be executed in accordance with the *Australian Border Force Act 2015*, and the *Privacy Act 1988* (Privacy Act), and that the disclosure regime is consistent with other enforcement regimes.[4] However, as identified in the initial analysis, the statement of compatibility does not examine whether there are

2 Statement of Compatibility (SOC) 16.

3 Explanatory Statement (ES) 4.

4 SOC 16-17.

less rights restrictive ways to achieve the objectives of the measure. No information is provided about whether these existing regimes will provide adequate and effective safeguards in the context of this particular measure. For example, while the Privacy Act contains a range of general safeguards, it is not a complete answer to this issue because the Privacy Act and the Australian Privacy Principles (APPs) contain a number of exceptions to the prohibition on disclosure of personal information. Relevantly, for example, an agency may disclose personal information where its use or disclosure is required or authorised by or under an Australian Law.[5] This means that the Privacy Act and the APPs may not operate as an effective safeguard of the right to privacy in these circumstances.

2.214 An additional issue identified is whether the law specifies the precise circumstances in which interferences may be permitted. As set out above, the statement of compatibility explains that disclosure of information is limited to the name of the business, the Australian Business Number, and the relevant legal requirements that have been breached.

2.215 The wording of the proposed sections 140K(4) and (7) to the bill provides:

> (4) the Minister must, subject to subsection (7), publish the information (including personal information) prescribed by the regulations if an action is taken under this section in relation to an approved sponsor or former approved sponsor who fails to satisfy an applicable sponsorship obligation […]
>
> (7) The regulations may prescribe circumstances in which the Minister is not required to publish information under subsection (4).

2.216 The statement of compatibility states that:

> The publication will be appropriately limited to cases where a breach has been substantiated and a sanction has been imposed. As such it will be confined to cases where it is necessary to inform future potential visa holders of the risks of accepting employment with the relevant sponsor and to cases that will genuinely act as a deterrent to other sponsors.[6]

2.217 However, the initial analysis stated that the legislative requirement on the minister to publish information in proposed section 140K(4) is broader than the narrow circumstances outlined in the statement of compatibility. It is therefore unclear in the bill as currently drafted whether the relevant provisions are sufficiently circumscribed and impose a proportionate limitation on the right to privacy.

2.218 Finally, neither the bill nor the statement of compatibility provide any information as to whether, and if so how, information can be removed from the

5 APP 9; APP 6.2(b).

6 SOC 17.

public domain if circumstances change. For instance, there is no information provided as to whether and how the information will be removed if a sanction imposed under section 140K is subsequently overturned on review, nor as to whether information can be removed from public disclosure after a period of time or where the sanction has been complied with. In this respect, the initial analysis stated that the bill may not provide adequate safeguards.

2.219 The committee therefore sought the advice of the minister as to whether the limitation on the right to privacy is proportionate to the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

Minister's response

2.220 The minister's response provides the following information about the measure:

> The Department already undertakes a range of activities to deter businesses from breaching their sponsorship obligations, and inform visa holders and Australians about breaches. These include employer education and awareness visits, monitoring of compliance with sponsorship obligations and visa conditions, investigation of allegations, liaison with the Fair Work Ombudsman, imposition of sanctions, and publication of aggregate data on breaches.
>
> The current framework does not allow Australians and overseas workers to sufficiently inform themselves about breaches as current information in the public domain does not identify businesses which have breached their legal obligations. The current framework also prevents the Department from advising persons making allegations that a sponsor has been sanctioned, which undermines public confidence in the compliance framework as complainants are unaware of any outcome of their allegation. The Department received 1585 allegations regarding the 457 programme in 2016-17. By releasing a sponsor's adverse compliance history to the public, the Department will be able to demonstrate that there are repercussions for sponsors who breach their sponsor obligations described by Division 2.19 of the *Migration Regulations 1994*. This will encourage visa holders, and others, to report suspected breaches, and act as a deterrent to a sponsor who may otherwise breach their obligations.

2.221 In relation to the proportionality of the proposed measure, the minister's response states:

> Publication will only occur where it has been determined by a departmental delegate that a sponsor has breached a sponsor obligation and the breach is serious enough to warrant the imposition of a sanction under section 140K of the *Migration Act 1958* (the Migration Act). Sponsors will continue to be afforded natural justice regarding whether a sponsor obligation has been breached.

> The provisions of the *Privacy Act 1988* (Privacy Act) are intended to protect individuals, not corporations, therefore in most cases the publication of sponsor sanctions does not impose on the rights of these sponsors to privacy. However, the Department recognises that some sponsors may be sole traders, and that publishing the details sanction details could include information that might identify the individual.
>
> Although the Department could publish sanction details without amending the Migration Act, publication would be restricted to information that did not identify an individual, therefore sole trader details could not be published. Whilst this would be less restrictive, it would not fulfil the objective. It is imperative that publication apply to all sponsors so Australians and overseas workers are fully informed about all businesses and to avoid a loophole which companies could exploit.
>
> It is intended that the Regulations will prescribe information that must be published. The scope of information published is narrow, and it is intended that this will be limited to information that identifies the sponsor, breach and sanction.
>
> The proposed amendments provide flexibility by allowing the Minister to prescribe circumstances where a sanction should not be disclosed. At this time, no exemptions are proposed.
>
> The Department intends that sanction information will remain in the public domain for a period proportionate to the seriousness of the breach, and will prescribe this in policy. In determining this, the Department will take into consideration the publication periods for sanctions by other regulators such as the Office of the Migration Agents Registration Authority and the Fair Work Ombudsman. Migration agent sanctions must be removed from the web site not later than 12 months, 5 years or 10 years, depending on the nature of the breach.
>
> The implementation of the measure will include a comprehensive communications package to inform sponsors, visa holders, and the Australian public of the measure.
>
> Requiring the publication of sponsor sanctions is reasonable and proportionate, as it will further reduce the potential for visa holders to be exploited, and allow workers to make informed decisions about potential employers. Publication will demonstrate to the public that there are repercussions for sponsors who breach their obligations, and act as a deterrent to a sponsor who may otherwise breach their obligations.

2.222 It is acknowledged that in light of the need to deter sponsors from breaching sponsorship obligations, the fact that there are limited circumstances where personal information will be involved, and the need to apply the laws consistently between incorporated entities and sole proprietors, that a less rights restrictive approach may not be possible in this particular case. The minister's response confirms that the information to be published will be narrowly confined, noting however that such information will be prescribed by regulation. Based on the

information provided it appears the information to be published will be appropriately circumscribed, however the committee will consider the human rights compatibility of the regulation once it is received. Further, the minister's further clarification that the department intends to take into account publication periods for sanctions by other regulators when determining how long sanction information will remain in the public domain indicates that the measure is likely to be accompanied by adequate safeguards to remove information from the public domain after a period of time. On balance, therefore, it appears that this aspect of the measure is likely to be compatible with the right to privacy.

Committee response

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

2.224 The committee considers that, on balance, the measure is likely to be compatible with the right to privacy, noting that the committee will consider the human rights compatibility of the regulations that prescribe the information to be disclosed once they have been received.

Disclosure of tax file numbers

2.225 The bill introduces new section 506B to the Migration Act, which permits tax file numbers (TFNs) of applicants and holders of specified visas to be requested, provided, used, recorded and disclosed. Amendments are also made to the *Income Tax Assessment Act 1936* (Income Tax Assessment Act) to add that the facilitation of the administration of the Migration Act is an object of Part IVA of the Income Tax Assessment Act. Amendments are also made to the *Tax Administration Act 1953* to provide that a person does not commit an offence under that Act by requesting, recording, using or disclosing a tax file number as authorised under the Migration Act.

Compatibility of the measure with the right to privacy

2.226 As noted above, the right to privacy includes the right to informational privacy including the respect for private information, particularly the storing, use and sharing of personal information.

2.227 The statement of compatibility acknowledges that through the provision, use, recording and disclosure of tax file numbers, the measure engages and limits the right to privacy. However, the statement further considers that this limitation is permissible:

> Data matching using TFNs minimises the risk of misidentifying a visa holder when investigating a sponsor for compliance with their obligations. The limits placed on a visa holder’s right to privacy by TFN sharing are justifiable as reasonable, necessary and proportionate because it provides

> the Department with a tool to more accurately identify and investigate infringements of that visa holder's work rights.[7]

2.228 The objective of the measure is stated to be to enable the department to undertake compliance activities with improved targeting, and also for research purposes insofar as data matching through tax file number sharing 'will improve the Department's ability to perform the research and trend analysis that underpins the development of visa policy'.[8] The statement of compatibility also suggests the measure is aimed to provide protection for temporary work visa holders against exploitation.[9]

2.229 The statement of compatibility provides some information about the importance of these objectives:

> There are currently difficulties verifying that sponsors are paying visa holders correctly or if a visa holder is working for more than one employer. Employers may collude with visa holders to alter documentation provided to the Department as evidence of salary payments, or employers may be engaging skilled visa holders who are not approved to work for them.[10]

2.230 The initial analysis noted that ensuring that the department's compliance policies are targeted and effective is likely to be a legitimate purpose for international human rights law, as is the objective of protecting vulnerable visa holders. Collecting the tax file numbers of temporary work visa holders for these purposes would appear to be rationally connected to these objectives.

2.231 However, while the explanatory statement and statement of compatibility focus attention on the collection of tax file numbers for the investigation of infringements by sponsors of temporary work visa holders,[11] it was noted that the scope of the proposed amendment is broader:

> (1) The Secretary may request any of the persons mentioned in subsection (2) to provide the tax file number of a person (the ***relevant person***) who is an applicant for, or holder or former holder of, a visa of a kind (however described) prescribed by the regulations.[12]

2.232 By allowing a tax file number to be collected from any class of visa applicant, holder or former visa holder, the measure may be overly broad with respect to its stated objectives and accordingly may not be a proportionate limit on the right to privacy.

---

7 SOC 16.

8 SOC 11, 16.

9 See SOC 15,16.

10 SOC 11-12.

11 See, for example, SOC 16.

12 Paragraph 506B(1) to the bill.

2.233 The explanatory statement further explains that it is not the intention to *require* a visa applicant, visa holder, or former holder to provide their tax file number.[13] This is consistent with subsection 7(3) of the *Privacy (Tax File Number Rule) 2015* which provides that 'an individual is not legally obliged to quote their TFN, however there may be financial consequences for an individual who chooses not to quote their TFN'.[14] However, no information was provided as to how it will be made clear to a relevant person that there is no legal obligation to quote their tax file number. This raises specific questions as to whether there are adequate safeguards in place to protect the right to privacy.

2.234 The committee therefore sought the advice of the minister as to whether the limitation is a proportionate limitation on the right to privacy (including whether there are effective safeguards with respect to the right to privacy).

Minister's response

2.235 In relation to whether the limitation is proportionate, the minister's response states:

> The tax file number measure will be used for compliance and research purposes, which will assist the Department in identifying where visa holders are not being paid correctly. This will reduce the potential for visa holders to be exploited. The limitations on privacy introduced by the tax file number measure are reasonable and proportionate as they will protect and benefit visa holders.
>
> The collection, use, recording and disclosure of tax file numbers will be prescribed in the Regulations. It is intended that the regulations will allow tax file number sharing in relation to a narrow list of subclasses, that is limited to temporary and permanent skilled visas, for research and compliance purposes. This includes identifying and preventing exploitation.
>
> The implementation of tax file number sharing will include a comprehensive communications package. This will ensure affected persons are aware of their rights.
>
> Whilst the tax file number measure engages the right to privacy, this is necessary and proportionate to achieve the measure's objectives, which will protect and benefit visa holders.

2.236 The minister's clarification that a comprehensive communications package will be provided so that affected persons are aware of their rights in relation to disclosure of tax file numbers indicates that there may be safeguards in place to protect individual's rights in this respect. It would have been of assistance if further

13 EM 8.

14 See, section 7(3) of the *Privacy (Tax File Number) Rule 2015.*

information had been provided as to the content of the communications package, specifically how it will be made clear to a relevant person that there is no legal obligation to quote their tax file number, and when and how that information will be provided to an affected person (for example, on the same form as the request for the tax file number). However, the minister's clarification that the regulations will only allow tax file number sharing in relation to a narrow list of subclasses indicates that the measure may be appropriately circumscribed, noting however that the committee will consider the human rights compatibility of the regulation once it is received. On balance, it appears that the measures may be a proportionate limitation on the right to privacy in light of the measure's legitimate objectives.

Committee response

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

2.238 The committee considers that on balance the measure appears to be compatible with the right to privacy. If the bill is passed, the human rights compatibility of the regulations specifying the class of visa holders to be covered by the amendments will be considered once the regulation is received.

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

Purpose	Seeks to amend the *Social Security (Administration) Act 1999* to extend cashless debit card trials at existing sites and enable the expansion of trials to new locations
Portfolio	Human Services
Introduced	House of Representatives, 17 August 2017
Rights	Social security; private life; family; equality and non-discrimination (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.239 The committee first reported on the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (the bill) in its *Report 9 of 2017*, and requested a response from the Minister for Human Services by 20 September 2017.[1]

2.240 The minister's response to the committee's inquiries was received on 20 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

2.241 The committee has previously considered the trial of cashless welfare arrangements in the two current trial locations of Ceduna (and its surrounding region) and East Kimberley in previous reports, including in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Bill 2015).[2]

2.242 The committee has also examined the income management regime in its 2013 and 2016 Reviews of the Stronger Futures measures.[3]

2.243 The Debit Card Bill 2015 amended the *Social Security (Administration) Act 1999* to provide for a trial of cashless welfare arrangements in up to three prescribed

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 34-40.

2 See Parliamentary Joint Committee on Human Rights, *Twenty-seventh report of the 44th Parliament* (8 September 2015) 20-29 and *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36. Also see, Parliamentary Joint Committee on Human Rights, Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], *Report 7 of 2016* (11 October 2016) 58-61.

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).

locations, as set out in section 124PF. Persons on working age welfare payments in the prescribed sites would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcohol or to conduct gambling. A person subject to the trial is prevented from accessing this portion of their social security payment in cash. Rather, payment is accessible through a debit card which cannot be used at 'excluded businesses' or 'excluded services'.[4]

2.244 The trial arrangements were initially extended to a period of twelve months in two instruments[5] and, subsequently, by a further six months,[6] bringing the total period of the trials to 18 months in each location. The trial was further extended through the Social Security (Administration) (Trial Area) Amendment Determination (No. 2) 2017 [F2017L01170], which tabled in the House of Representatives on 13 September 2017 and in the Senate on 14 September 2017. The determination extends the cashless debit card trial in the Ceduna region for a further six months (until 14 March 2018) and in East Kimberley for a further six months (until 25 April 2018).

Expanding trials of cashless welfare arrangements

2.245 The bill seeks to remove section 124PF of the *Social Security (Administration) Act 1999* which specifies that the trial of cashless welfare arrangements is to occur in up to three locations, include no more than 10,000 participants and end on 30 June 2018.

2.246 By removing these restrictions, the bill provides for the extension of the cashless debit card trial in the two current sites of Ceduna and its surrounding region and East Kimberley, as well as the expansion of arrangements to new locations to be determined by disallowable legislative instruments.

Compatibility of the measure with human rights

2.247 The previous human rights assessments of the cashless welfare trial measures raised 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. These concerns related to the right to social security, the right to privacy and family and the right to equality

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

5 Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 53.

6 See Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33 and *Report 8 of 2017* (15 August 2017) 122-125.

and non-discrimination.[7] 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).[8]

2.248 As the initial analysis stated, by providing for the extension of the trial in each location and for expansion to new sites, this bill engages and limits these rights. Referring to the committee's previous reporting, the statement of compatibility acknowledges that these rights are engaged and limited.[9] These rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to (that is, effective to achieve) and proportionate to that objective.

2.249 The statement of compatibility identifies that the objective of the measures is:

> ...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.[10]

2.250 While the committee previously accepted that the cashless welfare trial measures may pursue a legitimate objective,[11] it raised concerns as to whether the measures are rationally connected to (that is, effective to achieve) and proportionate to their objective.[12]

2.251 In relation to whether the measure is effective to achieve its stated objective, the statement of compatibility cites findings from the Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial, conducted by ORIMA Research and commissioned by the Department of Social Services, based on data collected in the two trial locations over the first six months of the trial.[13] The statement of compatibility describes the report as indicating that 'the trial is having positive early

---

7 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

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

9 Statement of compatibility (SOC) 1.

10 SOC 2.

11 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 27.

12 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; *Report 7 of 2016* (11 October 2016) 42; and *Report 5 of 2017* (14 June 2017) 31-33.

13 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017).

impacts in relation to alcohol consumption, illegal drug use, and gambling in the trial regions'.[14] As outlined in the previous analysis, statistics cited from the report include that 25% of participants reported drinking alcohol less frequently; 32% reported gambling less; and 24% reported using illicit drugs less often.[15]

2.252 While the report states that 'overall, the [trial] has been effective to date' in terms of its performance against certain pre-established indicators, it was noted that the report also contains some other more mixed findings on the operation of the scheme. For example, 49% of participants said the trial had made their lives worse, as did 37% of family members;[16] 33% of participants reported noticing an increase in 'humbugging'[17] or harassment for money, as did 35% of family members;[18] and 46% of participants reported experiencing problems using their card.[19] These statistics are not cited in the statement of compatibility.

2.253 Further, the initial analysis noted that a review of the ORIMA report, published by the Centre for Aboriginal Economic Policy Research at the Australian National University, raised several issues with the evaluation's findings and methodology.[20] In particular, the review noted the difficulty in identifying whether a reduction in alcohol use was directly attributable to the cashless debit card trial or to alcohol restrictions separately implemented in both locations, including the Takeaway Alcohol Management System trial operating in the East Kimberley during the same period.[21]

2.254 The initial analysis cited an additional concern that the final evaluation of the trial based on the initial 12 month period, which the statement of compatibility cites as a safeguard in relation to the measure,[22] had not yet been finalised. The trial was therefore being extended in the two locations, and expanded elsewhere, before

---

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

15 EM, SOC 3.

16 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 5.

17 Defined as 'Making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 6.

18 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 34.

19 ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) B7.

20 J Hunt, *The Cashless Debit Card trial evaluation: A short review*, Aboriginal Economic Policy Research, Australian National University, (1/2017).

21 J Hunt, *The Cashless Debit Card trial evaluation: A short review*, Aboriginal Economic Policy Research, Australian National University, (1/2017) 2.

22 EM, SOC 4.

more comprehensive evaluation findings were available. While the statement of compatibility states that 'early indications' suggest the next stage of the report 'will continue to demonstrate positive results',[23] the concerns raised above in relation to some of the interim report's findings raise doubts as to whether the trials have been successful. It was therefore not clear from the statement of compatibility as to why extending and expanding the trials would be effective to achieve the objectives of the measure.

2.255 It was also unclear that the extension of the trials is a proportionate limitation on human rights. The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, are relevant to assessing the proportionality of these limitations.

2.256 In this respect, the statement of compatibility argues that it is a relevant safeguard that the rollout of the trials in the two existing locations was subject to an extensive consultation process, and that similar consultation will be conducted in new trial locations, to be set out in legislative instruments. However, it was not clear from the statement of compatibility that consultation had been held in the existing locations in relation to the *extension* of the trials. It was noted that Indigenous people make up the overwhelming number of participants in both trial sites.[24] While the United Nations Declaration on the Rights of Indigenous Peoples is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context as to how human rights standards under international law apply to the particular situation of Indigenous peoples. Under the Declaration, state parties such as Australia are obligated to 'consult and cooperate in good faith' with Indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.[25]

2.257 The explanatory memorandum for the Debit Card Bill 2015 noted that the policy intention was for the trial to take place for only 12 months in each location.[26] The initial analysis stated that there was a concern that the trial was now being extended through the bill with no specified end date or sunsetting provision and

23 SOC 3.

24 Previous advice provided to the committee by the Assistant Minister to the Prime Minister in relation to the Debit Card Bill 2015 stated that Indigenous people make up 72% of the total number of trial participants in Ceduna. See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 31. The statement of compatibility to the bill examined in the current report states that, in the East Kimberley, Indigenous people made up around 83% of the total income support payment population who would become trial participants. See SOC 7.

25 Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

26 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, EM 4.

potentially without adequate consultation with the affected communities. In this respect, the bill would permit 'trials' to be rolled out, extended and imposed on communities on a compulsory basis through legislative instruments without existing safeguards.[27]

2.258 More generally, the previous analysis identified that the cashless debit card would be imposed without an assessment of individual participants' suitability for the scheme. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

2.259 As the cashless debit card trial applies to anyone residing in locations where the trial operates who is receiving a social security payment specified under the scheme, serious doubts were raised as to whether the measures are the least rights restrictive way to achieve the stated objectives. The previous analysis noted that, by comparison, the income management regime in Queensland's Cape York allows for individual assessment of the particular circumstances of affected individuals and the management of their welfare payments.[28] Accordingly, the committee previously stated that this regime may be less rights restrictive than the blanket location-based scheme applied under other income management measures.[29]

2.260 The compulsory nature of the cashless debit card trial also raises questions as to the proportionality of the measures. In its 2016 Review, the committee stated that, while income management 'may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it'.[30] The previous analysis stated that application of the scheme on a voluntary basis, or with a clearly defined process for individuals to seek exemption from the trial, would appear to be a less right restrictive way to achieve the trial's objectives. This was not discussed in the statement of compatibility.

2.261 The committee therefore sought further information from the minister as to:

- why it is necessary to extend and expand the trials (including why the extension and expansion is proposed before the final evaluation report is finalised and why no end date to the current trial is specified);

27 See SOC 4.

28 See Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017, *Report 5 of 2017* (14 June 2017) 45-48.

29 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 47.

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

- how the measures are effective to achieve the stated objectives (including whether there is further evidence in relation to the stated effectiveness of the trial);
- how the limitation on human rights is reasonable and proportionate to achieve the stated objectives (including the existence of safeguards and whether affected communities have been adequately consulted in relation to the extension of the trial); and
- whether the use of the cashless debit card could be restricted to instances where:
    - there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location in a particular community;
    - individuals opt-in on a voluntary basis.

Minister's response

2.262 The minister's response restates the objectives of the trial and emphasises the necessity of the measures 'given the high levels of harm in potential communities'. The committee has previously assessed that the stated objective of the trials, in seeking to reduce hardship, violence and harm in communities, is a legitimate objective for the purposes of international human rights law.

2.263 The minister's response states that the initial decision to extend the trials in the two current sites was based on the results of the interim evaluation report as well as ongoing positive feedback from people in the trial communities. The response also refers to the final evaluation report of the cashless debit card trial, conducted by ORIMA Research and released on 1 September 2017, which 'has seen an even further increase in positive outcomes against the three key indicators of a reduction in alcohol and drug use and gambling'. The response states that the expansion of the trials is necessary to 'allow the Government an opportunity to build on the research findings of the interim and final reports [and] to help test the card and the technology that supports it in more diverse communities and settings'.

2.264 In relation to the effectiveness of the trial, the minister's response cites a range of statistics from the final evaluation report, including:

- Of people surveyed who drank alcohol before the trial started, towards the end of the 12 months 41% reported drinking alcohol less frequently (up from 25% in the Wave 1 survey, which was done approximately six months into the trial); 37% of binge drinkers were doing this less frequently (up from 25% at Wave 1).
- A decrease in alcohol-related hospital presentations including a 37% reduction in Ceduna in the first quarter of 2017 compared with first quarter of 2016 (immediately prior to the commencement of the trial).

- A 14% reduction in Ceduna in the number of apprehensions under the *Public Intoxication Act* compared to the previous year.
- In the East Kimberley, decreases in the alcohol-related pick-ups by the community patrol services in Kununurra (15% reduction) and Wyndham (12%), and referrals to the sobering up shelter in Kununurra (8% reduction).
- A decrease in the number of women in East Kimberley hospital maternity wards drinking through pregnancy.
- Qualitative evidence of a decrease in alcohol-related family violence notifications in Ceduna.
- A noticeable reduction in the number of visible or public acts of aggression and violent behaviour. Nearly 40% of non-participants perceived that violence in their community had decreased.
- People are now seeking medical treatment for conditions that were previously masked by alcohol effects.
- 48% of gamblers reported gambling less (up from 32% at Wave 1).
- In Ceduna and surrounding local government areas (which covers a much bigger region that [sic] the card's operation), poker machine revenue was down 12%. This is the equivalent of almost $550,000 less spent on poker machines in the 12 month trial.
- The card has had "a positive impact in lowering illegal drug use" across the two sites.
- Of drug takers, 48% reported using illegal drugs less often (up from 24% at Wave 1).
- 40% of participants who had caring responsibility reported that they had been better able to care for their children (up from 31% at Wave 1).
- 45% of participants have been better able to save more money (up from 31% at Wave 1).

2.265 It is noted that the final evaluation report appears to provide some evidence to indicate that aspects of the trial may be effective. This includes statistics on participants' reported drug and alcohol use and gambling, which appear to have improved by comparison with the findings of the interim report.

2.266 However, as with some of the findings of the interim report (outlined at [2.252]), the final evaluation contains some mixed results which indicate ongoing concerns over the effectiveness and operation of the scheme. For example, 32% of participants reported that the trial had made their lives worse;[31] 24% of participants

31 ORIMA Research, *Cashless Debit Card Trial Evaluation, Final Evaluation Report* (August 2017) 6.

with children reported that their child/children's lives were worse as a result of the trial;[32] 33% of participants reported experiencing problems with their card;[33] and 27% of participants reported noticing an increase in 'humbugging'.[34] These statistics and their implications are not referenced in the minister's response.

2.267 Further, questions remain from the final evaluation report regarding the extent to which the reduction in alcohol use is attributable to the cashless debit card trial or to alcohol restrictions separately implemented in both locations, as identified in the review of the interim evaluation report published by the Centre for Aboriginal Economic Policy Research set out above at [2.253].

2.268 In relation to how the measures are reasonable and proportionate, the minister's response states:

> This amendment does not remove the legislative safeguards protecting how, when and where the Cashless Debit Card can operate. The legislation continues to ensure that the program cannot be implemented in any location without the introduction of a disallowable instrument. These instruments can also specify other safeguards, including sunset dates and participant criteria. This provides the opportunity for the Government to co-design these parameters with interested communities, and tailor the program to meet community needs. It also allows those communities to make decisions about these arrangements in their own time, rather than being restricted by the legislation end date. These safeguards ensure that Parliament retains the right to consider each proposed application of the cashless debit card. Instead of passing legislative amendments for potential hypothetical communities and participants, Parliament can accept or reject new sites by considering the impacts and level of community support for the measure on a case by case basis.

2.269 While it is noted that under the bill the legislative instruments would be able to set out some relevant safeguards, there is no requirement in the bill that they do so. Under the bill, a legislative instrument could be compulsorily imposed on communities without sunset dates, participant criteria or community agreement. The committee has previously noted that it is generally preferable that safeguards, or at least a general legislative requirement for them, be included in primary, rather than delegated, legislation. As set out in the initial analysis, the bill would permit 'trials' to

---

32 ORIMA Research, *Cashless Debit Card Trial Evaluation, Final Evaluation Report* (August 2017) 6.

33 ORIMA Research, *Cashless Debit Card Trial Evaluation, Final Evaluation Report* (August 2017) 89.

34 ORIMA Research, *Cashless Debit Card Trial Evaluation, Final Evaluation Report* (August 2017) 76. 'Humbugging' is defined in the initial evaluation report as 'Making unreasonable financial demands on family members or other local community members'. See ORIMA Research, *Wave 1 Interim Evaluation Report of the Cashless Debit Card Trial*, (February 2017) 6.

be rolled out or extended through legislative instruments without existing safeguards. The removal of key parameters of the trial from the primary legislation, including the number of participants and the trial end date, raises significant concerns as to whether the measures are proportionate to the objective being sought. While the minister's response further states that the bill 'does not indefinitely extend' the cashless debit card program, it appears to be the effect of the proposed legislation that the program would be able to be extended for a potentially undefined period through particular legislative instruments. In this respect, there is also a risk that the legislative instruments imposing the trial may not be compatible with human rights. If the bill is passed, the committee will assess the human rights implications of the instruments once they are received.

2.270 As to whether affected communities have been adequately consulted in relation to the *extension* of the trial, the minister's response states:

> All decisions around the extension of the Cashless Debit Card have been made and will continue to be made in close partnership with community leaders. Engagement with community members and leaders has been ongoing, informally and formally (through the independent evaluation) in all locations to help Government better understand local needs and gauge interest in the extension of the program. Topics of consultation include objectives; benefits of the program in terms of community safety/wellbeing for vulnerable people; the identification of gaps and possible support services; the role of community bodies; the evaluation; and differences between the Cashless Debit Card and Income Management arrangements.

2.271 The further information indicates that engagement with community members is ongoing to allow the government to 'gauge interest in the extension of the program'. It is welcome that consultation with communities on the operation of the scheme is continuing and that, as stated, decisions will be made in partnership with community leaders. However, it remains unclear whether community members in existing trial locations have been adequately consulted — or support — the extension of the scheme. It is a further concern that no requirements to undertake consultation and secure community agreement are set out in the bill. It would therefore appear to be possible that the trial could be imposed or extended without community consultation or agreement.

2.272 In response to whether the use of the cashless debit card could be restricted to instances where there has been an assessment of an individual's suitability to participate in the trial, the minister's response states:

> While Income Management, the Australian Government's other welfare quarantining program, is targeted towards vulnerable individuals, the Cashless Debit Card is testing whether restricting the amount of cash in a community can reduce the overall social harm caused by welfare-fuelled alcohol, gambling and drug misuse at the individual and community level. The community wide impacts of these harmful goods mean that the

> Cashless Debit Card program is most effective when a majority of people in a community who receive a welfare payment participate in the program. In current sites, the program applies to all people who receive a working age welfare payment in Cashless Debit Card locations, with the exception of Age Pension and Veterans' Pension recipients. However, people receiving these two payments may volunteer to participate. People who earn money from other sources, such as paid work, are also able to volunteer.
>
> The Cashless Debit Card is not designed to operate as a punitive measure. For people who do not spend a large proportion of their money on alcohol, gambling or drugs, the Cashless Debit Card has very little impact and will ensure that those receiving welfare payments and their children will have money available for life's essentials.
>
> Another key difference between Income Management and the Cashless Debit Card is that Cashless Debit Card participants are able to use their card to purchase anything other than alcohol and gambling products, providing greater consumer choice to participants. Using a card that is delivered by a commercial provider also means less involvement from government employees. This helps people to engage in the mainstream financial market; encouraging improved financial capability and removing interference from government in people's lives.

2.273 While part of the rationale for the approach appears to be 'testing' the effectiveness of the blanket imposition of the Cashless Debit Card on a community, the further information from the minister does not directly address why it is not possible to restrict the imposition of the cashless debit card to instances where there has been an assessment of an individual's suitability and consent to participate in the scheme. As stated in the initial analysis, in assessing whether a limitation on human rights is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases. The committee has previously noted concerns of the impact of the card on individuals, including, for example, in situations where a person would only be able to use cash in order to purchase goods or services.[35]

2.274 Further, the minister's response states that the cashless debit card program 'is most effective when a majority of people in a community who receive a welfare payment participate'. However, no specific evidence or reasoning is provided in relation to this assertion. This raises specific concerns that the measure may not be the least rights restrictive method of achieving its legitimate objective as required in order to be a proportionate limit on human rights. In this respect, the human rights concerns in relation to income management identified in the committee's 2016 Review remain relevant. In particular, the committee recommended that 'income

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

management should be imposed on a person only when that person has been individually assessed as not able to appropriately manage their income support payments'.[36] Accordingly, serious doubts remain as to whether the measures in the proposed legislation are the least rights restrictive way to achieve the stated objectives.

Committee response

2.275 The committee thanks the minister for his response and has concluded its examination of the proposed legislation.

2.276 The preceding analysis indicates that concerns remain as to whether the trial is effective to achieve its stated objectives.

2.277 The analysis further indicates that, based on the information provided, the measures may not be a reasonable and proportionate limitation on human rights.

2.278 Accordingly, noting concerns raised by previous human rights assessments of the trial and related concerns regarding income management identified in the committee's *2016 Review of Stronger Future measures*, the measures may not be compatible with the right to social security, the right to privacy and family and the right to equality and non-discrimination. If the bill is passed, the committee will consider the human rights implications of the legislative instruments once they are received.

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

Social Services Legislation Amendment (Welfare Reform) Bill 2017

Purpose	Seeks to amend various acts to: create a Jobseeker Payment to replace seven existing payments as the main payment for people of working age from 20 March 2020 and replace other payment types; remove the ability of Newstart Allowance and certain special benefit recipients aged 55 to 59 to satisfy the activity test by engaging in voluntary work for at least 30 hours per fortnight; remove certain exemptions for drug or alcohol dependence; provide that a job seeker's Newstart Allowance or Youth Allowance be payable from the date they attend their initial appointment with their employment services provider; provide that job seekers are not able to use drug or alcohol dependency as an excuse for failing to meet their requirements; introduce a new compliance framework for mutual obligation requirements in relation to participation payments; establish a two year drug testing trial in three regions for 5,000 new recipients of Newstart Allowance and Youth Allowance; enable certain information obtained in the course of an administrative action to be used in subsequent investigations and criminal proceedings; and to exempt two social security laws from the operation of the *Disability Discrimination Act 1992*
Portfolio	Social Services
Introduced	House of Representatives, 22 June 2017
Rights	Social security; adequate standard of living; equality and non-discrimination; privacy; protection of the family; rights of children (see **Appendix 2**)
Previous report	8 of 2017
Status	Concluded examination

Background

2.279 The committee first reported on the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (the bill) in its *Report 8 of 2017*, and requested a response from the Minister for Social Services by 28 August 2017.[1]

2.280 The minister's response to the committee's inquiries was received on 29 August 2017. The response, which also includes input from the Minister for Employment, is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 46-77.

Nature of key rights engaged

2.281 The bill contains a number of schedules that impact on the administration, qualification and receipt of social security.

2.282 These measures engage the right to social security and the right to an adequate standard of living. The human rights assessment of the bill below addresses individual measures that raise human rights concerns in relation to these rights.

2.283 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 rights. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing.[2]

2.284 Under international human rights law, Australia has obligations to progressively realise the right to social security and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

2.285 A retrogressive measure is a type of limitation on an economic, social or cultural right and accordingly needs to be justified. A limitation on a right may be permissible provided that it addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective. A legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

2.286 Certain schedules of the bill also engage the right to privacy and the right to equality and non-discrimination, which are set out below.

Schedules 1-7 – creation of a new jobseeker payment and cessation of other payment types

2.287 Schedules 1-7 of the bill seek to create a new jobseeker payment which will be the main working age social security payment and provide that a number of other social security payments will cease. The bill proposes to cease Newstart Allowance, Sickness Allowance, Wife Pension, Bereavement Allowance, Widow Allowance, Widow B Pension and Partner Allowance.[3]

2 See, International Covenant on Economic Social and Cultural Rights (ICESCR) articles 9, 11.

3 Statement of compatibility (SOC) 136.

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

2.288 The statement of compatibility acknowledges that the measures engage the right to social security and refers to jurisprudence of the UN Committee on Economic Social and Cultural Rights (UNCESR) explaining that:

> [the UNCESCR] stated that there is 'a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.' The [UNCESCR] places a burden on the State party that has introduced deliberately retrogressive measures to 'prove that they have been introduced after the most careful consideration of all alternatives and that they are duly justified…'[4]

2.289 The initial human rights analysis stated that, given the complexity of the measures, it is not clear whether they are retrogressive. For example, in relation to the creation of the Jobseeker Payment and the cessation of other payment types, the statement of compatibility states that over 99.9 percent of social security recipients will continue to be eligible for income support. These recipients will transition from the payment types that are ceasing to the Age Pension, the Jobseeker Payment or Carers Payment with a range of transitional arrangements provided as safeguards.[5] It appears that it is intended that most current social security recipients will be transitioned onto new payment types with the exception of some recipients residing overseas.[6] The explanatory memorandum explains that the creation of the Jobseeker Payment 'will have the same basic qualification, payability and rate as existing Newstart Allowance, however, the payment will be broader in scope than Newstart Allowance'.[7]

2.290 The initial analysis also stated that, given that the qualification requirements and the amount payable to social security recipients varies between types of payments, the question arises as to whether certain individuals may be worse off than under current arrangements. In other words, there is some potential that these measures could have retrogressive aspects. For example, following the death of a partner, subject to means and asset testing, the Bereavement Allowance currently pays up to $803.30 per fortnight for a period of 14 weeks. By contrast, current fortnightly payments for Newstart Allowance for a single person are $535.60. With the cessation of the Bereavement Allowance, the explanatory memorandum states that certain new and existing social security recipients will become entitled to an additional one off payment following the death of their partner instead of Bereavement Allowance. It is not stated whether the amount payable would be

4 SOC 137.

5 See, for example, Explanatory Memorandum (EM) 44.

6 See, SOC 137-139.

7 EM 2.

equivalent to the current amount payable under the Bereavement Allowance or whether qualification for it will be the same.

2.291 Accordingly, the committee sought the advice of the minister as to:

- whether the cessation of certain social security types could result in reductions in the amount payable or qualification for any new or existing social security recipients, or whether such payments will be equivalent to the types of payments that are ceasing;
- whether any new or existing social security recipients would be worse off under the transitional arrangements;
- what safeguards are provided in relation to the measures (for example, to ensure that individuals continue to receive social security); and
- if there are any reductions in the amount of social security payable (retrogressive measures), whether they pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

Minister's response

2.292 The minister provided a useful and detailed response to the committee's questions. In relation to whether the cessation of certain social security types could result in reductions in the amount payable or qualification for any new or existing social security recipients, the minister's response states:

> The cessation of **Newstart Allowance** will not result in reductions in the amount payable to recipients or impact on qualification. All existing Newstart Allowance rules and rates will be rolled into the JobSeeker Payment.
>
> The cessation of **Widow B Pension** will not result in reductions in the amount payable to recipients. The payment has been closed to new entrants since 20 March 1997 so ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension which is paid at the same rate as Widow B Pension.
>
> The cessation of **Partner Allowance** will not result in reductions in the amount payable to recipients. The payment was closed to new entrants on 20 September 2003 therefore ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension. Partner Allowance is paid at the lower allowance rate and therefore recipients will receive a payment increase when they transition to Age Pension.
>
> The cessation of **Wife Pension** may result in reductions to the amount payable to a small number of recipients. Wife Pension has been closed to new entrants since 1 July 1995 so ceasing the payment does not impact qualification. On the implementation date there will be around 7,750 recipients:

- Around 2,250 will transition to Age Pension and 2,400 will transition to Carer Payment. Age Pension and Carer Payment are paid at the same rate as Wife Pension so these recipients will not experience any reduction in assistance.
- Around 2,900 Wife Pension recipients will transition to JobSeeker Payment. JobSeeker Payment will be paid at the lower allowance rate. However, transitional arrangements described in the Explanatory Memorandum will ensure that these recipients do not experience a nominal reduction in their payment rates.
- Around 200 Wife Pension recipients residing overseas will no longer be eligible for a social security payment. These recipients are under Age Pension age and would not be eligible for either another payment under an international agreement or a portable payment. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by obtaining employment.

The cessation of **Widow Allowance** will not result in reductions to the amount payable existing to Widow Allowance recipients. Widow Allowance will close to new entrants on 1 January 2018. Existing Widow Allowance recipients will gradually transition to Age Pension by 1 January 2022 as they reach Age Pension age. Widow Allowance is paid at the lower allowance rate so recipients transitioning to Age Pension will experience an increase in their payment rates. In relation to new recipients:

- Widow Allowance is only open to women over 50 born before 1 July 1955 who are no longer partnered and have become widowed, divorced or separated since turning 40 years of age, and have no recent workforce experience. All those who could be eligible would have reached Age Pension age by 1 January 2022.
- Between 1 January 2018 and 1 January 2022, women who would otherwise have been eligible for Widow Allowance will be able to claim Newstart Allowance. As a result of the Newstart Allowance upper age limit (Age Pension age), recipients will have to claim Age Pension when they reach Age Pension age.

The cessation of **Sickness Allowance** may result in small reductions to the amount payable to some recipients. Sickness Allowance criteria will be rolled into JobSeeker Payment so there will be no impact on qualification for payment. Existing recipients will be gradually transitioned to JobSeeker Payment. Sickness Allowance is paid at the same rate that Jobseeker Payment will be paid, so recipients will not experience a reduction in their base rate. However, Sickness Allowance automatically entitles a person to the Pharmaceutical Allowance supplement ($6.20 per fortnight singles, $3.10 per fortnight partnered). In line with existing Newstart Allowance rules, JobSeeker Payment recipients will be assessed to determine their eligibility for Pharmaceutical Allowance. It is estimated that around 400

former Sickness Allowance recipients will be ineligible for Pharmaceutical Allowance when they transition to JobSeeker Payment as they will not meet the relevant criteria. That is, up to 5 per cent of recipients are expected to have capacity to work of 15 hours or more per week and will therefore not automatically qualify for Pharmaceutical Allowance. They will be referred to an employment service provider where they would enter a Job Plan and undertake suitable mutual obligation activities. This represents less than 5 per cent of the Sickness Allowance population on 20 March 2020.

The cessation of **Bereavement Allowance** will not result in reduction in the amount payable to existing recipients on 20 March 2020. In relation to new recipients:

- Up to 960 people annually who would have previously claimed Bereavement Allowance will now be able to claim JobSeeker Payment or another income support payment. It is expected that the majority will claim JobSeeker Payment.
- As per existing Newstart Allowance rules, JobSeeker Payment will have a more stringent means test than Bereavement Allowance. An estimated 30 bereaved people per year will not qualify for an income support payment due to their income, assets or other circumstances, such as age.
- JobSeeker Payment will be paid at the allowance rate compared to Bereavement Allowance which is paid at the pension rate. However, JobSeeker Payment will provide a triple upfront payment to newly bereaved people to assist with the high upfront costs associated with the death of a partner. While the overall assistance provided on JobSeeker Payment will be less than that currently available on Bereavement Allowance over a 14 week period, JobSeeker Payment will provide a substantially higher level of support in the first fortnight. Additionally, many recipients leave Bereavement Allowance before the end of the 14 week bereavement period, so JobSeeker Payment recipients would receive a higher level of overall assistance than some shorter-term Bereavement Allowance recipients due to the higher upfront payment on the JobSeeker Payment.
- If a person is eligible for another payment such as Parenting Payment Single which is paid at the pension rate, they will receive that payment with a 14 week exemption from mutual obligations, consistent with existing provisions in the Bereavement Allowance.

2.293 This information usefully indicates that in the majority of cases the cessation of certain categories of social security payments will not result in a reduction in the level of payments. This means that for most social security recipients the measures are not retrogressive (that is, a backward step in the level of attainment of social security).

2.294 The minister's response further clarifies that transitional arrangements will only apply to existing social security recipients. In relation to whether any existing social security recipients would be worse off under the transitional arrangements, the minister's response states '[a]s a result of the transitional arrangements, over 99.9 per cent of existing recipients will be the same or better off'. It appears from the information provided that, of those social security recipients that will be worse off, the impact may be relatively limited.

2.295 In response to the committee's question as to what safeguards are provided in relation to the measures, the minister's response states that there are a range of safeguards to ensure that existing payment recipients will be transferred 'to the income support payment best suited to their circumstances'. In this respect, the minister's response outlines the following safeguards in respect of existing recipients:

- people over Age Pension age will be deemed to satisfy the residency requirements for Age Pension, regardless of actual qualifying residence;
- recipients of Widow B Pension and Wife Pension will retain their existing exemptions from Australian Working Life Residence requirements;
- people aged 55 years or older transferring to JobSeeker Payment would be exempt from compulsory mutual obligation requirements but would be able to opt in to employment services;
- recipients aged under 55 years with significant barriers to employment will be assisted by jobactive (Stream C) or Disability Employment Services to re-enter the workforce;
- JobSeeker Payment will include mutual obligation exemptions for newly bereaved recipients; and
- Wife Pension recipients who transfer to JobSeeker Payment will continue to receive the Pensioner Concession Card while in receipt of a transitional rate of Wife Pension.

2.296 The minister's response further outlines a range of additional safeguards to help 'to ensure future claimants are not precluded from accessing social security when they need it':

- JobSeeker Payment eligibility criteria will be broader than current Newstart Allowance criteria to provide access for persons who have temporarily stopped working or studying to recover from illness or injury;
- exemptions from the ordinary waiting period, the liquid assets test waiting period, the income maintenance period and the seasonal work preclusion period will apply to newly bereaved claimants of Job Seeker Payment and Youth Allowance;

- Job Seeker Payment and Youth Allowance will provide additional bereavement assistance for persons who have recently experienced the death of their partner; and
- women who claim Newstart Allowance from 1 January 2018 who would have otherwise qualified for Widow Allowance will be exempted from the activity test requirements.

Schedule 8 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 also provides for the Minister for Social Services to make rules of a transitional nature in relation to the JobSeeker Payment package of measures should they become necessary, for example, as a result of an anomalous or unexpected consequence.

2.297 These matters indicate that, in a range of circumstances, there appear to be adequate safeguards in place to assist to ensure that individuals are able to access social security to meet basic necessities.

2.298 The minister's response acknowledges that the cessation of the Wife Pension may amount to a retrogressive measure noting that there will be a reduction in social security payments for some recipients. The minister's response explains the scope of this limitation and why the minister considers that it is permissible:

> The creation of JobSeeker Payment will result in approximately 2,900 Wife Pension recipients who transfer to JobSeeker Payment receiving no nominal increase in payment until the rate of the JobSeeker Payment equals or exceeds their frozen rate of Wife Pension. These recipients are all under Age Pension age and in similar circumstances as males or some single women of similar age who currently receive other activity-tested payments such as Newstart Allowance. The Government expects that those who have capacity to work, should be encouraged and supported to find work, and that this objective should apply consistently to people of working age who are in similar circumstances. Wife Pension is a dependency based payment that does not support these objectives. Removing Wife Pension and transitioning Wife Pension recipients under Age Pension age to the activity-tested JobSeeker Payment will support partnered women of working age to find employment, reduce their welfare dependence and improve their wellbeing. Pausing rate increases for these Wife Pension recipients is considered justified to achieve consistent treatment of people in similar circumstances in the longer term.
>
> Around 200 Wife Pension recipients who are under Age Pension age and living overseas are expected to no longer be eligible for an Australian Government payment unless they return to reside in Australia. This loss of payment is consistent with the above-mentioned objectives and the residence-based nature of Australia's social security system. The Government expects that people have some reasonable connection to the Australian economy and society before being granted an Australian income support payment and this is reflected in residence requirements

for payments including Age Pension, Disability Support Pension and Newstart Allowance.

Wife Pension was introduced in 1972 and is payable to the female partner of a male recipient of either Age Pension or Disability Support Pension. Wife Pension was granted without any other eligibility criteria or mutual obligations. The payment no longer reflects social and economic norms regarding women's workforce participation or government expectations in relation to income support.

While 200 overseas recipients under Age Pension age are expected to cease income support, their partners will continue to receive their Age Pension or Disability Support Pension. Additionally, a large proportion (over 75 per cent) of the 200 Wife Pension recipients overseas currently receive a part-rate of payment, suggesting they already have access to other income sources besides Australian income support. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by finding new or further employment.

2.299 In light of the information provided it appears that the measures are likely to be a proportionate limitation on the right to social security.

Committee response

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

2.301 The preceding analysis indicates that the measures are likely to be compatible with the right to social security.

Schedule 10 – Start date for Newstart and Youth Allowance payments

2.302 Under current RapidConnect requirements, persons claiming Newstart Allowance or Youth Allowance, unless otherwise exempt, are required to attend an interview with an employment services provider before their income support is payable.[8] Payment is not made until claimants attend such an interview but it is currently backdated to the date on which the claim was made. In some cases, this may be the date of first contact with the Department of Human Services.

8 See, Department of Social Services, *Guide to Social Security Law*, Version 1.234, 3.2.1.40 RapidConnect - Impact on NSA Payability.

2.303 Persons claiming Newstart and Youth Allowance, unless exempt, are also currently required to serve a waiting period of 7 days before payment is made, usually beginning from the date of claim.[9]

2.304 Schedule 10 of the bill seeks to amend the *Social Security (Administration) Act 1999* (Social Security Administration Act) so that payments for individuals who are claiming Newstart Allowance or Youth Allowance, and are subject to RapidConnect, will be calculated from the day the individual attends their initial appointment with an employment services provider, instead of the earlier date the claim was made.[10]

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

2.305 The initial analysis stated that the right to social security and the right to an adequate standard of living are engaged and limited by this measure.

2.306 The analysis noted that by proposing to only backdate Newstart and Youth Allowance payments to the date an applicant attends an initial interview with a job services provider, instead of the earlier date of claim, the measure appears to reduce the initial amount payable to the applicant. Accordingly, the measure may impact on an individual's ability to afford the necessities to maintain an adequate standard of living.

2.307 By deferring the start day for payments to some applicants under Newstart and Youth Allowance, the proposed measure would appear to constitute a backwards step in the realisation of these rights and, accordingly, as a matter of international human rights law this limitation needs to be justified.

2.308 While acknowledging that the measure engages the right to social security and the right to an adequate standard of living, the statement of compatibility sets out that any limitations on these rights are 'necessary and proportionate' to achieving 'the legitimate policy objective of encouraging greater workforce participation and self-support for job seekers who have no significant barriers to employment'.[11]

2.309 While it was noted that this may be considered a legitimate objective for the purposes of international human rights law, limited information is provided in the statement of compatibility as to whether the measure is effective to achieve the stated objective and is a proportionate means of doing so.

---

9 The one-week waiting period - or Ordinary Waiting Period (OWP) - also applies to persons claiming the parenting payment and sickness allowance. A number of exemptions are available, including for persons experiencing financial hardship.

10 This measure does not apply to persons claiming Youth Allowance who are new apprentices or full-time students. See EM 56.

11 EM, SOC 147.

2.310 At present, payment of Newstart and Youth Allowance, though backdated, is not made until the claimant (unless exempt) attends an interview with a job services provider. Therefore, it was noted that an incentive to connect with a job services provider would appear to already exist. The statement of compatibility does not explain why this existing measure is inadequate in encouraging Newstart and Youth Allowance claimants to connect promptly with their job services provider. Without such detail, it was not clear that the proposed measure is the least rights restrictive way of achieving the stated objective.

2.311 The statement of compatibility sets out some information which may be relevant to the proportionality of the measure. This includes that the measure would not apply to job seekers who are exempt from RapidConnect, including disadvantaged job seekers, and that the secretary may take account of individual circumstances when a claimant fails to attend an interview to determine the start day for payment. In particular, the statement of compatibility notes that if an appointment with a job services provider is not available within two business days, payment is backdated to the date on which the original requirement to attend an interview was made.[12]

2.312 However, it is unclear from the statement of compatibility what time period exists between the date a claim for payment is made and the date on which the requirement to attend an interview is imposed. Nor is it stated how the proposed measure interacts with the 7 day Ordinary Waiting Period for claimants, and whether back pay or the length of the waiting period is affected in this context. Accordingly, it is not clear how many days a claimant may have to wait from the original date of claim to the start day for payment or the maximum period of time a person may go without back pay. This information is necessary to determine the extent to which a job seeker's initial payment would be affected by this measure or the extent of the limitation on the right to social security and the right to an adequate standard of living.

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

- how the measure is effective to achieve (that is, rationally connected to) the objective; and
- how the limitation is a reasonable and proportionate measure to achieve the stated objective (including why existing measures are insufficient to achieve the stated objective of the measure, the existence of relevant safeguards and the period of time a person may be required to go without payment or back pay).

12 EM, SOC 146.

Minister's response

2.314 In relation to how the measure is effective to achieve the stated objective 'of encouraging greater workforce participation and self-support for job seekers who have no significant barriers to employment', the minister's response states that:

> By being connected more quickly to employment services, job seekers are more readily able to access assistance to build their skills and experiences and help them find a job faster.

2.315 The minister's response provides some information that indicates that existing measures may be ineffective to achieve the stated objective. For example, the response states that, at present, over one third of job seekers wait longer than two days to connect with a job services provider.

2.316 Some further information is also provided that is relevant to the proportionality of the measure. In particular, the minister's response explains that booking an initial interview with the Department of Human Services, at which the claimant is then referred to an appointment with a job services provider, forms part of the process for the claimant when submitting an online claim for Newstart or Youth Allowance. The response states that an appointment with the department is 'usually' available within two days from the date of the initial claim and that the department 'monitors the availability of appointments so the interview can be conducted in a timely manner'.

2.317 These processes for booking a timely initial interview with the department may be capable of addressing potential concerns about the period of time a person may be without payment in most cases. It is also relevant to the proportionality of the measure that the period of time a person may be going without payment will, under usual circumstances, be fairly short. However, it is noted that in some cases, it appears claimants may wait longer than two days before an appointment with the Department of Human Services is available. As how long a claimant may have to wait from the initial date of claim to the start day for payment remains imprecise, this could potentially give rise to concerns in some circumstances.

2.318 As noted in the initial analysis, the statement of compatibility outlines a relevant safeguard in that, if an appointment with a job services provider is not available within two business days, the payment is backdated to the date on which the original requirement to attend an interview was made. However, no information is provided in the minister's response as to legislative safeguards that exist in situations where an appointment with the Department of Human Services — at which the requirement to attend an appointment with a job services provider is imposed — is not available within two days of the date of claim. Accordingly, the effectiveness of the department's processes in regard to ensuring timely appointments for claimants appear to be an important factor to ensure that the limitation is proportionate.

2.319 In relation to how the measure interacts with the 7 day Ordinary Waiting Period for claimants, the minister's response states:

> The intent of Schedule 10 is that the Ordinary Waiting Period will apply in the same way to job seekers who are subject to RapidConnect and to job seekers who are not subject to RapidConnect. For those job seekers subject to Schedule 10, but who are also required to serve an Ordinary Waiting Period, it would be served concurrently with time taken to connect with employment services. This ensures that job seekers who are subject to RapidConnect and an Ordinary Waiting Period will not have to wait longer to receive their payment than job seekers who are not subject to RapidConnect.

2.320 This information clarifies that the Ordinary Waiting Period for claimants subject to RapidConnect will not commence (and expire) at a later date than for claimants not subject to this measure. It is noted that this was not clear in the bill as originally proposed but has now been reflected in proposed amendments to Schedule 10.[13] The fact that these periods of non-payment are to be served concurrently also assists the proportionality of the measure. Accordingly, the measure appears to be a proportionate limitation on the right to social security and the right to an adequate standard of living.

Committee response

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

2.322 In light of the information provided, the committee notes that the measure is likely to be compatible with the right to social security and the right to an adequate standard of living. However, the committee notes that this will be subject to how the department's processes for appointments work in practice in order to ensure that the limitation is proportionate.

Schedule 12 – Mandatory drug-testing trial

2.323 Schedule 12 establishes a two year trial of mandatory drug-testing in three regions, involving 5,000 new recipients of Newstart Allowance and Youth Allowance. New recipients will be required to acknowledge in the claim for Newstart Allowance and Youth Allowance that they may be required to undergo a drug test as a condition of payment, and will then be randomly subjected to drug testing.

2.324 A 'drug test' is defined in proposed section 23(1) as follows:

> ***drug test*** , in relation to a person, means a test that:
>
> (a) is carried out:

13 See, Supplementary explanatory memorandum, 4-9.

(i) directly or indirectly under a contract with the Commonwealth for the carrying out of the test; and

(ii) in accordance with applicable provisions (if any) of the drug test rules; and

(b) is for the presence of a testable drug in a sample taken in the drug test trial period from the person's saliva, urine or hair

2.325 A 'testable drug' means:

(a) methamphetamine; or

(b) methylenedioxy-methamphetamine; or

(c) tetrahydrocannabinol; or

(d) opioids; or

(e) another substance prescribed by the drug test rules for the purposes of this definition.

2.326 Recipients who test positive will then be subject to income management (including the use of a cashless welfare card) for 24 months and be subject to further random tests. If a recipient tests positive to a subsequent test, they will be required to repay the cost of these tests through reduction in their fortnightly social security payment. This may be varied due to hardship. Recipients who test positive to more than one test during the 24 month period will be referred to a contracted medical professional for assessment.[14] If the medical professional recommends treatment, the recipient will be required to complete certain treatment activities, such as counselling, rehabilitation and/or ongoing drug testing, as part of their employment pathway plan.[15]

2.327 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[16]

2.328 Recipients who refuse to take the test will have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, payment will not be payable for 4 weeks from the date of cancellation and they will still be required to undergo random mandatory drug-testing.[17]

---

14 See EM 63.

15 An employment pathway plan sets out particular activities certain recipients must do in order to receive their Newstart Allowance or Youth Allowance payments.

16 EM 63. See discussion of Schedules 13 and 14 below.

17 EM 63.

Compatibility of the measure with the right to privacy

2.329 The right to privacy includes the right to protection against arbitrary or unlawful interference with a person's privacy, family, home or correspondence. As acknowledged in the statement of compatibility,[18] the right to privacy extends to protecting a person's bodily integrity against compulsory procedures such as drug testing. As outlined in the initial human rights analysis, drug testing is an invasive procedure and may violate a person's legitimate expectation of privacy. Further, the measure requires the divulging of private medical information to a firm contracted to conduct the drug testing. A person may need to provide evidence of their prescriptions and/or medical history to the company to avoid false positives that, for example, detect prescribed opioids. Finally, the use of a card in purchasing essential goods after a person's benefit is quarantined will disclose that a person receives quarantined social security payments. On these bases, the measure engages and limits the right to privacy.

2.330 A limitation on the right to privacy may be permissible where it is pursuant to a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to achieve that objective. 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.

2.331 The statement of compatibility states that the objective of the drug testing trial is twofold:

- [to] maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse; [and]
- [to] provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required.[19]

2.332 In support of the need for the measure, the statement of compatibility referred to statistics indicating that a greater number of people are using drug and alcohol use as an exemption to mutual obligation requirements.[20] The statement of

18 SOC 156.

19 SOC 151.

20 SOC 156-157. Mutual obligation requirements are either participation or activity test requirements that a person must meet in order to receive certain social security payments, including Newstart Allowance and Youth Allowance.

compatibility argues that the drug testing measure will help direct people into treatment before the drug use becomes too severe and a barrier to employment.[21]

2.333 The initial analysis noted that the statement of compatibility asserts that there is, but does not provide evidence of, a pressing social need to address the use of welfare payments to purchase drugs or support substance abuse. However, on the basis of the information and arguments presented, the measure can be understood as pursuing the objectives of the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency. The previous analysis stated that these are likely to constitute legitimate objectives under international human rights law. There are, however, serious concerns as to whether the measure is effective to achieve, and proportionate to, these legitimate objectives.

2.334 The initial analysis identified that, first, the measure appears to be overly broad. The randomised drug test is not reliant on any reasonable suspicion that a person has a drug abuse problem. Any selected person is then made to disclose medical information to the private firm contracted to conduct the testing, and subjected to an invasive medical procedure. If they test positive once, even if it was the first time they had used an illicit drug or it was a false positive, their payments are quarantined for two years, during which period they must use a cashless welfare card.[22] This card will immediately disclose that a person is receiving a welfare payment whenever they use it. Yet, the single use of the drug is unlikely to constitute a barrier to employment, nor necessarily lead to dependence.[23]

2.335 Second, it is unclear whether there will be adequate privacy safeguards as to the medical and drug-related information disclosed to a private provider of drug tests. The statement of compatibility states:

> This trial will be subject to the existing safeguards in the *Privacy Act 1988* and the confidentiality provisions in the *Social Security (Administration) Act 1999* which protect the collection, use and disclosure of protected information. A joint Privacy Impact Assessment by the Department of Human Services and the Department of Social Services is being conducted

---

21 SOC 156-157.

22 At the time of the Committee's initial human rights analysis, proposed subsection 123UFAA(1C) provided that the Secretary may determine that a person is not subject to the income management regime, but this is a non-compellable discretion, and only applies if the Secretary is satisfied that being subject to the regime 'poses a serious risk to the person's mental, physical or emotional wellbeing'. See EM 76-77. In response to comments by the Senate Scrutiny of Bills Committee, this provision was amended.

23 For example, one study indicated that the percentage of users who developed a dependency was 9% for marijuana, 15% for alcohol, 17% for cocaine, and 23% for heroin: U.S. National Academy of Sciences, Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* (Washington D.C., 1999).

> for this measure and will be submitted to the Office of the Australian Information Commissioner to ensure implementation of the measure minimises privacy law risks.[24]

2.336 The existing safeguards in the *Privacy Act 1988* and the Social Security Administration Act may not be sufficient in this context to establish the proportionality of the limitation. For example, it appears that they can allow the Department of Human Services to disclose the fact of a person's positive drug test to law enforcement, state welfare agencies or the Department of Immigration and Border Protection. The risk of prosecution, visa cancellation or loss of child custody may prevent people from attempting to access Newstart or Youth Allowance payments, causing destitution. Further, it appears that they may not prevent the Department of Human Services or a private contractor from disclosing information regarding a particular welfare recipient to the public to correct that person's criticism of the trial.[25]

2.337 A question also arises as to how long drug test samples will be retained. As noted in the initial analysis, the taking and retention of bodily samples for testing purposes can contain significant 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 per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[26]

2.338 Rules that can be made by the minister pursuant to proposed section 38FA[27] of the Social Security Administration Act as well as the preparation of a Privacy Impact Assessment, may result in further safeguards which would address concerns regarding retention and disclosure of drug test samples. However, no detail has been provided as to the intended content of the rules.

2.339 The previous analysis also identified that the trial may limit the privacy rights of a large group of people in order to identify a very small number of people who had used illicit drugs or have a drug abuse problem. For example, in relation to drug testing in the United States jurisdiction of Florida, only 2.6% of welfare recipients tested were found to have used drugs, most commonly marijuana. This trial may

---

24 SOC 157.

25 The Department of Human Services has previously maintained that it is permissible to disclose welfare recipients' personal information to correct media statements. See http://www.abc.net.au/news/2017-03-02/department-of-human-services-defends-release-blogger-personal/8317910.

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

27 Proposed section 38FA provides that the Minister may make rules providing for a number of matters, including the confidentiality and disclosure of drug test results.

target areas with a higher percentage of drug users which may identify a higher number of people.[28]

2.340 Fourth, there appear to be a variety of less rights restrictive methods to achieve the objective of providing new pathways for referral to treatment of those who have or are likely to develop substance abuse issues, such as increasing the availability and promotion of treatment options for those with drug and alcohol dependency. This was not addressed in the statement of compatibility.

2.341 The committee therefore sought further advice from the minister as to how the measure is effective to achieve and proportionate to its objectives, including:

- whether overseas experience indicates that this trial will be effective to achieve its objectives;
- whether there will be a process to apply to remove income quarantining measures if no longer necessary or if special circumstances exist;
- whether there will be additional safeguards in place in relation to the disclosure of drug test results, particularly to law enforcement, immigration authorities, other agencies and the public and the nature of those safeguards; and
- the availability of less rights restrictive measures to achieve the objectives of the trial.

Minister's response

2.342 In relation to whether overseas examples indicate that the proposed trial will be effective to achieve its objectives, the minister's response acknowledges that international evidence on the effectiveness of drug testing of welfare recipients is limited, as many overseas experiences have not been evaluated comprehensively or because the results are not comparable to the measures introduced by the bill. The minister further states that, to the best of the government's knowledge, the model of combining drug testing with other interventions such as income management has not been implemented in any other country. The minister points to the benefits of mandatory treatment through evaluations of Australian drug courts, and the trials of the Cashless Debit Card, as evidence of the effectiveness of income quarantining.

2.343 However, previous substantive evaluations of compulsory income management regimes in Australia have demonstrated that income management may be effective when it is applied to participants after considering their individual circumstances and consensually, rather than where it is applied coercively and

28 See SOC 150: 'The trial sites will be set out in a legislative instrument and will be selected based on the best available evidence and data around drug use in Australia, as well as the availability of alcohol and other drug treatment options'; and EM, 62: 'These locations will be selected by considering a range of factors, including crime statistics, drug use statistics, social security data and health service availability'.

compulsorily.[29] It is therefore not evident that the measure, which is not targeted to appropriate individual cases or consensual, is effective to achieve its objectives.

2.344 As to whether there will be a process to apply to remove income quarantining measures if no longer necessary or if special circumstances exist, the minister's response notes that, following concerns raised by the Senate Standing Committee for the Scrutiny of Bills,[30] amendments have been introduced whereby the Secretary must determine that a person is not subject to the income management regime if the Secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing. The minister explains that this is designed to balance the objectives of Income Management as part of the drug testing trial and the needs of individuals whose wellbeing is at serious risk. Further, the minister explains that drug test providers may withdraw or revoke a referral to Income Management if they become aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid; for example, the job seeker provided evidence of legal medications which could have caused this result. The minister also explains that the decision that a person be subject to income management is able to be appealed in accordance with existing review and appeal provisions in the Social Security Administration Act.

2.345 The amendments introduced following the initial human rights analysis that provide that the Secretary *must* (as opposed to may) determine a person not be subject to income management if the regime would pose a risk to the person's health and well-being alleviates some of the concerns raised in the initial human rights analysis as to the proportionality of the measure. So too does the explanation of the affected person's appeal rights, and the clarification that the drug test provider may withdraw or revoke a referral to income management in certain circumstances. However, there remains only limited circumstances in which a person may be removed from the income management regime within the 24 month period, even where that person may have only tested positive once during that period or it was the first time they had used an illicit drug. Nor is any information provided as to how the Secretary determines whether they are satisfied that a person being subject to the regime would pose a 'serious risk' to the person's mental, physical or emotional wellbeing. For example, no information is provided as to what constitutes a 'serious' risk or whether any safeguards exist (such as the requirement that the Secretary's satisfaction must be 'reasonable'). It is not clear, based on the information provided, that the limited circumstances in which the Secretary may determine a person not be subject to income management provide a sufficient safeguard against arbitrary application. In this respect, the committee has previously raised concerns where

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

30 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No.8 of 2017*.

compulsory income management provisions operate inflexibly, as it raises the risk that the regime will be applied to people who do not need assistance managing their budget.[31]

2.346 In response to whether there will be additional safeguards in place in relation to the disclosure of drug test results, the minister's response identifies that existing privacy and confidentiality laws, including in the *Privacy Act 1988* and the Social Security Administration Act, provide that protected information about a person can only be disclosed in limited circumstances. The minister further refers to the exposure draft to the *Social Security (Drug Test) Rules 2017* (the rules), tabled at the Senate Standing Committee on Community Affairs' inquiry into the bill on 30 August 2017,[32] and explains that these rules, if enacted, will provide additional safeguards to ensure the operation of the drug testing and the conduct of the drug testing provider is consistent with the requirements under the *Privacy Act 1988* and the confidentiality provisions in the Social Security Administration Act.

2.347 As to the disclosure of test results, the minister's response states:

> Disclosure of test results will only occur in accordance with the existing privacy laws and the Drug Test Rules. Test results will not be shared with police, immigration or other authorities, specifically as part of this trial.
>
> Under the existing confidentiality provisions in the Social Security (Administration) Act personal information can be disclosed to the police or state authorities in very limited circumstances where it has been certified as being in the public interest. This includes in relation to certain offences, to prevent or lessen a threat to the life, health or welfare of a person, or for child protection purposes. For example, where a recipient threatens the health, safety and welfare of their child, the Secretary can release relevant information to the appropriate authorities in order for these concerns to be investigated and addressed as necessary. These processes will remain in place. Information collected as part of the drug test testing would only be disclosed where relevant and necessary under these processes. This information will not be shared routinely as part of the trial itself.

2.348 The exposure draft of the rules sets out detailed procedures for the conduct of the drug tests, the handling of samples, the keeping of records of samples and the information that must be provided to the Secretary. This includes a requirement that samples be destroyed in specified timeframes, namely 13 weeks from the day a

---

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

32 The Exposure Draft and Explanatory Statement is available on the website for the Senate Standing Committee on Community Affairs' inquiry into the bill: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/WelfareReform/Additional_Documents.

positive result was notified to the Secretary or the end of the trial (whichever is the earlier), or otherwise no later than 28 days after the day the result of the drug test was notified to the secretary.[33] There are also provisions requiring samples or records to be kept in secure locations unless destroyed in accordance with the rules.[34] The rules also provide that drug tests must be conducted in a respectful manner and 'in circumstances affording reasonable privacy to the drug test trial pool member directed to undergo the test'.[35] These rules address the concerns set out in the previous human rights analysis regarding safeguards for retention of drug tests samples. However, it should be noted that these rules were contained in an exposure draft and the minister has expressly indicated that these rules may be subject to change following consultation with the health, alcohol and other drug sectors. In the event the bill is passed, the committee will consider the human rights compatibility of the rules once they have been received.

2.349 The minister's response further clarified that test results will not be shared with police, immigration or other authorities as part of the trial save for limited circumstances set out in the Social Security Administration Act and the *Privacy Act 1988*, namely, where the Secretary certifies that it is necessary in the public interest to do so. The *Social Security (Public Interest Certificate) Guidelines (DSS) Determination 2015* sets out detailed guidelines for the exercise of the Secretary's disclosure powers in this respect. This includes, as summarised by the minister, disclosure where it is necessary to prevent, or lessen, a threat to the life, health or welfare of a person, or the enforcement of certain laws. It also includes disclosure for other purposes, including where disclosure is necessary for research into (including evaluation or monitoring of, or reporting on) matters of relevance to a department that is administering any part of the family assistance law or the social security law.[36] This alleviates some of the concerns as to the adequacy of existing safeguards presenting disclosure. However, some uncertainties remain, including whether, for example, a person repeatedly testing positive for drugs would constitute a basis on which the Secretary could certify disclosure on the basis it was necessary to prevent, or lessen, a threat to the life, health or welfare of a person. On balance, it appears that the limited circumstances in which disclosure could occur may be compatible with this aspect of the right to informational privacy, noting that the minister has emphasised that test results will not be shared with police, immigration or other authorities as part of the trial.

33 Proposed Rule 11(3) to the Social Security (Drug Test) Rules 2017.

34 Proposed Rule 11(2) to the Social Security (Drug Test) Rules 2017.

35 Proposed Rule 9(2) to the Social Security (Drug Test) Rules 2017.

36 Section 18A of the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015*.

2.350 However, concerns remain over the other aspects of the measure that raise issues in relation to the right to privacy, namely the invasive nature of drug testing which may violate a person's right to bodily integrity, and the concerns in relation to informational privacy where individuals subject to income management pursuant to Schedule 12 would have that status immediately disclosed to persons by reason of using the cashless welfare card.

2.351 The minister's response sets out the basis on which the minister considers the measures to be a reasonable and proportionate limitation on the right to privacy as follows:

> There are some existing mechanisms in place which enable job seekers to self-disclose to the Department of Human Services (DHS) or their employment services provider that they have substance abuse or dependency issues. For example, job seekers may disclose drug and alcohol abuse or dependency as part of the Job Seeker Classification Instrument (a tool used to determine a person's relative disadvantage in the labour market in order to stream them to the appropriate employment services) and have this recorded as a vulnerability indicator on their record. Job seekers may also provide medical evidence of drug or alcohol dependency for the purposes of claiming an exemption from mutual obligation requirements or as part of an assessment of their capacity to work.
>
> Data from the 2013 National Drug Strategy Household Drug Use Survey reveals that 24.5 per cent of unemployed people reported recent drug use. However, administrative data from the DHS system shows that less than two per cent of job seekers in most locations self-disclose their drug or alcohol dependency issues through these existing mechanisms.
>
> This indicates that while some job seekers do already disclose their drug abuse or dependency issues and receive support from DHS and/or their employment services provider to address these issues, many do not.
>
> This measure is designed to trial a new approach to identifying job seekers with drug use issues and assisting them through Income Management and referral to appropriate treatment to address their barriers to employment and find work. As noted above, there will be a comprehensive evaluation of all aspects of the trial.
>
> To the extent that the measure at Schedule 12 engages or limits the right to privacy, including by seeking to collect new forms of protected information through drug testing, this is reasonable and proportionate to the objective of better identifying job seekers who have drug abuse issues that may be a barrier to work but have not necessarily self-disclosed these issues in order to support them to address those barriers.

2.352 The minister's response in this respect appears to suggest that a statistic relating to the level of drug use among unemployed people (24.5%) demonstrates that the figure of 2.4% of persons who self-disclose drug or alcohol dependency is

low. However, as the figure of 24.5 percent cited only relates to drug *use*, rather than drug *dependency*, the basis for the minister's conclusion as to the low rate of self-reporting of drug dependency is not clear. The minister's response otherwise does not explain how existing mechanisms are not sufficient, and does not expressly address whether the measure is the least rights restrictive measure available. As noted in the previous analysis, it is unclear, for example, why encouraging treatment and investing in additional treatment and referral services is insufficient to encourage recipients to self-report drug dependency and seek treatment. It is also unclear why a positive test should automatically result in the application of income management without an individual assessment of whether the person has a drug dependency problem and whether income management is necessary or appropriate in the person's circumstances. Noting that limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, the preceding analysis tends to indicate that the measure is unlikely to be a proportionate limitation on human rights.

Committee response

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

2.354 The preceding analysis indicates that the measure engages and limits the right to privacy including the right to informational privacy and the right to bodily integrity.

2.355 With respect to aspects of the right to informational privacy, the bill appears to provide adequate safeguards with respect to the retention and disclosure of drug test results, noting that the committee will consider the human rights compatibility of the proposed Social Security (Drug Test) Rules 2017 in the event the bill is passed.

2.356 However, overall with respect to the use of personal information and the issues of bodily integrity, noting that limitations on this right must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, the measure is likely to be incompatible with the right to privacy. While the measure is aimed at a legitimate objective, there appear to be other, less rights restrictive ways to achieve this objective.

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

2.357 The previous analysis assessed that the measure engages the right to social security and an adequate standard of living in three ways. First, the measure may result in a reduction in payments to cover the costs of positive drug tests, or to penalise a person for failing to fulfil their mutual obligation requirements. Second, the risk of the result of the test being disclosed to law enforcement, immigration or other welfare authorities may cause people to avoid applying for necessary welfare payments, causing destitution. Third, the measure may impermissibly discriminate

against those with substance addictions which rise to the level of disability, as further discussed below under the right to equality and non-discrimination.

2.358 A limitation on the right to social security and an adequate standard of living may be permissible where it is pursuant to a legitimate objective, effective to achieve that objective, and proportionate to that objective. As discussed above, the objectives of early treatment of harmful drug use to prevent drug dependency and addressing barriers to employment created by drug dependency are likely to be legitimate objectives for the purposes of human rights law. However, the initial analysis noted that there are serious concerns regarding whether the measure is effective to achieve and proportionate to those objectives.

2.359 The statement of compatibility states:

> Income management does not reduce the total amount of income support available to a person, just the way in which they receive it… Job seekers placed on Income Management under this trial will still be able to purchase items at approved merchants and pay rent and bills with their quarantined funds… Evidence collected on Income Management in Western Australia indicates that the program is improving the lives of many Australians. It has given many participants a greater sense of control of money, improved housing stability and purchase restraint for socially harmful products while reducing a range of negative behaviours in their communities including drinking and violence.[37]

2.360 While income management does not reduce the amount of income support available, the committee has previously examined income management measures and considered that those measures raise concerns, particularly where income management was not voluntary or is inflexibly applied. [38] This point is further examined in light of the minister's response at [2.372] below.

2.361 Further, as noted in the previous analysis, it appears that once a drug test is positive, the contractor may issue a notice to the Secretary that the person should be subject to income management, even where the person requests a second drug test. The mechanics of requesting a second drug test or providing evidence of legal medication were unclear. It appears possible that a person may be subject to income management for a period even where the result is challenged and a retest scheduled.

2.362 The measure will require those who test positive to repay the cost of the drug test over time, via deductions from their payments. Given the basic rate of

37 SOC 153.

38 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures*, (16 March 2016) 60-61.

Newstart and Youth Allowance,[39] there is a significant risk that repaying the cost of tests, even capped at a 10% reduction in the payment, will compromise a person's ability to afford necessities to live and successfully look for work. The explanatory memorandum refers to the existence of safeguards against hardship, specifically the power of the Secretary to vary the rate of repayment where the person's circumstances are 'exceptional', and the person would suffer 'severe financial hardship'.[40] The existence of a safeguard is welcomed, however, the previous analysis stated that the proposed test sets a very high threshold for the exercise of this power. On its face, it appears the test may be difficult to meet even when experiencing hardship. For example, it is questionable whether it would be satisfied where many people are experiencing similar circumstances of severe hardship, and therefore their individual circumstances are not considered to be 'exceptional'.

2.363 The initial analysis noted that the reduction in payments to penalise a person for failing to undertake treatment activities as part of their employment pathway plan may also severely compromise a person's ability to afford basic necessities. The statement of compatibility reasons that Australia's welfare system is founded on principles of mutual obligation, and that 'it is reasonable to expect the job seeker to pursue treatment as part of their Job Plan and be subject to proportionate consequences if they fail to do so'.[41] However, there are questions regarding whether withholding subsistence payments for failure to attend treatment takes into account evidence that addiction often involves cycles of relapse before recovery.[42] In this respect, the statement of compatibility argues that there are provisions in place to address individual vulnerabilities:

---

39 Henry Review of Australia's Future Tax System *Final Report*, F1 [Income support payments], http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/Papers/Final_Report_Part_2/chapter_f1-2.htm; Business Council of Australia, *Submission to the Senate Inquiry into the Adequacy of the Allowance Payment System for Jobseekers and Others*, August 2012, http://www.bca.com.au/publications/submission-to-the-senate-inquiry-into-the-adequacy-of-the-allowance-payment-system-for-jobseekers-and-others; Senate Standing Committees on Education and Employment, *The adequacy of the allowance payment system for jobseekers and others, the appropriateness of the allowance payment system as a support into work and the impact of the changing nature of the labour market*, 29 November 2012, 3.5, 3.83.

40 Proposed section 1206XD(1) of the *Social Security Act 1991*. EM 71.

41 SOC 154.

42 See Australian National Council on Drugs, *Position Paper: Drug Testing*, August 2013, 14; National Institute on Drug Abuse, *Principles of Drug Addiction Treatment: A Research Based Guide*, December 2012, 12 [Figure illustrating relapse rates between drug addiction and other chronic illnesses: drug addiction was 40 to 60% of all patients. 'For the addicted individual, lapses to drug abuse do not indicate failure — rather, they signify that treatment needs to be reinstated or adjusted, or that alternative treatment is needed'].

> ...the vulnerability of people and the impact of their circumstances on their ability to comply with their mutual obligation requirements is considered under social security law through reasonable excuse and exemption provisions, and delegates have significant discretionary powers regarding the application of compliance actions to consider the circumstances of each individual case.[43]

2.364 However, other measures in the bill, as discussed below, seek to ensure that drug addiction is not considered as a reasonable excuse or exemption. Given the basic rate of Youth Allowance and Newstart; the requirements to use up most of one's savings before becoming eligible for Newstart; and these reasonable excuse and exemption measures, the initial human rights assessment noted that it was unclear how a delegate's discretion will be able to be used to prevent those addicted to drugs from being unable to afford basic needs.

2.365 As stated above, should the regulations not adequately circumscribe the disclosure of drug test results, including by private contractors, this measure may also result in people in need of social security avoiding accessing payments due to the fear of consequences such as prosecution, deportation or loss of child custody. The risk that the measure may prevent people from attempting to access Newstart or Youth Allowance payments, despite need, also affects the proportionality of the measure.

2.366 Finally, as discussed above in relation to the right to privacy, the statement of compatibility does not address the availability of less rights restrictive measures to achieve the objectives of the measure. This is particularly important in the context of the right to social security given the strong presumption that retrogressive measures are prohibited under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that the state has the burden of proving that they were introduced after the most careful consideration of all alternatives.[44] It is relevant in this respect that it is not evident from the statement of compatibility what proportion of social security recipients have a drug dependency problem, as distinct from reported drug use as set out at paragraph [2.351] above.

2.367 The committee therefore sought further advice from the minister as to the effectiveness and proportionality of the measure including:

- whether recipients will be informed that they may request a retest or provide evidence of legal medications, and how these processes will occur;
- whether there is a mechanism to challenge or review the imposition of income management;

---

43 SOC 154.

44 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security* (art. 9), 23 November 2007, [42].

- whether a person can successfully have their rate of repayment reduced where they would experience severe hardship, but their circumstances are similar to others;
- further detail as to how the discretion of delegates will operate to consider the vulnerability of those with drug dependencies and ensure that their payments are not reduced such that they are unable to afford basic needs;
- whether there will be limits placed on the disclosure of drug test results to law enforcement, immigration authorities or other agencies; and
- whether there are less rights restrictive methods to achieve the objectives of the measure.

Minister's response

2.368 The minister's response provides information about the process of drug testing, including the existence of safeguards. The minister explains that job seekers selected for the initial drug test will be notified at an initial appointment that they can provide evidence of any legal medications or other substances that they are taking which may affect the test result, that they may request a re-test if they dispute the result of the test, and their review and appeal rights in relation to any decision made under social security law following a positive test result. Job seekers will also have a short pre-test interview with the drug testing provider to help identify any legal medications a job seeker may be taking which could interfere with the accuracy of the test result, at which time job seekers may provide evidence of any legal medication or substances they are taking. The minister's detailed response as to how recipients will be informed of their right to request a re-test, to advise of any legal medications that may affect the result, and of their review rights, addresses the concerns expressed in the previous analysis as to this aspect of the operation of the scheme.

2.369 As to the process of undertaking a re-test, the minister's response explains that it is intended that the sample taken by the drug testing provider will be split into two samples, and that if a job seeker requests a re-test, this will be done using the second sample. The minister clarifies that job seekers will not have to pay the cost of the re-test if the result is negative, but will have to repay the cost of the re-test if the result is again positive. The minister explains the rationale for requiring repayment as 'designed to discourage job seekers from requesting frivolous re-testing where they know they have used illicit drugs'. The minister further explains:

> This measure will only reduce a job seeker's income support payment through the repayment of the cost of a positive drug test, other than the initial test, or re-test. Recipients will not have to repay the cost of their first positive test or the cost of any negative test result. This means that recipients who test positive to their first test but then abstain from further drug use and do not record any further positive results will experience no reductions in payment.

> The amount that will be repaid for the cost of a positive drug test will be an amount set to represent the lowest cost of a test available to the Government, and not the cost of the test they were given. The exact costs of each of the drug tests to be used under the trial - saliva, urine and hair - will depend on the drug testing provider contracted to deliver the tests. The Government will approach the market to engage a suitable drug testing provider or providers which represent best value for money to deliver the required range of drug testing methods. Consideration will be given to ensuring the drug testing methods used in the trial are cost-effective.
>
> If the job seeker is required to pay for the cost of a drug test, the cost will be repaid through deductions from the job seeker's fortnightly payment. To protect the job seeker from potential hardship, deductions to pay for the cost of a test would be set at a small percentage of the job seeker's fortnightly payment which will be determined by the Department of Social Services Secretary, capped at no more than 10 per cent. This is significantly lower than the standard rate for recovery of social security debts, which is 15 per cent.
>
> Job seekers will also be able to have their repayment percentage reduced if required to ensure they are not placed in hardship. This is consistent with existing arrangements for repayment of debts through payment withholdings, and the process for application of this reduction will also be the same as existing arrangements…

2.370 As explained in the previous analysis, for those who will face reductions in their job seeker's income support payment (namely, those who have requested a re-test and tested positive, or those who test positive to any test other than the initial test), in light of the basic rate of Newstart and Youth Allowance, there is a significant risk that repaying the cost of the tests, even capped at a 10% reduction in the payment, will compromise a person's ability to afford necessities to live and successfully look for work. Given the basic rate of Newstart and Youth Allowance, this concern remains notwithstanding the recovery rate is lower than that of other social security debts (which is 15 per cent).

2.371 Moreover, while the minister has clarified that job seekers will be able to have their repayment percentage reduced to ensure they are not placed in hardship, as explained in the previous analysis, on its face this safeguard may be difficult to meet as it only applies where the person's circumstances are 'exceptional'.

2.372 Further, while the minister's response emphasises that income management does not reduce the amount of payment a recipient receives but rather changes the way they receive that payment, as set out in the previous analysis the committee has previously examined income management measures and considered them to raise concerns as a matter of international human rights law. The committee has previously found that whilst compulsory income management did reduce spending of income managed funds on proscribed items (such as alcohol), it could increase

welfare dependence, and interfere with a person's private and family life'.[45] Similarly, as explained in the previous analysis, the imposition of income management for two years appears to be disproportionate to the objectives pursued, particularly where inflexibly imposed on a person who may have used an illicit drug, but does not have ongoing drug abuse issues.

2.373 As to disclosure of drug test results to law enforcement, immigration authorities or other agencies, the minister's response states:

> As noted above, disclosure of test results will only occur in accordance with existing privacy laws, including in the Privacy Act and the Social Security (Administration) Act. There will be further safeguards set out in the Drug Test Rules under section 38FA in Schedule 12.

2.374 As discussed above in relation to the right to privacy, on balance it appears these safeguards on disclosure may be adequate, noting however that this is subject to the final content of the Drug Test Rules, which will be considered by the committee once they have been made.

2.375 In relation to whether there are less rights restrictive means to achieve the objective of the measure, the minister's response states:

> As outlined above, the measure at Schedule 12 is designed to trial a new approach to identifying job seekers with drug abuse issues and assisting them to address their barriers to employment, including support through Income Management to manage their payments to meet their priority needs.
>
> This trial will not remove access to social security payments. Income Management does not change the amount received, just the way it is received. Income Management is designed to better ensure that the priority needs of vulnerable individuals (such as those with proven drug use issues) are met, ensuring these individuals are better placed to maintain an adequate standard of living.
>
> As noted above, job seekers will not be required to repay the costs of their first positive test; they will only be required to repay any second or subsequent positive test. The use of repayment of these positive tests is designed to test this as a means of deterring further drug abuse. There are safeguards in place to ensure that the job seeker is only required to repay an amount equivalent to the lowest cost option of any test used under the trial and that the repayment percentage can be reduced (including to nil) in cases of financial hardship.

45 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures*, (16 March 2016) 60-61.

2.376 For the reasons stated above and in light of the committee's earlier findings about income management,[46] concerns remain as to the use of income management as a mechanism to maintain an adequate standard of living, notwithstanding that income management changes the way in which payment is received and can be used rather than the amount. Neither the statement of compatibility nor the minister's response demonstrates why less rights-restrictive alternatives are unavailable. Given the strong presumption that retrogressive measures are prohibited under the ICESCR and that the state has the burden of proving that measures were introduced after the most careful consideration of all alternatives, from the information provided it appears the measure is unlikely to be proportionate to the legitimate objective of the measure.

Committee response

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

2.378 The preceding analysis indicates that the measure is likely to be incompatible with the right to social security as it appears the measure is unlikely to be proportionate to the legitimate objective of the measure.

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

2.379 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2 of the ICESCR. It is further protected with respect to persons with disabilities by Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The right applies to the distribution of welfare benefits or social security.[47]

2.380 Article 26 of the ICCPR provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination. It effectively prohibits the law from discriminating on any ground such as race, sex, religion, political opinion, national origin, or 'other status'.

2.381 Where the person's drug use rises to that of dependence or addiction, the person has a disability, which is not only considered an 'other status'[48] but is also protected from discrimination by the CRPD.[49] As acknowledged in the statement of compatibility, there may also be a disproportionate impact against Indigenous

46 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures*, (16 March 2016) 60-61.

47 Art. 2 and 9 ICESCR; S.*W.M Broeks v Netherlands*, Communication No. 172/1984, CCPR/C/OP/2 at 196 (1990).

48 Concluding Observations on Ireland (2000) UN Doc A/55/40, [422]-[51], [29e]; Panama, 2008, [8]; Sweden (2009), [9], Dominican Republic (2012) [9].

49 The Department of Human Services has stated that they are required to seek an exemption from the operation of the *Disability Discrimination Act 1992.*

people, due to higher levels of drug and alcohol use.[50] Further, the drug-testing will not be entirely random, but based on the development of a risk profile, which identifies risk factors to drug misuse.

2.382 As noted in the initial analysis, the possible interference of prescription medications may also disadvantage those with communication difficulties who fail to disclose their prescriptions and therefore are tested as positive for illicit drugs.

2.383 To the extent that this measure affects those with drug and alcohol dependencies and Indigenous people, the initial analysis stated that it engages the right to non-discrimination. Under international human rights law, differential treatment[51] will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

2.384 The statement of compatibility argues that the objective of the measure is to ensure that tax-payer funded welfare payments are not being used to support substance abuse and provide new pathways for identifying recipients and facilitating their referral to treatment where required.

2.385 As stated above, the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency, are likely to be legitimate objectives for the purposes of human rights law. However, as discussed above, the initial analysis identified that it is not clear that the measure is effective to achieve and proportionate to the stated objectives, and there would appear to be less rights restrictive methods for achieving these objectives.

2.386 The committee therefore sought further advice from the minister as to whether the measure is proportionate to its objective, in particular whether there are less rights restrictive alternatives to the measure to achieve the objective.

Minister's response

2.387 In relation to the compatibility of the measure with the right to equality and non-discrimination, and whether the measure is proportionate to its objective, the minister's response states:

> Drug or alcohol dependency is a known barrier to work or to undertaking activities to find or prepare for work. In 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

50 SOC 155.

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

> This is a significant number of job seekers; however, as outlined above, data from the 2013 National Drug Strategy Household Drug Use Survey indicates that there may be many more job seekers with drug and/or alcohol abuse issues who are not being identified.
>
> Supporting job seekers with drug and/or alcohol abuse issues to seek treatment will better enable them to meet the mutual obligation requirements associated with their payments and ultimately find and maintain a job. This trial is designed to test a new way of identifying job seekers in these circumstances and providing them with support. To the extent that the trial is targeted at people with drug abuse issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues.
>
> Research indicates that certain groups within the population may be at greater risk of developing harmful drug use behaviours or undergoing drug-related harm. These groups may require particular targeting in terms of education, treatment and prevention programs.
>
> In relation to the potential use of risk profiling, it was intended that this would be used to inform the selection of job seekers for the trial in order to maximise the chances of identifying job seekers who may have drug abuse issues and may need help to address their barriers to work.

2.388 As stated above, the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency, are likely to be legitimate objectives for the purposes of human rights law. However, the concern is whether the measure is rationally connected and proportionate to that objective. While in general providing support for persons with drug dependency issues (such as referring people to medical treatment, education training, treatment and prevention programs) is consistent with international human rights law, the minister has not provided any information as to whether income management and, in certain circumstances, reducing payments of persons who fail to undertake treatment activities would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues.

2.389 Further, the minister has not expressly identified whether the measure was the least rights restrictive way of achieving its legitimate objective. While the minister acknowledged that certain groups within the population may be at greater risk of developing harmful drug use behaviours and therefore may require particular targeting, the minister did not expressly engage with the right to equality and non-discrimination on the basis of disability where drug dependency may rise to the level of a disability. Based on the information provided, the measure appears to have a disproportionate negative effect on particular groups and is likely to be incompatible with the right to equality and non-discrimination.

Committee response

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

2.391 The preceding analysis indicates the measure is likely to be incompatible with the right to equality and non-discrimination noting that the measure appears likely to have a disproportionate negative impact on particular groups and that it appears the measure is unlikely to be the least rights restrictive measure.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses

2.392 Under current social security law, a person may be *exempted* from participation or activity test requirements (mutual obligation requirements) in relation to the receipt of certain social security payments such as Newstart Allowance, Youth Allowance, parenting payments and special benefits. If they are not exempted from the requirements, and commit a 'participation failure' (such as failing to attend a participation interview or undertake a compulsory work activity) they will have their payments suspended, cancelled or reduced. However, where a person fails to meet a mutual obligation requirement or commits a participation failure, they will not be subject to a suspension or a non-payment penalty where that person has a 'reasonable excuse'.

2.393 Schedule 13 of the bill seeks to ensure that exemptions from mutual obligation requirements are not available where the reason for the exemption is wholly or predominantly attributable to drug or alcohol dependency or misuse.

2.394 Schedule 14 of the bill provides the secretary with a power to make a legislative instrument setting out the matters that must not be taken into account when deciding whether a person has a 'reasonable excuse' for committing a participation failure.

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

2.395 As noted above, the right to equality and non-discrimination provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination. It effectively prohibits the law from discriminating on grounds such as race, sex, religion, political opinion, national origin, or "other status".[52]

52 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (1989).

2.396 Alcohol and drug dependence is considered to be a disability, and therefore considered "other status"[53] as well as protected from discrimination by the CRPD.[54]

2.397 As stated in the statement of compatibility, the measure:

> ...engages the rights to equality and non-discrimination because people who may have a disability or illnesses associated with drug or alcohol dependency (such as alcoholism) will be subject to differential treatment insofar as they will not be eligible for the exemption that people with another illness or disability could potentially access.[55]

2.398 The statement of compatibility also acknowledges potential discrimination against Aboriginal and Torres Strait Islander people who experience higher rates of drug and alcohol dependencies.

2.399 As noted in the initial analysis, the statement of compatibility states that in both instances the differential treatment is permissible because the measure is 'reasonable and proportionate to the objective of encouraging these recipients to address the underlying cause of their incapacity'.[56] While this may be a legitimate objective for the purposes of human rights law, questions arise as to whether the measures are effective to achieve (that is, rationally connected to) and proportionate to that objective.

2.400 The proposed preclusion from obtaining an exemption from the measure in specified circumstances is quite broad, affecting both the rational connection and proportionality of the measure to the objective of 'encouraging these recipients to address the underlying cause of their incapacity'.[57] The measure refers to circumstances, illness or accident 'predominantly attributable to a person's misuse of alcohol or another drug' and therefore appears to cover not only ongoing drug and alcohol misuse but diseases that may result from past misuse such as Alcoholic Liver Disease or brain damage. In these circumstances, a person may have already done all they can to address 'the underlying cause of their incapacity'. It may also cover injuries resulting from accidents when intoxicated, where again, the cause cannot be addressed as the misuse occurred in the past. In addition, the previous analysis stated that it appears to cover circumstances where a person has undergone treatment unsuccessfully several times, and may no longer have the mental capacity to be assessed as a suitable candidate for treatment.

---

53 Concluding Observations on Ireland (2000) UN Doc A/55/40, paras 422-51, para 29e; Panama, 2008, para. 8; Sweden (2009), para 9, Dominican Republic (2012) [9].

54 The Department of Human Services has stated that they are required to seek an exemption from the operation of the *Disability Discrimination Act 1992.*

55 SOC 161.

56 SOC 162.

57 SOC 162.

2.401 The explanatory memorandum states that an exemption would not cover 'a special circumstances exemption due to a major personal crisis because they have been evicted from their home due to drug or alcohol misuse'.[58] The measure therefore appears intended to have the effect that if a person fails to attend a participation interview or undertake a compulsory work activity because that person has, for instance, been rendered homeless, that person's social security payments will be suspended, cancelled or reduced, if this homelessness is predominantly attributable to drug or alcohol dependency.

2.402 The initial analysis stated that it is difficult to see how making a person subject to mutual obligation requirements when they are in crisis due to eviction, caused by alcohol or drug misuse (which depending on severity may be a disability), will encourage that person to address the 'underlying cause of their incapacity'. The withdrawal of social security in circumstances of personal crisis may indeed exacerbate substance abuse problems, rather than encourage treatment.

2.403 Whilst the explanatory memorandum and statement of compatibility reason that the measure will allow treatment to be sought as part of mutual obligation requirements, it appears to rely on the exercise of discretion by the Department of Human Services. The legal basis for requiring treatment as part of an employment pathway plan is not apparent, and this is not addressed by the statement of compatibility.[59]

2.404 In order for a measure to be a proportionate limitation on the right to equality and non-discrimination, it must be shown that there were no less rights restrictive methods available to achieve the objective. The previous analysis stated that, in this instance it is not evident why, for example, encouraging treatment and investing in additional treatment and referral services, as would be the case with other disabilities, is insufficient to encourage recipients to address the underlying cause of their incapacity.

2.405 A potentially important safeguard within the Social Security Administration Act is the mechanism by which a person will not be subject to a suspension or non-payment penalty for non-compliance with mutual obligation requirements where that person has a 'reasonable excuse'. As noted above, schedule 14 provides the secretary with a power to make a legislative instrument setting out what constitutes a reasonable excuse. The statement of compatibility states that this power is intended to be exercised so as to ensure that income support recipients will not be able to repeatedly use drug or alcohol abuse or dependency as a reasonable excuse for participation failures.[60] This raises a concern that what constitutes a

58 EM 80.

59 Compare, *Social Security (Employment Pathway Plan Requirements) Determination 2015 (No. 1*) [F2015L02029], s 5(a)(ii) and (iii).

60 SOC 165.

'reasonable excuse' may not cover the particular circumstances of those suffering from addiction. However, the statement of compatibility further explains that it is intended that individuals will still be able to use drug or alcohol abuse or dependency once as a reasonable excuse (but not for second or subsequent participation failures and be offered treatment as part of their employment pathway plan.[61]

2.406 The explanatory materials provide some further information about the likely content of such a legislative instrument made under schedule 14 and state that the penalty would not be imposed where treatment was not appropriate, or available:

> It is intended that existing reasonable excuse provisions will continue to apply following the initial relevant participation failure due to drug or alcohol misuse or dependency where treatment is unavailable/inappropriate, including where the job seeker:
>
> - is ineligible or unable to participate;
> - has already participated in all available treatment;
> - has agreed but not yet commenced in treatment; or
> - has relapsed since completing treatment and is seeking further treatment.[62]

2.407 The content of these safeguards is important in assessing the human rights compatibility of the measure. However, the initial human rights assessment stated that without reviewing the legislative instrument, which will set out what constitutes a reasonable excuse, it is difficult to determine the extent of any limitation on the right to equality and non-discrimination and whether there will be sufficient safeguards to ensure that the limitation on this right is proportionate.

2.408 The committee sought further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect the rights of people with disabilities relating to alcohol or drugs.

2.409 Noting that the details of what is to constitute a 'reasonable excuse' is to be provided by legislative instrument, the committee also sought further information from the minister regarding the safeguards to be included in this instrument.

---

61 SOC 165.

62 EM 86.

Minister's response

2.410 In relation to the committee's inquiry seeking further information regarding the safeguards to be included in the legislative instrument, the minister's response states:

> The instrument will include a number of safeguards to ensure that job seekers with drug or alcohol dependency affecting their ability to meet their requirements are not adversely affected by the measure through no fault of their own. The intent of the measure is to remove the ability for job seekers to repeatedly use reasonable excuse only in those instances where they have previously had it accepted and subsequently refused available and appropriate treatment.
>
> Accordingly, the instrument will specify that drug or alcohol dependency cannot be considered as a reasonable excuse only if it has been previously used and accepted and if the individual has refused to participate in appropriate and available treatment. This would mean that the only time job seekers would not be able to have their drug or alcohol considered as a reasonable excuse would be if they had decided not to participate in treatment. In any instance where the job seeker had made a decision to participate in available and appropriate treatment, drug and alcohol dependence would be required to be considered in determining if the job seeker had a reasonable excuse (as per current arrangements).
>
> As an additional protection, it will be specified in the instrument that if appropriate treatment is not available for the job seeker, then the existing reasonable excuse provisions will continue to apply.
>
> More broadly, the instrument will continue to specify those matters that must be taken into account when deciding whether a job seeker has a reasonable excuse. The instrument will not limit the discretion of the decision-maker to take into account any factor that may provide a reasonable excuse (except for drug and alcohol dependency while refusing to participate in appropriate treatment).

2.411 The minister's response clarifies that it is only where a person has previously invoked drug dependency as a reasonable excuse and the person has refused to participate in treatment that the person would not be able to invoke their drug dependency as a reasonable excuse. Based on this information, it appears that this aspect of the measure may be sufficiently circumscribed and constitute a safeguard insofar as persons who cannot meet the requirements through no fault of their own (such as where appropriate treatment is unavailable) will not be affected. The committee will consider the human rights compatibility of the proposed legislative instrument once it is received.

2.412 In relation to whether less rights restrictive measures would be workable, and whether there are adequate safeguards available to protect the rights of people with disabilities relating to alcohol or drugs, the minister's response states:

Schedule 13

Drug or alcohol dependency is [a] known barrier to work or to undertaking activities to find or prepare for work. As highlighted in 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had a drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

AIIowing people to be exempt from their mutual obligations due to drug or alcohol issues supports a disengagement from the employment services support process, and from potential referral to treatment, which may impede a person's return to work in the longer term.

This measure is designed to ensure that job seekers with drug and alcohol abuse issues remain connected to their employment services provider so that they can be supported to engage in appropriate activities to address their barriers to work.

As per existing arrangements, the provider will work with the job seeker to develop a Job Plan that is individually tailored and responds to their issues and needs. This could include drug and/or alcohol treatment where appropriate.

People who have a disability, such as acquired brain injury or liver disease, that may have been caused or exacerbated by drug and/or alcohol abuse will remain eligible to apply for a temporary incapacity exemption on the basis of this disability if it is impacting on their ability to meet their mutual obligation requirements. Job seekers that have other circumstances not connected to drug or alcohol misuse which impact their ability to meet their mutual obligation requirements may also qualify for another type of exemption. This may include circumstances, such as domestic violence, temporary caring responsibilities or a major personal crisis.

To the extent that this measure is targeted at people with drug and/or alcohol misuse or dependency issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues, noting that other exemptions will continue to be available.

Schedule 14

As part of the tightening of reasonable excuse, job seekers, including those with disabilities related to drugs or alcohol, will be able to unconditionally use reasonable excuse due to drug or alcohol dependency only once. Job seekers will then have the choice of seeking treatment, if it is available and appropriate, which will help them meet their mutual obligation requirements. If job seekers elect not to undertake treatment they will no longer be able to use drug or alcohol dependence as a reasonable excuse if they do not meet their mutual obligation requirements.

This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or

> alcohol as a reasonable excuse unless they agree to participate in treatment, if it is available and appropriate. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment (see further detail on available protections in the response to 1.311 and 1.316). Those with drug or alcohol conditions that do not impair the ability to meet their requirements or who agree to participate in treatment will not be affected by the tightening of reasonable excuse.

2.413 The minister's response has clarified some of the circumstances in which other types of exemption would apply, such as a temporary incapacity exemption for persons who have a disability such as an acquired brain injury or liver disease caused or exacerbated by drug use, or other exemptions for circumstances involving domestic violence, temporary caring responsibilities or a major personal crisis. This may alleviate some of the concerns expressed in the initial analysis as to the breadth of the proposed preclusions, and safeguards available to protect the rights of people with disabilities relating to alcohol or drugs. While it appears that the scope of the preclusion on obtaining an exemption in Schedule 13 remains broad, the safeguards with respect to the operation of the 'reasonable excuse' amendments in Schedule 14, discussed above, appear to address some of these concerns insofar as persons who cannot meet the mutual obligation requirements through no fault of their own (such as where appropriate treatment is unavailable) will be able to continue to rely on the 'reasonable excuse' requirement.

Committee response

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

2.415 The preceding analysis indicates that the right to equality and non-discrimination is engaged by the measure.

2.416 On balance, schedules 13 and 14 appear to include adequate safeguards to protect the rights of people with disabilities relating to alcohol or drugs, noting that this is subject to the final content of the Drug Test Rules and that the committee will consider the human rights compatibility of the proposed legislative instrument containing these safeguards once it is received.

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

2.417 Removing drug and alcohol dependence as an exemption to mutual obligation requirements means that more people will be required to comply with such requirements. The previous analysis stated that, as a failure to meet these requirements without a reasonable excuse will result in the reduction or suspension of social security payments, the measure engages and may limit the right to social security and the right to an adequate standard of living. Further, the analysis noted

that the changes to what constitutes a 'reasonable excuse' in these circumstances also engages and may limit these rights to the extent that drug and alcohol abuse and dependency no longer constitute a reasonable excuse for failing to meet a mutual obligation requirement.[63]

2.418 As discussed above, whilst encouraging recipients to address their underlying barriers to work is a legitimate objective under international law, there are questions as to whether the measures are effective to achieve and proportionate to that objective.

2.419 In the context of the right to social security and an adequate standard of living, these provisions may be particularly disproportionate as they restrict the discretion enabling compliance officers to take into account the particular hardship suffered by a person where alcohol and drugs are involved, and therefore may operate to deny a person basic necessities. As stated above, many welfare payments are already paid at a basic rate, and require a person to have used the majority of their savings in order to be eligible. Therefore, there may not be a financial buffer for personal crises or illnesses that cause difficulties in meeting mutual obligation requirements. The initial analysis stated that it was particularly concerning that a person may be subject to suspension or cancellation of social security payments in circumstances where they have been evicted from their housing due to alcohol or drug use. Under the intended rules of Schedule 14, it does not appear that they will then be able to access reasonable excuse provisions more than once. This kind of inflexibility may cause significant deprivation and fail to support people in addressing their substance misuse issues.

2.420 The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to social security and an adequate standard of living.

2.421 The committee therefore sought further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect people from suffering deprivation.

Minister's response

2.422 In relation to these matters, the minister's response provides further information as to what happens to job seekers who have drug dependency issues who cannot rely on an exemption from mutual obligation requirements or invoke their drug dependency as a 'reasonable excuse':

> Schedule 13

63 See, Schedule 14.

This measure recognises that, while job seekers with substance misuse issues may be unable to undertake job search or other work-related activities, they should be encouraged to pursue treatment to overcome their barriers to work.

A job seeker's rate of payment is not impacted by whether or not they have an exemption from their mutual obligation requirements. As such, this measure will not change the amount of income support a job seeker receives.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation or participation requirements.

Mutual obligation activities are tailored by employment service providers to the job seeker's needs, taking into account their individual circumstances. This may include drug or alcohol treatment. Intensive treatment (such as residential rehabilitation) which prevents the job seeker from participating in any other activities will fully meet the job seekers requirements. Less intensive treatment (such as fortnightly counselling) will contribute to meeting their requirements and the job seeker may have to undertake other activities, depending on their circumstances and capacity.

Job seekers (other than those participating in the trial) undertaking treatment will have this included in their Job Plan as a voluntary activity. This means that compliance action, such as a financial penalty, will not apply if the job seekers ceases to undertake that activity or fails to attend. However, in these circumstances, the job seekers will be required to undertake other activities to meet their mutual obligation requirements.

Limiting access to certain exemptions where the reason is wholly or predominantly attributable to drug or alcohol misuse or dependency is reasonable and proportionate to the objective of ensuring that job seekers are encouraged to address their substance-related issues rather than remaining disengaged.

Schedule 14

The impacts of Schedule 14, the tightening of reasonable excuse, on the rights to social security and an adequate standard of living are reasonable and proportionate. This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or alcohol as a reasonable excuse. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment. Those with drug or alcohol conditions that do not impair the ability to meet their requirements will not be affected.

The protections outlined in the response to 1.311 [that is, the safeguards in place surrounding what constitutes a 'reasonable excuse' to be

> introduced via a legislative instrument] will ensure that only those job seekers who actively refuse to participate in treatment will be unable to repeatedly use reasonable excuse due to drugs or alcohol. Additionally, all job seekers, whether or not they subsequently refuse to participate in treatment, will be able to use drug or alcohol dependency as a reasonable excuse once. This will ensure that job seekers are not adversely affected if they are unaware of what treatment is available in their area.
>
> To ensure that all job seekers who elect to participate in treatment are able to do so, their usual mutual obligation requirements will be reduced, depending on the amount of hours of treatment required.

2.423 The substance of the minister's response is that the mutual obligation activities, being tailored by employment service providers to the job seeker's needs, will be sufficiently flexible to accommodate the individual circumstances of the particular job seeker. This may include a range of treatment options of varying degrees of intensity. Additionally, the minister's response emphasises that the amendments limiting the 'reasonable excuse' safeguard are sufficiently circumscribed insofar as they apply only to job seekers who 'actively refuse to participate in treatment'.

2.424 While the minister's response explains that a person's rate of payment is not impacted by whether or not they have an exemption from their mutual obligation requirements, a person's payment is liable to suspension or cancellation in the event of a participation failure if they fail to meet a mutual obligation activity. That is, they will go without payment for at least a period of time. A person may still face a non-compliance penalty for failing to attend, for example, an interview with a job service provider due to drug dependence (such as being drug affected or hungover). As noted in the initial analysis, it is particularly concerning that a person may be subject to suspension or cancellation of social security payments in circumstances where, for example, they have been evicted from their housing due to alcohol and drug abuse. Further, while the minister explains that treatment is included as a voluntary activity in a job plan and therefore will not attract compliance actions (such as financial penalties), this does not apply to persons subject to the mandatory drug testing trial. In these circumstances, notwithstanding that the mutual obligation requirements may contain flexibility to accommodate treatment options, the inability of a person to cite their drug or alcohol dependency as a 'reasonable excuse' may have significant negative financial consequences on a person through the suspension or cancellation of their social security, or through financial penalties. It is unlikely that this potentially significant financial consequence, which may impair a person's ability to afford basic necessities, will be considered proportionate to the legitimate objectives of the measure as a matter of international human rights law.

Committee response

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

2.426 The preceding analysis indicates the measure is likely to be incompatible with the right to social security and the right to an adequate standard of living.

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

2.427 The rights of the family and child to protection and assistance are protected by Article 10 of ICESCR, as well as various provisions of the Convention on the Rights of the Child (CRC).

2.428 The statement of compatibility acknowledges that the right is engaged, but argues that any penalties would only apply to income support payments made to the parent in respect of themselves. It states that '[a]ny payments made to the parents for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs would not be affected by the penalty'.[64] The statement of compatibility further notes that some principal carer parents on working age payments are only required to meet part time mutual obligation requirements, even if denied an exemption to the requirements due to alcohol or drug misuse. Finally, it states that these measures will encourage parents to address barriers to employment and move into work.[65] However, as the initial analysis noted, it is unclear how it is envisaged this will operate. If a parent is having difficulty paying rent or purchasing food due to the imposition of a financial penalty, this would unavoidably affect the standard of living of the children under their care. This raises questions about the proportionality of the measure to the protection of the family and the rights of the child.

2.429 The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to protection of family and the rights of the child. The committee therefore sought further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether there are adequate safeguards to protect the rights of children.

Minister's response

2.430 In relation to these questions raised by the committee, the minister's response states:

> *Schedule 13*
>
> As outlined above, whether a job seeker is granted an exemption or not doesn't change the amount of income support they receive.

64 SOC 161.

65 SOC 159.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation requirements, tailored to their individual circumstances. Job seekers who are the principal carer of a dependent child aged under 16 years are subject to part-time mutual obligation requirements of 15 hours per week. This recognises their caring role and is designed to ensure they are able to balance their caring responsibilities with their participation obligations.

Ensuring that parents with substance misuse or dependency issues remained connected and can be referred to appropriate treatment will put these parents in a better position to overcome their issues, find a job and provide for their families. As noted above, job seekers undertaking treatment will have this included in their Job Plan as a voluntary activity (unless participating in the trial under Schedule 12) and will not be subject to a financial penalty if they cease to undertake that activity or fail to attend.

Family Tax Benefit, which is paid to parents to assist with the costs of children, is not subject to mutual obligation or participation requirements and will not be impacted by this measure.

Schedule 14

As a result of the tightening of reasonable excuse in Schedule 14, job seekers who continually fail to meet their usual mutual obligation requirements due to drug or alcohol dependence, and actively refuse to participate in treatment to which they have been referred, may face financial penalties. In some cases, where these job seekers are parents, this may indirectly have flow on impacts to their children (although in no circumstances would the application of a financial penalty impact family payments, including rent assistance where paid with the family payments).

However, the primary purpose of the measure is to incentivise job seekers with serious drug or alcohol issues into treatment. Continued drug or alcohol dependency by parents to an extent that they are repeatedly unable to meet their requirements is likely to have significant adverse effects for the child. Children in this circumstance would likely be better off if their parents participated in the treatment they need. Also, as part of the tightening of reasonable excuse measure, no significant increase in the number of financial penalties applied is expected. Further, given that the ultimate policy objective is to ensure job seekers address drug and alcohol barriers so that they are able to more quickly move into paid work, this will be beneficial for children as there is evidence that when parents are in paid employment this improves outcomes for children.

2.431 As discussed above in relation to the right to social security and the right to an adequate standard of living, while the minister's response explains that a person's rate of payment is not impacted by whether or not they have an exemption from

their mutual obligation requirements, a person's payment is liable to suspension or cancellation in the event of a participation failure if they fail to meet a mutual obligation activity. Further, while the minister explains that treatment is included as a voluntary activity in a job plan and therefore will not attract compliance actions (such as financial penalties) this does not apply to persons subject to the mandatory drug testing trial. That is, persons may go without payment for at least a period of time and, in the case of persons undertaking the mandatory drug test trial, may be subject to financial penalties for failing undertake or attend treatment as part of their job plan.

2.432 In these circumstances, as with the conclusions above in relation to the right to social security and the right to an adequate standard of living, the flexibility contained in mutual obligation requirements to accommodate treatment options (including the options to complete those obligations part-time) does not overcome the potentially significant negative financial consequences on a person that may occur through the suspension or cancellation of their social security, or through financial penalties, for participation failures due to drug dependency. The suspension or cancellation of parents' payments may have serious consequences on children in their care.

2.433 It is unlikely that this potentially significant financial consequence, which may impair a person's ability to afford basic necessities, will be considered proportionate to the legitimate objectives of the measure as a matter of international human rights law. As noted in the initial analysis, if a parent is having difficulty paying rent or purchasing food due to the imposition of a financial penalty, this would naturally affect the standard of living of the children under their care. Thus, while it is certainly the case that continued drug and alcohol dependency by parents may have adverse effects for the child (as the minister states in his response), the imposition of suspension, cancellation or financial penalties on parents is unlikely to constitute a proportionate limitation on the rights of children and the right to protection of the family.

Committee response

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

2.435 The preceding analysis indicates the measure is likely to be incompatible with the right to protection of the family and the rights of the child.

Schedule 15 – compliance framework

2.436 Currently, job seekers who receive an activity-tested income support social security participation payment (that is, Newstart Allowance and, in some cases, Youth Allowance, Parenting Payment or special benefit) are subject to the

compliance framework set out in Division 3A of the Social Security Administration Act and must comply with mutual obligation requirements.[66]

2.437 Schedule 15 of the bill proposes to introduce a new compliance framework, including:

- Payment suspension for non-compliance with a mutual obligation requirement;
- Financial penalties for refusing work; and
- Financial penalties for persistent non-compliance.

2.438 The committee has previously examined several bills which contained measures similar to those proposed in this schedule.[67]

Payment suspension for mutual obligation failures

2.439 Under schedule 15 job seekers will have their income support payment suspended for every failure to meet a mutual obligation requirement without a reasonable excuse.[68] The suspension period ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day. If the job seeker fails to reconnect with employment services within four weeks, their social security participation payment will be cancelled.[69] The measure is similar to those currently contained in division 3A of the Social Security Administration Act.

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

2.440 The previous analysis stated that, as the measure operates to suspend social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. As set out above, such limitations are permissible provided certain criteria are met.

---

66 Mutual obligation requirements include a range of requirements a job seeker can be compelled to undertake under social security law, such as attending employment service provider appointments or appointments with relevant third party specialist organisations or undertaking job search requirement: Department of Human Services, Guide to Social Security Law [3.2.8.10] http://guides.dss.gov.au/guide-social-security-law/3/2/8/10.

67 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70; *Thirty-Second Report of the 44th Parliament*, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (1 December 2015) 92-100; *Thirty-Third Report of the 44th Parliament*, Social Security Legislation Amendment (Community Development Program) Bill 2015 (2 February 2016) 7-12.

68 See proposed sections 42AC, 42AJ.

69 See SOC 169.

2.441 The statement of compatibility identifies the objective of the measure as 'encouraging persons to remain engaged with employment services and actively seek and accept suitable work'.[70] This is likely to be a legitimate objective for the purposes of international human rights law.

2.442 It was noted that the existence of safeguards is relevant to the proportionality of the measure. The statement of compatibility outlines some of the relevant safeguards including that the suspension does not apply if the person has a 'reasonable excuse'. What constitutes a reasonable excuse is to be outlined in a legislative instrument. The statement of compatibility notes that a 'reasonable excuse' may include, for example, 'whether the person or a close family member has suffered an illness or was prevented from complying by circumstances beyond their control'.[71] However, other aspects of this bill, as outlined above, seek to limit what constitutes a reasonable excuse. Without being able to review the legislative instrument, which will include further information about what constitutes a reasonable excuse, the initial analysis noted that it is difficult to determine whether or not this mechanism will operate as an effective safeguard.

2.443 The statement of compatibility outlines some other safeguards including that:

- Job seekers will continue to be eligible for concession card benefits while suspended (but not cancelled);
- cancelations and suspensions are subject to review both internally and externally;
- if a job seeker's payment is cancelled as a result of failing to reengage within four weeks, they are able to reclaim benefits immediately; and
- the payment suspension can be ended by fulfilling the reconnection requirement (such as attending an interview with their employment service provider) and be fully back paid.[72]

2.444 The committee therefore requested the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its legitimate objective, in particular, what criteria will apply to whether a person is considered to have a 'reasonable excuse' for failing to comply with a mutual obligation requirement.

Minister's response

2.445 The minister's response argues that 'the targeted compliance framework, is reasonable and proportionate in achieving the objective of encouraging job seekers

70 SOC 172.

71 SOC 172.

72 EM 88-89; SOC 144.

to remain engaged with employment services and actively seeking and accepting suitable work'.

2.446 In relation to the suspension of payment for a mutual obligation failure, the minister's response states that 'job seekers who miss requirements without reasonable excuse will have their payment suspended until they re-engage, with any missed payment back-paid'.

2.447 In relation to what will constitute a reasonable excuse, the minister's response states that:

> Reasonable excuse criteria will be largely identical to those applying under current arrangements. When determining if an individual has a reasonable excuse, decision makers will be required to consider if the job seeker's failure was directly contributed to by:
>
> - lack of access to safe, secure and adequate housing;
> - literacy and language skills;
> - an illness, injury, impairment or disability;
> - a cognitive, neurological, psychiatric or psychological impairment or mental illness;
> - a drug or alcohol dependency;
> - unforeseen family or caring responsibilities;
> - criminal violence (including domestic violence and sexual assault);
> - adverse effects of the death of an immediate family member or close relative; or
> - working or attending a job interview at the time of the failure.
>
> The instrument does not limit the discretion of decision-makers, who will also be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of repeated use of drug or alcohol dependency if the person has actively refused treatment).

2.448 These appear to be relevant safeguards with respect to the operation of the measure. Such 'reasonable excuse' criteria may be capable of operating in a matter which assists to ensure that it does not operate harshly in respect of vulnerable individuals. This means that in a number of circumstances the measure is likely to be a proportionate limitation on the right to social security. However, as set out above, there are concerns that the 'reasonable excuse' criteria will not capture drug or alcohol dependency. In terms of human rights compatibility, it will be relevant for the committee to examine the legislative instrument setting out the criteria for what constitutes a 'reasonable excuse' once it is received.

Committee response

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

2.450 The preceding analysis indicates that, in view of the range of circumstances identified in the minister's response to constitute a 'reasonable excuse', the measure may be compatible with the right to social security. However, it is noted that this safeguard does not apply in relation to repeated drug or alcohol dependency and the committee refers to its comments above. The committee will examine the legislative instrument defining what constitutes a 'reasonable excuse' when it is received.

Financial penalties for refusing work or dismissal due to misconduct

2.451 Job seekers who fail to accept an offer of suitable work will have their social security payment suspended. They will also be subject to payment cancellation and a 4 week non-payment period if they are found to have refused or failed to commence the work without a reasonable excuse.[73]

2.452 Job seekers who leave suitable work voluntarily without a valid reason or are dismissed from suitable work due to misconduct will (in addition to having their payment cancelled if they are receiving payment) be subject to a 4 week non-payment period (or 6 weeks where the person received relocation assistance to move to take up the work).[74]

2.453 Currently, under section 42N of the Social Security Administration Act a person would be subject to a non-payment period of 8 weeks. However, the secretary has the discretion to end this period if it would cause 'severe financial hardship'.[75]

2.454 The bill would remove the ability for the non-payment penalty to be waived on the basis of financial hardship.

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

2.455 The previous analysis stated that, as the measure operates to suspend social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. The statement of compatibility identifies the objective of the measure as having:

73 EM 170.

74 EM 170.

75 Social Security Administration Act, section 42Q.

> demonstrably employable job seekers remain committed to obtaining work as soon as they can rather than continuing to remain in receipt of income support at tax-payers' expense.[76]

2.456 In relation to the proportionality of the measure, the statement of compatibility outlines some safeguards and notes that this measure would reduce the non-payment penalty from eight-weeks to four-weeks.[77] On its own, this reduction would make the current arrangements less rights restrictive. However, as the initial analysis noted, concerns remain as to whether, during this four-week period, there would be sufficient support for a person to meet basic necessities. In particular, the measure would remove the ability for the non-payment penalty to be waived on the basis of financial hardship. In this regard, the explanatory memorandum explains:

> There will be no waivers for non-payment or preclusion periods under the new compliance framework. The current widespread availability of waivers, where over 88 per cent of penalties for serious failures are waived, has undermined the effectiveness of these penalties to the extent that they no longer provide a deterrent to job seekers who persistently fail to meet their requirements.[78]

2.457 The committee has previously examined the removal of the waiver and raised concerns regarding the compatibility of the measure with the right to social security and the right to an adequate standard of living.[79] It does not appear from the materials provided in the statement of compatibility that these concerns have been addressed.

2.458 While the statement of compatibility provides information as to the percentage of cases in which a waiver has been applied, the assessment does not establish that the removal or limitation of the waiver will, of itself, provide a deterrent against non-compliance with job seekers' obligations.[80] In particular, the figures provided on the proportion of waivers granted are not accompanied by any basis to conclude that these were inappropriate, excessive or misused. The previous analysis stated that it is therefore unclear how removing the availability of a waiver on the ground of a job seeker's severe financial hardship, would achieve the stated objective of the measures. Even if excessive reliance on the waiver is considered

---

76 SOC 176.

77 SOC 175-176.

78 EM 90.

79 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70.

80 EM 90.

problematic, it appears possible to address concerns without removing the waiver altogether.

2.459 The committee therefore requested the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, and in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available, for instance, whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- whether there are any safeguards in relation to the application of the measure (such as crises or when a person is unable to meet basic necessities).

Minister's response

2.460 In relation to the removal of the ability for the non-payment penalty to be waived on the basis of financial hardship, the minister's response outlines concerns that the waiver was ineffective and was being misused:

> Waivers are not appropriate for job seekers who turn down suitable work. This is because, by definition, any job seeker who turns down suitable work is able to work to help support themselves.
>
> Job seekers may only be penalised for turning down work, where the work is suitable. That is, where it meets a range of legislated criteria, including that the person has the skills required to do the work, or will be trained to do so, the work would not aggravate any medical or psychological condition, the work meets all relevant safety and wage legislation, commuting time to and from the work is reasonable and the person has appropriate childcare available.
>
> The presence of waivers undermines the efficacy of penalties for refusing work. As was highlighted in the statement of compatibility of human rights, the vast majority of serious penalties are waived under current arrangements. Further, as part of the policy development process for the development of the targeted compliance framework, consultation with Department of Human Services' staff reported that the cycle of assessments and the ability for cash-in-hand workers and serially non-compliant job seekers to remain on payment is exacerbated by the ability to too easily waive the eight week non-payment period for serious failures. A large number of recipients do not serve applied eight week non-payment penalty periods, having them provisionally waived by simply agreeing to participate in a Compliance Activity. Many recipients reportedly attend Compliance Activity appointments necessary to unconditionally waive the penalty and re-start their payment, but do not attend any other

appointments or participate in the Compliance Activity. The Department of Human Services' staff reported that recipients in this situation are often very knowledgeable about the compliance system and pre-empt advice about how to receive payment again.

2.461 The minister's response outlines that there have been some aspects of the operation of the current measure that have undermined the effectiveness of penalties in circumstances where a person refuses suitable work. The minister's response does not expressly provide any information as to whether there are similar concerns about the operation of the waiver where a person is dismissed due to misconduct. However, it appears that similar issues relating to the operation of the waiver could apply.

2.462 Although not directly addressed, the minister's response appears to confirm that in circumstances where the non-payment penalty applies, there may be limited support available to an individual to meet basic necessities. The minister's response states that while the penalty will not be able to be waived, it will now be limited to one month (rather than the two months that was previously the case). However, it is noted that one month may still be a considerable period of time to go without social security payments.

2.463 In this respect, the minister's response states that compliance penalties will not affect family payments and that a person may be able to access crisis relief programs delivered by charities (some of which are funded under the Emergency Relief Program which is administered by the department). Continued access to family payments and potential access to emergency relief is relevant to the proportionality of the measure. However, the minister's indication that an individual may be forced to rely on charities (which they may or may not be able to access) tends to indicate that the measure is unlikely to be a proportionate limitation on human rights.

2.464 Insofar as the measure is responsive to widespread grants of waivers, the minister did not address whether, if waivers have been granted inappropriately, other less rights-restrictive means are reasonably available to ensure waivers are only granted in appropriate circumstances, without needing to remove the existence of a waiver for financial hardship.

Committee response

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

2.466 While this measure reduces the non-payment penalty from 8 weeks to 4 weeks, the 8 week non-payment penalty was subject to a waiver in situations of severe financial hardship. By contrast no waiver from the 4 week non-payment penalty would be available under the proposed measure.

2.467 The preceding analysis indicates that the measure is likely to be incompatible with the right to social security insofar as there may be circumstances where a person is unable to meet basic necessities during the four-week non-

payment period. This is consistent with the committee's previous conclusions in relation to a similar measure.

Repeated non-compliance penalties

2.468 Schedule 15 proposes that recipients of the participation payments who have repeatedly failed to comply with their mutual obligation requirements will be subject to escalating reductions in their income support social security payments for further non-compliance with requirements.[81]

2.469 For the first failure of persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.[82] For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.[83] For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a 4 week non-payment period, starting from the date of cancellation, will apply if the job seeker reapplies for payment. There will be no waivers for non-payment periods.[84]

2.470 Proposed section 42AR(1) obliges the minister to make a legislative instrument determining the circumstances in which the secretary must, or must not, be satisfied that a person has committed a persistent obligation failure.

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

2.471 As the measure operates to suspend or cancel social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. As noted above and in the previous analysis, the objective of 'encouraging persons to remain engaged with employment services and actively seek and accept suitable work' is likely to be considered a legitimate objective for the purposes of international human rights law.[85]

2.472 In relation to the proportionality of the measure, the explanatory memorandum explains:

> In practice, administrative arrangements will ensure that job seekers will need to have committed multiple failures without a reasonable excuse before they can be determined to be persistently non-compliant, and their provider and the Department of Human Services (DHS) will conduct checks to ensure the job seeker does not have any undisclosed issues that are affecting their ability

81 EM 90; SOC 176.

82 EM 90; SOC 176.

83 EM 90; SOC 176.

84 EM 90; SOC 176.

85 SOC 172.

> to comply, and that their employment pathway plan is suitable for their circumstances. The factors that the Secretary must consider as constituting persistent non-compliance will be included in a legislative instrument.[86]

2.473 However, in order for a measure to be a proportionate limitation on human rights, it must be accompanied by sufficient safeguards in legislation. Accordingly, the criteria to be included in the legislative instrument that the secretary must consider as constituting persistent non-compliance are relevant to the proportionality of the measure.

2.474 Additionally, the measure would remove the ability for the four-week non-payment penalty to be waived. The committee has previously examined the removal of the waiver and raised concerns regarding the compatibility of the measure with the right to social security and the right to an adequate standard of living.[87] As noted above, it is unclear how limiting the availability of a waiver on the ground of a job seeker's severe financial hardship would achieve the stated objective of the measure. It is also unclear, during the four-week non-payment period, whether there would be sufficient support for a person to meet basic necessities or other safeguards.

2.475 The committee therefore requested the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, and in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available;
- whether there are any safeguards in relation to the application of the measure (such as, crises or when a person is unable to meet basic necessities);
- whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- what criteria will be set out in the legislative instrument as matters the Secretary must or must not consider as constituting persistent non-compliance.

86 EM 89.

87 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70.

Minister's response

2.476 In relation to the proportionality of the measure and whether any safeguards are available, the minister's response states:

> The measure is proportionate and reasonable and will be fairer and less harsh than the current framework for the vast majority of job seekers who are generally compliant. Job seekers will only face penalties where they repeatedly and persistently do not meet their requirements without reasonable excuse, refuse work or voluntarily become unemployed…
>
> Existing protections for the 200,000 job seekers who have some sort of exemption from their mutual obligations or are fully meeting their obligations through approved activities will also be preserved.
>
> In addition, numerous safeguards will exist to ensure that only those job seekers who are deliberately and persistently non-compliant will face financial penalties. This recognises the fact that the majority of job seekers consistently do the right thing and should not have payment deducted, when payment suspension (with back-pay) alone is sufficient to get them to re-engage. Job seekers will generally have to miss a minimum of five appointments in six months, without good reason, before they actually lose money. In contrast, job seekers may lose money for their first failure under the current one-size-fits-all system.
>
> To ensure that job seekers with circumstances affecting their ability to meet their requirements are not unfairly penalised, job seekers will also have their capabilities assessed twice before they face any loss of money, by both their provider (on their third failure) and the Department of Human Services (on their fourth failure). Job seekers whose vulnerabilities have impacted their ability to meet agreed commitments will be able to renegotiate their job plan at either of these assessments and have their demerits reset to zero (allowing a further five failures without reasonable excuse before any payment is lost). These protections are in contrast to the current framework, where job seekers on average have almost four penalties applied before they undergo a Comprehensive Compliance Assessment to see if they have any vulnerabilities.

2.477 It is acknowledged that this process of assessment is intended to operate in a less rights restrictive way than is the case under the current system.

2.478 In relation to the inability for the non-payment penalty to be waived regardless of individual circumstances, the minister's response states 'as with penalties for refusing work, the vast majority of penalties for repeated noncompliance are waived under current arrangements, undermining the deterrent effect of penalties — particularly for persistently non-compliant job seekers'.

2.479 As noted above, it is acknowledged that there may be legitimate concerns regarding waivers being applied in a manner which undermines the effectiveness of penalties. However, the minister's response does not address whether less right restrictive approaches to the total removal of the waiver would be available.

Specifically, the response does not address whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver.

2.480 The minister's response further states that while the penalty will not be able to be waived, it will now be limited to one month (rather than the two months that was previously the case). However, as noted above, one month may still be a considerable period of time to go without social security payments. In this respect, the minister's response further states that compliance penalties will not affect family payments and that a person may be able to access crisis relief programs delivered by charities (some of which are funded under the Emergency Relief Program which is administered by the department). Continued access to family payments and potential access to emergency relief is relevant to the proportionality of the measure. Yet, the fact that an individual may be forced to rely on charities (which they may or may not be able to access) tends to indicate that the measure is unlikely to be a proportionate limitation on human rights.

2.481 In relation to the criteria that will be set out in the legislative instrument as matters the secretary must or must not consider as constituting persistent non-compliance, the minister's response states:

> The legislative instrument determining the circumstances in which the Secretary must or must not be satisfied that a person has persistently committed mutual obligation failures will specify the number and timeframe within which prior failures must have been committed to constitute persistent non-compliance. However, the determination of individual failures contributing to a finding of persistent non-compliance will continue to be guided by the reasonable excuse provisions and instrument. As outlined above, reasonable excuse criteria will be largely identical to those applying under current arrangements. It should also be reiterated that the instrument does not limit the discretion of decision-makers, who will continue to be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of drug or alcohol dependency if the person has refused treatment).

2.482 It is noted that this approach may assist to ensure that a non-payment penalty is only applied according to objective criteria. This is likely to assist with the proportionality of the measure. In terms of human rights compatibility, it will be relevant for the committee to examine the legislative instrument setting out the criteria for what constitutes persistent non-compliance once it is received. However, it is noted that the criteria described in the minister's response does not require any assessment that a person will be able to meet basic necessities before the penalty is applied. Accordingly, it does not address the concern, set out above, that a person may be unable to meet basic necessities during the four week non-payment period.

Committee response

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

2.484 While this measure reduces the non-payment penalty from 8 weeks to 4 weeks, the 8 week non-payment penalty was subject to a waiver in situations of severe financial hardship. By contrast no waiver from the 4 week non-payment penalty would be available under the proposed measure.

2.485 The preceding analysis indicates that the measure is likely to be incompatible with the right to social security noting that there may be circumstances where a person is unable to meet basic necessities during the four-week non-payment period. This is consistent with the committee's previous conclusions in relation to a similar measure.

2.486 The committee will examine the legislative instrument setting out the criteria for what constitutes persistent non-compliance once it is received.

Schedule 17 – Information gathering powers and referrals for prosecution

2.487 Currently, the secretary may require a person to give information or produce a document that is in a person's custody or control in order to assess a person's qualification, payability or rate of payment.[88] It is an offence with a penalty of up to 12 months imprisonment to refuse to comply with this requirement.[89]

2.488 Schedule 17 of the bill would allow information and documents obtained in the course of such administrative action by the Department of Human Services to be used in subsequent investigations and criminal proceedings.[90]

2.489 It also proposes to provide that a person is not excused from giving information or producing a document on the ground that the information might tend to incriminate the person.[91]

Compatibility of the measure with the right to privacy

2.490 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information and the right to control the dissemination of information about one's private life. The initial analysis stated that, as the measure would allow for the compulsory collection and sharing of information about an individual, it engages and limits the right to privacy. It does so in

88 *Social Security (Administration) Act 1999,* Part 5, section 197. There are equivalent provisions under *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Student Assistance Act 1973* and the *Paid Parental Leave Act 2010.*

89 *Social Security (Administration) Act 1999* section 197.

90 SOC 179.

91 See, schedule 17, item 54, proposed section 197A.

circumstances where the person providing the information or document will not be afforded the privilege against self-incrimination.

2.491 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected and proportionate to achieving that objective. The statement of compatibility acknowledges that this measure engages the right to privacy but argues that this limitation is permissible.[92]

2.492 The statement of compatibility explains that currently information and documents obtained under section 192 of the Social Security Administration Act are inadmissible in criminal proceedings. It notes that the current process is to obtain such information by search warrant:

> Because of this, admissible evidence is obtained by using search warrants pursuant to section 3E of the Crimes Act 1914 (Cth). The Department of Human Services requests around 1,000 of these warrants annually. Each warrant requires two to three business days of a seconded Australian Federal Police agent's effort. This process places a significant burden on the Department of Human Services, the Australian Federal Police, warrant recipients and the courts, particularly when this information has already been collected under section 192 of the SS(Admin) Act for administrative purposes.[93]

2.493 The statement of compatibility identifies the objective of the measure as 'to streamline the process of gathering evidence for welfare fraud prosecution'.[94] As the initial analysis noted, matters of administrative ease or streamlining processes on their own are unlikely to be considered a legitimate objective for the purpose of international human rights law. Rather, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

2.494 Further, the statement of compatibility does not demonstrate that the measure imposes a proportionate limitation on the right to privacy. In particular, the statement of compatibility does not address whether there are adequate safeguards in place with respect to the exercise of this information gathering and sharing power. It is noted that a warrant system by its nature provides external safeguards that would not be present in the new system. In order to be a proportionate limitation on the right to privacy a measure must be the least rights restrictive way of achieving its legitimate objective.

---

92 SOC 182.

93 SOC 179.

94 SOC 181.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.496 In relation to the compatibility of the measure with the right to privacy, the minister's response outlines the objective of the measure:

> The proposed changes within schedule 17 are aimed at achieving a legitimate objective, by preventing the need to obtain, via a search warrant, information already obtained administratively. This not only provides administrative benefits to the Department of Human Services and the Australian Federal Police, but also benefits those persons providing the information, typically third parties, by reducing the burden placed on them.

2.497 However, as noted in the initial analysis, reducing administrative burdens or administrative convenience alone will generally be insufficient for the purposes of permissibly limiting a human right under international human rights law. Generally, a legitimate objective must address an area of public or social concern that is pressing and substantial enough to warrant limiting the right. Although not advanced in the minister's response, a legitimate objective of the measure may be to ensure the effective investigation of fraud.

2.498 In relation to the proportionality of the limitation on the right to privacy, the minister's response states:

> The limitation of the right to privacy of this measure is reasonable and proportionate.
>
> In cases where this measure is used to obtain evidence from individuals other than the person under investigation for welfare fraud, this method does not impose any additional interference to their privacy, family, home or correspondence. This is because any evidence obtained under this measure would previously have been obtained using a search warrant, sometimes after they had already provided this information for administrative purposes.
>
> In cases where this measure is used to obtain information from the individual under administrative investigation, this information is only obtained for the purposes of ensuring the sustainability and integrity of the social security system. This does not entail any risk of reputational harm, except where an individual commits an offence by providing false or

incomplete information. This measure does not change the scope of information being provided and only requires individuals to make a limited disclosure of information necessary for the proper administration of the social security system.

2.499 The response does not acknowledge that the purposes for which the information may be used will be broadened such that the effect on the right to privacy may be more extensive under the proposed measure. The fact that information may have previously been provided for another purpose does not necessarily mean that use of such information for further purposes is permissible. Further, the response does not acknowledge that a warrant may or may not be granted in a particular case. The warrant process is a form of external oversight and a relevant safeguard against search powers being used improperly. No assessment is made in the response as to the likely impact of the removal of the warrant requirement.

2.500 On the other hand, as discussed further below, the existence of a 'use' and 'derivative use' immunity contained in proposed section 197A may operate as a safeguard in relation to the potential use of particular information. Proposed section 197A relevantly provides that, subject to exceptions, information given, documents produced or information obtained directly or indirectly as a result of providing the documents or information, are not admissible in evidence against the individual in criminal proceedings.[95] This applies to information provided in accordance with this measure. In relation to the scope of exemptions to these immunities, it appears that they are in relation to failing to provide documents in accordance with the measure as well as offences involving fraud or misrepresentation including in relation to obtaining social security payments.[96] While these exemptions provide significant scope for the use of information, the existence of the immunities in relation to information that does not go to these offences is relevant to the proportionality of the limitation.

95 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

96 The exceptions to the immunities relate to offences for failing to provide documents under section 197 of the Social Security Administration Act; offences related to providing false and misleading information under section 137.1 or 137.2 of the *Criminal Code*; using a forged document under section 145 of the *Criminal Code*; sections 212(1), 213(1), 214(1), 214(2), 216 of the Social Security Administration Act - false statement in connection with claim or hardship request; false statement to deceive or affect rates; and payment obtained through fraud etc.

Committee response

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

2.502 Based on the existence of relevant immunities against use of material against an individual, it appears that the measure may be compatible with the right to privacy.

Compatibility of the measure with the right not to incriminate oneself

2.503 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

2.504 The previous analysis stated that, requiring a person to provide information or produce a document even if this information may incriminate them engages and limits the right not to incriminate oneself. This right may be subject to permissible limitations where the measure pursues a legitimate objective and is rationally connected to, and proportionate to achieving, that objective.

2.505 The statement of compatibility acknowledges this right is engaged. However, as noted above, it is unclear from the statement of compatibility whether the abrogation of the privilege against self-incrimination pursues a legitimate objective for the purpose of international human rights law.

2.506 The statement of compatibility identifies some matters which may go towards whether the measure is proportionate.[97] In particular, the statement of compatibility outlines that a 'use' and 'derivative use' would be available in relation to information provided.[98] Such immunities are important safeguards. However, in this case, it was noted that the immunities are subject to a range of exceptions. In light of these exceptions, it is unclear whether the measure is sufficiently circumscribed so as to ensure the limitation is proportionate.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and

97 SOC 180.

98 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the exceptions to the 'use/derivative use' immunities are sufficiently circumscribed).

Minister's response

2.508 In relation to the legitimate objective of the measure, the minister's response points to 'reducing administrative burdens'. However, as noted above, this does not appear to be a legitimate objective for the purposes of international human rights law. Although not advanced in the minister's response, a legitimate objective of the measure may be to ensure the effective investigation of fraud.

2.509 In relation to the proportionality of the limitation, the minister's response states:

> The limitation on the right to self-incrimination is reasonable and proportionate. The common law right to silence preventing use of the information or documents against the person providing them is retained, other than in proceedings for the provision of false information. In these circumstances, this measure is a proportionate limitation on an individual's right to freedom from self-incrimination, because the Department of Human Services depends on individuals disclosing complete and accurate information in order to ensure the sustainability and integrity of the social security system.
>
> This limitation is also consistent with section 9.5.1 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement, which deals with the privilege against self-incrimination. The Guide states that the privilege against self-incrimination does not apply "where it is alleged that a person has given false or misleading information".

2.510 The availability of immunities under proposed section 197A including a 'use' and a 'derivative use' immunity, is relevant to whether the limitation is proportionate.[99] In relation to the scope of exemptions to these immunities, it appears that they are in relation to offences involving fraud or misrepresentation including in relation to obtaining social security payments.[100] The particular context

---

99 See, proposed section 197A: The 'use' and 'derivative use' immunity contained in proposed section 197A relevantly provides that, subject to exceptions, information given, documents produced or information obtained directly or indirectly as a result of providing the documents or information, are not admissible in evidence against the individual in criminal proceedings.

100 The exceptions to the immunities relate to offences for failing to provide documents under section 197 of the Social Security Administration Act; offences related to providing false and misleading information under section 137.1 or 137.2 of the *Criminal Code*; using a forged document under section 145 of the *Criminal Code*; sections 212(1), 213(1), 214(1), 214(2), 216 of the Social Security Administration Act - false statement in connection with claim or hardship request; false statement to deceive or affect rates; and payment obtained through fraud etc.

of the limitation is that the receipt of social security benefits is contingent upon the accurate provision of information. The existence of the immunities in relation to the provision of information that may go to other offences is relevant to the proportionality of the limitation.

Committee response

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

2.512 On balance, the committee considers that the measure is likely to be compatible with the right not to incriminate oneself.

Schedule 18 – Exempting social security laws from disability discrimination law

2.513 The *Social Security Act 1991* is currently exempt from the *Disability Discrimination Act 1992*. After this exemption was established, certain provisions from the *Social Security Act 1991* were transferred to two new acts – the Social Security Administration Act and the *Social Security (International Agreements) Act 1999*. The exemption from the *Disability Discrimination Act 1992* was not extended to these two new acts. The bill seeks to include the Social Security Administration Act and the *Social Security (International Agreements) Act 1999* in the list of legislation exempt from the operation of the Disability Discrimination Act, as well as legislative instruments made under the *Social Security Act 1991* and the Social Security Administration Act.

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

2.514 As discussed earlier, 'discrimination' under international law encompasses differential treatment on the basis of a protected attribute, such as disability, as well as treatment having a disproportionate impact on people with a protected attribute.[101] However, differential treatment based on a protected attribute may be permissible where it is a 'special measure'.

2.515 The initial analysis stated that, as the proposed schedule extends the exemption from the *Disability Discrimination Act 1992* to two additional acts and legislative instruments, the measure engages and limits the right to equality and non-discrimination.

2.516 In relation to the purpose of the measure, the statement of compatibility states that:

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

> This exemption from the Disability Discrimination Act is designed to ensure that social security pensions, allowances and benefits, including for people with disability, can be appropriately targeted according to the purposes of the payments…. Payments under social security law are made to eligible people on the basis of a variety of factors such as their health, disability, age, income and asset levels. This ensures that Australia's social security system is targeted based on people's circumstances and need and constitutes legitimate differential treatment.[102]

2.517 It was noted that section 45 of the *Disability Discrimination Act 1992* already exempts special measures 'designed to assist people who have a disability to obtain greater equality of opportunity or provide them with benefits to meet their special needs'. An exemption therefore is not required in order to pay benefits to people with disabilities, but would be required for measures which negatively impact people with a disability, such as reducing or suspending payments to those who fail to meet mutual obligation requirements due to their disability where that disability is a drug or alcohol dependency.

2.518 The previous analysis stated that it was unclear from the limited information provided in the statement of compatibility as to why such a broad exemption is required for all social security laws, given section 45 of the Disability Discrimination Act.

2.519 The committee therefore sought further information from the minister as to how the broad exemption of all social security law is permissible under international law, in particular why such an exemption is required in view of section 45 of the Disability Discrimination Act.

Minister's response

2.520 In response to the committee's questions in this regard, the minister's response provides that:

> The *Disability Discrimination Act 1992* plays a vital role in protecting people with disability from unfair treatment and promoting equal rights, opportunity and access. These changes are required to align social security and disability discrimination law to ensure consistent treatment in relation to social security entitlements.
>
> Payments under social security law are made to eligible people on the basis of a variety of factors such as their health, disability, age, income and asset levels. This ensures that Australia's social security system is targeted based on people's circumstances and need.
>
> As noted in the Explanatory Memorandum, the *Social Security Act 1991* has been exempt from the operation of the disability discrimination law since the Disability Discrimination Act commenced in 1992. This ensures

102 SOC 184-185.

> that pensions and allowances, including for those with disability, can be appropriately targeted to particular groups without this being considered discriminatory.
>
> The amendments at Schedule 18 will ensure that this existing exemption from the Disability Discrimination Act in relation to pensions and allowances applies consistently to all of the social security law, in line with its original intent. This does not change eligibility for payments under social security law (which will continue to be appropriately targeted according to their purpose) or the broader protections that the Disability Discrimination Act provides to people with disability.
>
> Section 45 of the Disability Discrimination Act is designed to ensure that special measures - i.e. programs, facilities, employment opportunities that exist and are limited to people with disabilities in order to particularly support their participation are not considered to be discriminatory under the Act. Special measures could be considered a form of positive discrimination towards people with disabilities. This section of the Act does not relate to the exemption of social security law from the Disability Discrimination Act.
>
> The Government considers that the appropriate ways of ensuring that the disability discrimination law applies consistently across social security law is through the amendments proposed at Schedule 18.

2.521 The minister's response explains that the purpose of the measure is to align social security and disability discrimination law to ensure consistent treatment in relation to social security entitlements, noting that the *Social Security Act 1991* has been exempt from the operation of the disability discrimination law since the Disability Discrimination Act commenced in 1992. The minister further states that section 45 of the *Disability Discrimination Act* does not relate to the exemption from social security law from the Disability Discrimination Act.

2.522 However, as noted in the previous analysis, under international human rights law, exemptions for differential treatment are permissible where they constitute a 'special measure', that is, a specific measure 'necessary to accelerate or achieve the de facto equality of persons with disabilities'.[103] Special measures are generally measures granting a benefit or preference to members of a disadvantaged group, designed to advance the rights of members of those groups. Accordingly, it is permissible (and not discriminatory under international human rights law) to provide social security arrangements specifically for the benefit of persons with disabilities. Section 45 of the Disability Discrimination Act reflects this and would appear to allow Australia's social security system to be targeted based on people's circumstances and need and provide adequate levels of support for persons with disabilities. It is not apparent, from the perspective of measures benefitting persons with disabilities,

103 Convention on the Rights of Persons with Disabilities, art 5(4).

why the exemption in the proposed measure is necessary to align social security laws and disability discrimination law.

2.523 What the proposed measure would allow is laws or government action which may adversely impact people with a disability, such as reducing or suspending payments to those who fail to meet mutual obligation requirements due to their disability. Insofar as the proposed measure would permit the government to take social security measures which adversely impact persons with disabilities, as a form of either direct or indirect discrimination, it falls outside permissible 'special measures' and may therefore be incompatible with the right to equality and non-discrimination.

Committee response

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

2.525 The exemption from the Disability Discrimination Act could be compatible with the right to social security insofar as Australia's social security system is appropriately targeted based on need and provides adequate levels of support for persons with a disability. However, it is noted that the application of section 45 of the Disability Discrimination Act would allow for social security measures benefitting persons with disabilities without such measures constituting discrimination. The proposed exemption may therefore be overly broad in allowing for measures that adversely impact persons with disabilities, noting that special measures under international human rights law must have the object of advancing the rights of members of vulnerable groups. Accordingly, the measure may be incompatible with the right to equality and non-discrimination.

Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706]

Purpose	Seeks to allow the Australian Prudential Regulation Authority to collect data on debt held by the agricultural sector and share it with the Department of Agriculture and Water Resources for the purposes of assisting the department to perform its functions or exercise its powers
Portfolio	Treasury
Authorising legislation	*Australian Prudential Regulation Authority Act 1998*; *Financial Sector (Collection of Data) Act 2001*
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives 22 June 2017; tabled in the Senate 8 August 2017)
Right	Privacy (see **Appendix 2**)
Previous report	9 of 2017
Status	Concluded examination

Background

2.526 The committee first reported on the Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706] (the regulations) in its *Report 9 of 2017*, and requested a response from the treasurer by 20 September 2017.[1]

2.527 The treasurer's response to the committee's inquiries was received on 29 September 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Power to collect and disclose information

2.528 Under the *Financial Sector (Collection of Data) Act 2001* (FSCDA), information may be collected from a financial sector entity (such as banks) by the Australian Prudential Regulation Authority (APRA) for the purpose of assisting another financial sector agency to perform its functions or exercise its powers.

2.529 The regulations prescribe the department administering the *Agricultural and Veterinary Chemicals Act 1994* (presently, the Department of Agriculture and Water Resources) as a 'financial sector agency' for the purposes of the FSCDA. The regulations thereby extend APRA's powers to collect and disclose information in respect of the department.

1 Parliamentary Joint Committee on Human Rights, *Report 9 of 2017* (5 September 2017) 41-44.

2.530 Currently, it is an offence under section 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) for an APRA officer to directly or indirectly disclose protected documents and information.[2] However, there is an exception to this offence under section 56(5) of the APRA Act where a disclosure will assist an agency specified by regulation to perform its functions or exercise its powers and the disclosure is to that agency.[3] The regulations also specify the department as an agency for the purposes of section 56(5) of the APRA Act.

Compatibility of the measure with the right to privacy

2.531 The right to privacy includes respect for informational privacy, including the right to respect private information, particularly the storing, use and sharing of personal information; and the right to control the dissemination of information about one's private life.

2.532 The initial human rights analysis stated that, by extending APRA's powers to collect and disclose information to the department, the measure engages and limits the right to privacy. The statement of compatibility for the regulations notes that the amendments will allow APRA to collect and disclose to the department data on debt held by the agricultural sector. The statement of compatibility acknowledges that this information from financial sector entities may include personal information, including the borrowing and lending activities of agricultural sector participants.[4]

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

2.534 The statement of compatibility states that the regulations do 'not engage any of the applicable rights or freedoms'.[5] However, while the statement of compatibility does not specifically acknowledge that the measure engages and limits the right to privacy, it nevertheless concludes that the collection and sharing of personal information arising from the regulations does not constitute an arbitrary or unlawful interference with the right to privacy as:

---

2 Protected information is defined by section 56 of the APRA Act to mean information disclosed or obtained under, or for the purposes of, a prudential regulation framework law and relating to the affairs of: (a) a financial sector entity; or (b) a body corporate that has been or is related to a body regulated by APRA or to a registered entity; or (c) a person who has been, is, or proposes to be, a customer of a body regulated by APRA or of a registered entity; or (ca) a person in relation to whom information is, or was, required to be given under a reporting standard made in accordance with subsection 13(4A) of the *Financial Sector (Collection of Data) Act 2001*.

3 See, APRA Act section 56(5).

4 Statement of compatibility (SOC) 2.

5 SOC 2.

> The collection and sharing will be conducted lawfully and in furtherance of legitimate policy goals. It will have the defined and limited purpose of assisting [the department] to perform its functions and exercise its powers.

2.535 No further information is provided in the statement of compatibility to justify this limitation.

2.536 It was noted that the explanatory statement nevertheless provides some information as to the objective of the measure:

> The Government seeks to improve the quality of available data on debt held by the agricultural sector in order to support policies that better target assistance measures to farmers. More specifically, over time, the improved data would enable the Government to better target assistance measures such as concessional loans, the Rural Financial Counselling Service and a nationally consistent Farm Debt Mediation scheme. It may also assist with developing and implementing other assistance measures, such as mental health and social support measures, community development measures and income support measures.[6]

2.537 As the initial analysis noted, providing means through which policies may better target assistance measures to farmers is likely to be a legitimate objective for the purposes of international human rights law. The collection and disclosure of information also appears to be rationally connected to this objective, insofar as such information may assist the department exercising its powers and functions.

2.538 However, it was unclear from the information provided in the statement of compatibility that the measures impose a proportionate limitation on the right to privacy in pursuit of that stated objective. In particular, the statement of compatibility provides no information as to whether there are adequate safeguards in place with respect to the exercise of this power.

2.539 Laws that interfere with the right to privacy must specify in detail the precise circumstances in which such interferences may be permitted.[7] As set out above, section 56(5) of the APRA Act allows a person to disclose protected information or documents (which may include personal information) when the person is satisfied that the disclosure will assist the department to perform its functions or exercise its powers. While the APRA Act restricts disclosure to circumstances where disclosure will assist the department to perform its functions or exercise its powers, the regulations do not provide any guidance as to how, and under what circumstances, a person may be 'satisfied' that the disclosure of information would assist the department.

---

6 Explanatory Statement, 1.

7 UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [8].

2.540 Further, the power for information to be collected or disclosed to assist the department 'to perform its functions or exercise its powers' is broader than the stated purpose of the measure (to promote policies that provide assistance to farmers through the collection and disclosure of data on debt in the agriculture sector). In these respects, the previous analysis assessed that the regulations appear to be overly broad with respect to the stated objective and do not appear to provide satisfactory legal safeguards.

2.541 Further, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility does not examine whether there are less rights restrictive ways to achieve the objective of the measure, including any safeguards that may apply in relation to the sharing of personal information.

2.542 The committee therefore sought the advice of the treasurer as to whether the limitation is a proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

Treasurer's response

2.543 The treasurer's response provides the following information in relation to the committee's inquiries:

> The Regulations allow the Australian Prudential Regulation Authority (APRA) to collect data on debt held by the agricultural sector and share it with the Department of Agriculture and Water Resources (DAWR) for the purpose of assisting DAWR to perform its functions and exercise its powers. This is consistent with existing arrangements for APRA to collect and share financial sector information with the Australian Bureau of Statistics and the Department of Health.
>
> I consider that the limitations on the right to privacy imposed by the Regulations are reasonable for the achievement of the stated objective and that there are adequate and effective safeguards in place with respect to the right to privacy.
>
> As the Committee notes, the explanatory statement identifies improved targeting of assistance measures to farmers as an objective of the Regulations. Reflecting this, the relevant reporting standard (ARS 750.0) only seeks to collect information on the amount and nature of debt at a state and agricultural activity level.
>
> In addition to the recent public consultation on the collection of the data, APRA will consult further on the publication of statistics on agricultural lending later this year. This will provide a further opportunity to address any concerns about confidentiality.
>
> In collecting, sharing and using the information in question, APRA and DAWR must comply with the *Privacy Act 1988* ('Privacy Act') and the *Australian Prudential Regulation Authority Act 1998* ('APRA Act').

> To support compliance, APRA and DAWR are entering into a Cooperative Working Agreement that outlines the two agencies' use of the data. This covers DAWR's policies and procedures to maintain the confidentiality of data, and stipulates that DAWR will only publicly release data obtained from APRA if that data is prepared by APRA for public release, consistent with its obligations. APRA will prepare that data in such a way that it will not be possible to derive information relating to any particular person.
>
> When preparing that data for public release, APRA will comply with its internal policy and procedure for the Release of Statistics, which exceeds the legal requirements in the APRA Act and the Privacy Act. This policy contains further measures to ensure confidentiality and privacy are maintained when releasing the data publicly, including a privacy risk assessment and a confidentiality analysis that measures an entity's representation in a statistic.
>
> In addition to the above, the application of the Australian Public Service Code of Conduct to APRA and DAWR provides for additional protection of confidential information.

2.544 On the basis of the information provided in the treasurer's response, on balance, the measure appears likely to be a proportionate limit on the right to privacy. The information provided by the treasurer that the relevant reporting standard (ARS 750.00) only seeks to collect information on the amount and nature of debt at a state and agricultural level clarifies that the collection and disclosure may only occur for that narrow purpose, which is consistent with the legitimate objective of the measure (to promote policies that provide assistance to farmers through the collection and disclosure of data on debt in the agriculture sector).

2.545 The further information provided by the treasurer in relation to compliance with the *Privacy Act 1988* and the *Australian Prudential Regulation Authority Act 1998,* as well as the additional measures taken by APRA together with the Department of Agriculture and Water Resources to protect confidentiality when preparing any data for public release, indicates that there are likely to be adequate safeguards in place in relation to the sharing of personal information. While the treasurer's response did not specifically address how, and under what circumstances, a person may be 'satisfied' that the disclosure of information would assist the department, on balance it appears that any limitation on the right to privacy is proportionate.

Committee response

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

2.547 The committee notes that, on the basis of the information provided and the preceding analysis, the measure appears likely to be compatible with the right to privacy.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017 [F2017L01080];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2) [F2017L01063];
- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 (No. 2) [F2017L01118];
- Citizenship (Authorisation) Revocation and Authorisation Amendment Instrument 2017 [F2017L01074];
- Citizenship (Authorisation) Revocation and Authorisation Instrument 2017 [F2017L01044];
- Defence Legislation Amendment (Instrument Making) Bill 2017;
- Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143];
- Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148];
- Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017 [F2017L01090];
- Investigation and Prosecution Measures Bill 2017;
- Migration (IMMI 17/015: Person who is a Fast Track Applicant) Instrument 2017 [F2017L01042]; and
- Social Services Legislation Amendment (Housing Affordability) Bill 2017.

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

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

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

The Hon Ken Wyatt AM, MP

Minister for Aged Care
Minister for Indigenous Health
Member for Hasluck

Ref No: MC17-015896

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Ian Chair

Thank you for your correspondence of 6 September 2017 regarding the Parliamentary Joint Committee on Human Rights (Committee) request for a response in relation to the human rights compatibility of the *Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017* and *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017*.

I note the Committee's analysis raises questions as to whether the pause of indexation is compatible with the right to health and the right to an adequate standard of living. I have sought to provide a response for each Committee comment below:

- what effect the pausing of indexation will have on the level of attainment of the right to health and the right to an adequate standard of living

The Australian Government remains the principal funder of aged care, providing estimated funding of $17.5 billion in 2016–17 to support aged care consumers and the sector. Furthermore, Government spending on aged care will continue to grow over future years and is expected to reach over $22.3 billion by 2020–21, which will protect residential aged care recipients' rights to health and their rights to an adequate standard of living.

Funding to the residential aged care sector will continue to grow in aggregate at an average of 5.1 per cent per annum over the forward estimates.

Furthermore, legislation requires Government-subsidised aged care homes meet standards to ensure that quality care and services are provided to all residents, including that there are adequate numbers of appropriately skilled staff to meet the care needs of residents. These requirements are monitored by the Australian Aged Care Quality Agency in its assessment of an aged care facility against the standards.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the measure is otherwise aimed at achieving a legitimate objective

The indexation pause, as legislated by the two Determinations, was announced at the Mid Year Economic Outlook 2016, and was in response to sector concerns that savings measures announced at Budget would have a disproportionate impact across the aged care sector. Following consultation with the sector, the Government replaced some of the previously announced changes relating to the delivery of complex pain management with an indexation pause for all Aged Care Financing Instrumet (ACFI) domains in 2017-18, and a 50 per cent indexation pause on the Complex Health Care domain in 2018-19. This change was to ensure the impacts of the original Budget measures were more evenly distributed amongst the aged care sector.

The original changes were precipitated by an increase over the forward estimates for residential care expenditure by $3.8 billion up to 2019-20 due to higher than estimated growth in ACFI claiming (in the context of total estimated residential care expenditure to 2019-20 of just over $50 billion).

As a responsible fiscal manager, Government had to take action to ensure future growth in expenditure occurred at a sustainable rate. The 2016–17 Budget measures reduced the unexpected growth by $2 billion over the forward estimates. This was less than the $3.8 billion amount that Government had increased its previous estimated expenditure. This is reflected in continuing expenditure growth going forward.

Similar measures, including an indexation freeze, were taken in 2012-13 to attempt to bring ACFI expenditure back in line with estimates.

- how the measure is effective to achieve (that is, rationally connected to) the objective

The ACFI measures were designed to help protect the integrity of the residential aged care sector funding model, while ensuring the highest levels of funding continued to be allocated to the residents with the highest care needs.

Removing some original components of the ACFI changes and replacing them with a two staged indexation pause meant that the impact on the average ACFI subsidy was more evenly distributed across providers, as the indexation pause applies across all three ACFI domains. The revised package provides more certainty for the sector and will deliver sustainable expenditure growth over the short term while paving the way for longer term reform options. The Government has commenced consulting with the sector on long term options.

- whether the limitation is reasonable and proportionate for the achievement of that objective (including whether there are any safeguards in relation to the measure, information regarding the number of approved providers that may be affected by the pausing of indexation of the amount of the subsidy, and any anticipated financial impact on the provision of aged care services)

All Commonwealth funded residential aged care providers will be impacted by the indexation pause of the ACFI basic subsidy. The Government recognised that small rural and remote, and homeless providers may be disproportionately affected by the impacts of the ACFI changes, and increased the viability supplement as a safeguard. As a result around 350 eligible services received a flat rate increase of an additional $2.12 per care recipient per day from 1 July 2017. For a 40 bed service, this equates to around $30,000 a year.

The measures are reasonable and proportionate in that they aim to reduce the rate of growth in funding to sustainable levels, with the $2 billion impact of the 2016-17 Budget measure less than the $3.8 billion increase in forward estimates expenditure. Funding to the residential care sector will continue to grow in aggregate at an average of 5.1 per cent over the forward estimates.

Thank you for bringing this matter to my attention. To assist the Committee in their deliberations I have enclosed a fact sheet on residential care subsidy for reference purposes.

Yours sincerely

The Hon KEN WYATT AM, MP
Minister for Aged Care
Minister for Indigenous Health

Encl (1)

26 SEP 2017

FACT SHEET – RESIDENTIAL CARE SUBSIDY – AGED CARE FUNDING INSTRUMENT (ACFI)

Residential care subsidy is paid to approved providers of Commonwealth funded residential aged care monthly and is calculated by adding the amounts due for each care recipient for each day of the month. An approved provider's residential care subsidy amount for the claim period (month) is calculated as:

1. the basic subsidy amount for each eligible permanent resident based on their classification under the ACFI. The amount payable for the ACFI depends on the ratings determined for each ACFI question claimed by the approved provider;
2. **plus** any primary supplements for each eligible care recipient (oxygen supplement, enteral feeding supplement);
3. **less** any reductions in subsidy (means testing, compensation recovery and adjusted subsidy reduction for state government homes);
4. **plus** any other supplements for each eligible care recipient (accommodation supplement, hardship supplement, viability supplement, veterans' supplement, homeless supplement).

The basic subsidy uses ACFI to determine the level of funding provided to aged care facilities. It is a resource allocation instrument and assesses care needs of residents across three domains as a basis for allocating the funding:

- Activities of Daily Living Domain (ACFI Questions 1-5) covers the assessed usual care needs for Nutrition (readiness to eat and eating), Mobility (transfers and locomotion), Personal Hygiene (dressing and undressing, washing and drying, and grooming), Toileting (use of toilet and toilet completion) and Continence.
- Behaviour Domain (ACFI Questions 6-10) covers the assessed usual care needs for Cognitive Skills, Wandering, Verbal Behaviour, Physical Behaviour and Depression.
- Complex Health Care Domain (ACFI Questions 11-12) covers the usual care needs for assistance with Medication and ongoing Complex Health Care Procedures.

Ratings are calculated from completing checklists in each domain which determines the level of the subsidy for that domain.

Maximum daily ACFI subsidy payable is currently $214.06.

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-002208

Mr Ian Goodenough MP
Chair of Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair Ian

I refer to the Parliamentary Joint Committee on Human Rights' Report 10 of 2017 tabled on 12 September 2017, which includes a report on the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*.

I would like to take this opportunity to thank the Committee for its consideration of the compatibility of the Bill with Australia's human rights obligations.

I provide the enclosed additional information in response to the Committee's requests for further advice on certain aspects of the Bill.

I trust this additional information is of assistance.

Yours sincerely

Michael Keenan

Encl: Response to the Parliamentary Joint Committee on Human Rights' Report 10 of 2017, concerning the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017*

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7290 Facsimile: (02) 6273 7098

Civil penalty provisions

Item 20, proposed subsections 76A(11) and 76P(3) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

Item 73, proposed subsection 199(13) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

Item 75, proposed subsection 200(16) of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2017

The committee requests the Minister's advice as to whether the civil penalty provisions in the Bill could be considered as 'criminal' in nature for the purposes of international human rights law, given the provisions attract civil penalties of up to 20,000 penalty units for an individual (or $4.2 million) and 100,000 penalty units (or $21 million) for a body corporate.

Minister for Justice's response:

It is well recognised that money laundering can be a very lucrative crime, and therefore penalties for behaviour that may allow money laundering to occur need to be sufficiently high to be an effective deterrent. All civil penalty provisions in the AML/CTF Act carry a maximum fine of 100,000 penalty units for corporations and 20,000 penalty units for individuals. Section 175 of the AML/CTF Act, containing the civil penalties framework, applies uniformly across the Act; as such, the severity of the maximum penalty is not determinative but rather its application to the circumstances of the offence. The scope of the civil penalties framework reflects the range of factors (e.g. the amount of money laundered through a reporting entities' services) that could be present in relation to a particular offence. For this reason, the appropriate penalty is a matter for judicial discretion. In determining the penalty, the Federal Court must consider a range of factors in section 175, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
- if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

The significance of the offences that have been highlighted by the Committee should not be understated. For example, failure to notify AUSTRAC of changes in circumstances that could materially affect a person's registration can have serious consequences. Changes in key personnel or beneficial ownership of a digital currency exchange could expose the business to

money laundering and terrorism financing risks. Proper notification ensures that AUSTRAC has correct information to consider the ongoing suitability for that business to provide designated services, to consider whether the risk of ML/TF continues to be sufficiently mitigated and also to ensure that valuable information that may be of relevance to law enforcement and other relevant agencies is accurate.

The proposed civil penalty provisions in the Bill are consistent with other existing provisions in the Act. This is in accordance with the Guide to Framing Commonwealth Offences (The Guide), which notes that 'a penalty should be formulated in a manner that takes account of penalties applying to offences of the same nature in other legislation and to penalties for other offences in the legislation in question'. These businesses have the potential to generate significant criminal proceeds far exceeding the maximum penalties available under the standard ratio. The Guide contemplates the use of higher penalties to combat corporate or white collar crime to counter the potential financial gains from committing an offence.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-003402

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017
and
Australian Border Force Amendment (Protected Information) Bill 2017

Thank you for your letters of 6 September 2017 in which further information was requested on the *Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017* and the *Australian Border Force Amendment (Protected Information) Bill 2017*.

I have attached the *Response to Parliamentary Joint Committee on Human Rights' Report 9 of 2017* as requested in your letters. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 26/09/17

Response to Parliamentary Joint Committee on Human Rights - Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Public disclosure of sponsor sanctions

1.113 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.
1.114 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether the measure is sufficiently circumscribed and whether there are adequate and effective safeguards with respect to the right to privacy).

The Department already undertakes a range of activities to deter businesses from breaching their sponsorship obligations, and inform visa holders and Australians about breaches. These include employer education and awareness visits, monitoring of compliance with sponsorship obligations and visa conditions, investigation of allegations, liaison with the Fair Work Ombudsman, imposition of sanctions, and publication of aggregate data on breaches.

The current framework does not allow Australians and overseas workers to sufficiently inform themselves about breaches as current information in the public domain does not identify businesses which have breached their legal obligations. The current framework also prevents the Department from advising persons making allegations that a sponsor has been sanctioned, which undermines public confidence in the compliance framework as complainants are unaware of any outcome of their allegation. The Department received 1585 allegations regarding the 457 programme in 2016-17.[1] By releasing a sponsor's adverse compliance history to the public, the Department will be able to demonstrate that there are repercussions for sponsors who breach their sponsor obligations described by Division 2.19 of the *Migration Regulations 1994*. This will encourage visa holders, and others, to report suspected breaches, and act as a deterrent to a sponsor who may otherwise breach their obligations.

Publication will only occur where it has been determined by a departmental delegate that a sponsor has breached a sponsor obligation and the breach is serious enough to warrant the imposition of a sanction under section 140K of the *Migration Act 1958* (the Migration Act). Sponsors will continue to be afforded natural justice regarding whether a sponsor obligation has been breached.

The provisions of the *Privacy Act 1988* (Privacy Act) are intended to protect individuals, not corporations, therefore in most cases the publication of sponsor sanctions does not impose on the rights of these sponsors to privacy. However, the Department recognises that some sponsors may be sole traders, and that publishing the details sanction details could include information that might identify the individual.

Although the Department could publish sanction details without amending the Migration Act, publication would be restricted to information that did not identify an individual, therefore sole trader details could not be published. Whilst this would be less restrictive, it would not fulfil the objective. It is imperative that publication apply to all sponsors so Australians and overseas workers are fully informed about all businesses and to avoid a loophole which companies could exploit.

It is intended that the Regulations will prescribe information that must be published. The scope of information published is narrow, and it is intended that this will be limited to information that identifies the sponsor, breach and sanction.

[1] Department of Immigration and Border Protection.

The proposed amendments provide flexibility by allowing the Minister to prescribe circumstances where a sanction should not be disclosed. At this time, no exemptions are proposed.

The Department intends that sanction information will remain in the public domain for a period proportionate to the seriousness of the breach, and will prescribe this in policy. In determining this, the Department will take into consideration the publication periods for sanctions by other regulators such as the Office of the Migration Agents Registration Authority and the Fair Work Ombudsman. Migration agent sanctions must be removed from the web site not later than 12 months, 5 years or 10 years, depending on the nature of the breach.

The implementation of the measure will include a comprehensive communications package to inform sponsors, visa holders, and the Australian public of the measure.

Requiring the publication of sponsor sanctions is reasonable and proportionate, as it will further reduce the potential for visa holders to be exploited, and allow workers to make informed decisions about potential employers. Publication will demonstrate to the public that there are repercussions for sponsors who breach their obligations, and act as a deterrent to a sponsor who may otherwise breach their obligations.

Disclosure of tax file numbers

1.124 The preceding analysis raises questions about whether the limitation on the right to privacy is proportionate to achieve the stated objective.
1.125 The committee therefore seeks the advice of the minister as to whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including whether there are effective safeguards with respect to the right to privacy).

The tax file number measure will be used for compliance and research purposes, which will assist the Department in identifying where visa holders are not being paid correctly. This will reduce the potential for visa holders to be exploited. The limitations on privacy introduced by the tax file number measure are reasonable and proportionate as they will protect and benefit visa holders.

The collection, use, recording and disclosure of tax file numbers will be prescribed in the Regulations. It is intended that the regulations will allow tax file number sharing in relation to a narrow list of subclasses, that is limited to temporary and permanent skilled visas, for research and compliance purposes. This includes identifying and preventing exploitation.

The implementation of tax file number sharing will include a comprehensive communications package. This will ensure affected persons are aware of their rights.

Whilst the tax file number measure engages the right to privacy, this is necessary and proportionate to achieve the measure's objectives, which will protect and benefit visa holders.

Response to Parliamentary Joint Committee on Human Rights – Australian Border Force (Protected Information) Bill 2017

Secrecy Provisions

1.41 The measure engages and limits the right to freedom of expression.
1.42 The proposed measure in the bill appears to provide a greater scope to freedom of expression than is currently the case.
1.43 The preceding analysis raises questions about whether the measure imposes a proportionate limit on this right.
1.44 The committee therefore seeks the advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether it is possible to narrow the range of information to which the offence in section 42 applies or provide greater safeguards including in relation to whether a document is inappropriately classified.**

The proposed amendments in the Australian Border Force (Protected Information) Bill 2017 (the Bill) clarifies Part 6 of the *Australian Border Force Act 2015* (ABF Act), and related provisions, to reflect the original intention of the legislation. That intention was to prevent the unauthorised disclosure of specific types of information—the disclosure which could cause harm to the public interest.

The secrecy and disclosure provisions in Part 6 of the ABF Act were adapted from the now repealed *Customs Administration Act 1985* (the Customs Administration Act). Those provisions prohibited the unauthorised making of a record or disclosure of information, and was incorporated into the ABF Act. The ABF Act was designed to regulate an increasingly complex and dynamic modern border environment. The ABF Act sets a different regulatory framework to the Customs Administration Act, by seeking to prevent the unauthorised disclosure of harmful material to preserve the secrecy provisions of that earlier legislation.

The amendments do not alter the original intention of the provisions but rather clarify the original intent by recalibrating the information disclosure model to make it more efficient and better suited to address the needs of the Department and its officers. Specifically, the amendments make it clear that protection is not required unless the information is a specified category of information, the disclosure of which would, or foreseeably could, cause harm to a public interest of a kind that is reasonably apparent from the particular category of that information. Crucially, the Bill provides assurance to the Australian public, business, government and our foreign partners that sensitive information provided to the department will be appropriately protected without unnecessarily hindering robust and informed public debate.

The Australian Law Reform Commission Secrecy Laws and Open Government in Australia, Report 112 (December 2009) identified 506 secrecy provisions across the Commonwealth in 176 different

pieces of legislation. Of those provisions, 70 per cent created criminal offences.[2] There was either a blanket or full prohibition in 15 per cent of those pieces of legislation. The fact that there is an offence provision attached to an unauthorised or improper disclosure of information is not unique.

Since the ABF Act came into effect in 2015, the law has been developing and emerging, most importantly with the additional tests added by the High Court in the McCloy test,[3] which postdates the introduction of the legislation. The High Court's view is that freedoms of expression need to be attended to in a way that is not necessarily a blanket freedom of expression—it can be limited by legislation, but that legislation has to balance the interests of the information to be protected with the freedom for communication.

The Department has moved to a series of six categories, rather than the previous model, which commenced with a prohibition against information sharing unless it fell into a series of permissions or exemptions. The Bill has identified, in the broad business of the Department, the types of information that warrant legitimate protection:

a) Information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;
b) Information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
c) Information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
d) Information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of duty of confidence;
e) Information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;
f) Information of a kind prescribed in an instrument under subsection (7).

In determining whether disclosure of information is prohibited under the amendments, a number of tests must be applied. The first test is to whom the ABF Act applies. Currently, the ABF Act applies to employees of the Department, but it also extends to Immigration and Border Protection workers including people providing a contracted service who have access to Departmental premises or systems. Since October 2016, the ABF Act has not applied to medical professionals.

The second test is consideration of the type of information that is protected. Under the amendments, there is free access and egress of information unless it comes within the above six categories of information specified in the Bill.

The third test examines whether the information falls within any of the exceptions provided for in the ABF Act. These exceptions provide a lawful means of disclosing information, even if the information is of a kind that is otherwise protected. In these circumstances, it is not an offence to disclose that information. This approach maintains the approach provided for in the ABF Act.

Part 6 of the ABF Act does not change or alter what any criminal prosecution of an alleged breach must prove. An individual who is subject to a prosecution remains innocent until found guilty by a court, and the offence in no way limits a defendant's right to a fair trial nor limits their right to be

[2] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 *(Dec 2009)*, p 22.
[3] *McCloy v New South Wales (2015) HCA 34*

presumed innocent. The onus remains on the prosecution to prove each element of the offence beyond reasonable doubt. If the defendant is claiming a defence to a breach of the prohibition on recording or disclosure of protected information, he or she bears the evidential burden in relation to whether one or more of the exceptions applied to his or her recording or disclosure. That is, any defendant who wishes to deny criminal responsibility bears an evidential burden in relation to that matter. This evidential burden of proof in relation to exceptions to an offence is set out in subsection 13.3(3) of the Criminal Code, not Part 6 of the ABF Act. This evidential burden applies to all offences across the Commonwealth. An evidential burden in relation to a matter means the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Having acknowledged that the amendment engages in the right to freedom of expression, the limitation is reasonable and proportionate to ensure Immigration and Border Protection Information is provided with the necessary level of protection, in a targeted manner, but is also able to disclose when it is appropriate to do so.

1.46 The engagement of this right was not addressed in the statement of compatibility and accordingly no assessment was provided about this issue.
1.47 The preceding analysis raises questions about whether the measure is compatible with the right to an effective remedy. This right was not addressed in the statement of compatibility.
1.48 The committee therefore seeks the advice of the minister as to whether the measure is compatible with the right to an effective remedy.

The measure is compatible with the right to an effective remedy, as it does not affect an individual's ability to seek redress.

The *Public Interest Disclosure Act 2013* (PID Act) provides protection to 'whistleblowers' who provide information in breach of the provisions of Part 6 of the ABF Act, where the disclosures are made in accordance with the PID Act. This protection mirrors section 16 of the now repealed Customs Administration Act.

The PID Act will, in certain circumstances, protect an entrusted person who discloses protected information in contravention of Part 6 of the ABF Act (for example if the disclosure was made by an entrusted person who was not authorised to make the disclosure under sections 44 and 45 of the ABF Act). Under the PID Act, the disclosure must relate to 'disclosable conduct'. 'Disclosable conduct' is set out in section 29 and includes, for example, conduct engaged in by a public official in connection with their position as a public official that contravenes a law of the Commonwealth. The disclosure must also be a 'public interest disclosure', the requirements for which are set out in section 26 the PID Act.

The PID Act provides immunity from any civil, criminal or administrative liability for making the disclosure in accordance the PID Act. Therefore, even if the disclosure breaches Part 6 of the ABF Act, the entrusted person would not be subject to criminal liability for the offence under Part 6.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC17-004177

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to your letter dated 6 September 2017 seeking further information about the item for the National Facial Biometric Matching Capability measure in the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017*.

The Minister for Justice, the Hon Michael Keenan MP, is responsible for this item, and has provided a response to the Committee's request. The response at Attachment A includes the Minister's response. I trust this advice will assist the Committee with its consideration of the instrument.

Thank you for bringing the Committee's comments to the Government's attention. I have copied this letter to the Minister for Justice.

Kind regards

Mathias Cormann
Minister for Finance

19 September 2017

Attachment A

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017

Provided by the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism

Response to the Committee's questions about the 'National Facial Biometric Matching Capability' program

I thank the Committee for its request for further information in relation to the privacy implications of the National Facial Biometric Matching Capability (the Capability).

Australia has international obligations relating to privacy under the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence. The right to privacy articulated in Article 17 may be subject to permissible limitations. In order for an interference with this right to be permissible, it must be authorised by law, be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted 'reasonableness' in this context to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The face matching services provided by the Capability enable access to facial images used by Australian Government agencies to issue passports, citizenship certificates and immigration visas, which are held within the databases of the document issuing agencies (i.e. the Department of Foreign Affairs and Trade and the Department of Immigration and Border Protection). Subject to the agreement of the states and territories, facial images used on driver licences will also be made available, via a National Driver Licence Facial Recognition Solution.

The face matching services provided by the Capability engage and limit the right to privacy as they involve the collection, use and disclosure of personal information. This includes biographic details such as name, date of birth and gender and facial images used for biometric matching purposes which are considered to be sensitive information under the *Privacy Act 1988*. This collection, use and disclosure of personal information may only occur where it is authorised by law and is consistent with objectives which are consistent with the ICCPR. The Capability facilitates, rather than authorises information sharing. The operation of the Capability is premised upon the legislative authorities and permissions to collect, use and disclose personal information that apply to those agencies which will use the Capability's face matching services.

The collection, use and disclosure of personal information through the face matching services will only be conducted where it is authorised by law, including the *Privacy Act 1988* and the Australian Privacy Principles (APPs). The APPs permit the collection (APP 3) and the use and disclosure (APP 6) of personal information in a range of circumstances, including where this is done with a person's consent or where it is authorised or required by an Australian law. Other relevant legislation which authorises the collection, use or disclosure of personal information, includes the *Crimes Act 1914*, the *Australian Passports Act 2005*, the *Migration Act 1958* and the *Australian Citizenship Act 2007*.

The Capability is designed to facilitate the secure, automated and accountable sharing and matching of facial images and related information amongst relevant government agencies for the purposes of identity security (including the prevention of identity crime), national security and law enforcement, while maintaining robust privacy safeguards. This sharing already occurs under existing legislative authority – the Capability will introduce a technical system to enable more efficient and auditable sharing.

The Capability's Face Verification Service (FVS) is designed to help prevent identity theft by strengthening the tools available to government agencies to verify a person's identity and help prevent identity crime.

Identity crime is one of the most common crimes in Australia. Research conducted by the Attorney-General's Department, in conjunction with the Australian Institute of Criminology, indicates that identity crimes affect around 1 in 20 Australians every year (and around 1 in 5 Australians throughout their lifetime), with an estimated annual cost of over $2.2 billion. In addition to financial losses, the consequences experienced by victims of identity crime can range from mental health impacts, to wrongful arrest, to significant emotional distress when attempting to restore a compromised identity.

The use of fraudulent identities is also a key enabler of organised crime and terrorism. Australians previously convicted of terrorism related offences are known to have used fake identities to purchase items such as ammunition, chemicals that can be used to manufacture explosives and mobile phones to communicate anonymously in order to evade detection by police and security agencies. A joint operation by the joint Australian Federal Police and New South Wales Police Identity Security Strike Team found that the fraudulent identities seized from just one criminal syndicate were linked to: 29 high profile criminals who were linked to historic or ongoing illicit drug investigations; more than $7 million in losses associated with fraud against individuals and financial institutions, and more than $50 million in funds that were discovered to have been laundered offshore and were likely to be proceeds of crime.

The Capability's Face Identification Service (FIS) will assist law enforcement and intelligence agencies to detect and prevent the use of fraudulent identities by terrorist or organised crime groups. It will also assist in identifying people involved in other serious criminal activity.

The FIS compares identity information across multiple records and may disclose the image and other personal information of people who were not the subject of the initial search. The service is being designed to limit the disclosure of images and other personal information of multiple people as far as is practicable, achieving the legitimate objective of identifying persons in accordance with existing legislative authority while balancing the privacy of unrelated persons. The service will only be available to agencies with criminal law enforcement or national security functions. Access will be further limited to users who have been trained in facial recognition, to help minimise the risk of false matches.

Other privacy safeguards include formal data sharing agreements amongst agencies participating in the face matching services and annual auditing of agencies' use of the services. These privacy safeguards have been informed by the 'Privacy by Design' approach that is being taken to the implementation of the Capability. As part of this approach the Attorney-General's Department has commissioned multiple privacy impact assessments to

obtain independent advice on the potential privacy risks posed by the face matching services and how these can be mitigated in the design, implementation and governance of the Capability. These assessments are conducted in accordance with guidelines issued by the Office of the Australian Information Commissioner.

The face matching services will provide significant benefits in combatting terrorism and organised crime, and in reducing the privacy and associated financial and health impacts that are experienced by victims of identity crime. To the extent that the Capability can limit the right to privacy beyond the existing legislative authorities to collect, use and disclose personal information on which it relies, that intrusion is reasonable and proportional to the objectives of this measure.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-003444

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Ian,

Dear ~~Mr~~ Goodenough

Migration Amendment (Validation of Decisions) Bill 2017

Thank you for your letter of 13 September 2017 in which a further response was requested in relation to the human rights compatibility of the *Migration Amendment (Validation of Decisions) Bill 2017*.

I have attached the *response to Parliamentary Joint Committee on Human Rights' Report 10 of 2017* as requested in your letter. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 25/09/17

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Response to the Parliamentary Joint Committee on Human Rights Report 10 of 2017

Migration Amendment (Validation of Decisions) Act 2017

The *Migration Amendment (Validation of Decisions) Act 2017* (the Act) supports the Australian Government's commitment to protect the Australian community from people who have had their visa cancelled or their visa application refused because they are of serious character concern. The amendments in this Act proactively address the risk to the safety of Australians and reflect the Government's and the Australian community's low tolerance for criminal behaviour by those who are given the privilege of holding a visa to enter into and stay in Australia. I note that the Act came into force on 6 September 2017.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to due process prior to expulsion in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

Right to due process

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

The Act validates decisions that used information protected by section 503A. The Act does not affect the ability of non-citizens to contest information or the assessment of the confidentiality of information, nor does it seek to limit review or due process prior to expulsion.

Standards for the need for confidentiality of section 503A

Under section 503A law enforcement and intelligence agencies provided information to the Department, on the basis it was protected from disclosure to any other person or body. The ability to protect information is essential to these agencies, as information provided to the Department may have originated from at-risk sources and may include information whose disclosure would endanger either individuals, the community or Australia's national security if released.

The Department does not assess what information is to be 'protected' under section 503A of the Migration Act. Law enforcement and intelligence agencies determine what information is 'protected' for the purposes of section 503A by providing it on condition that it be treated as confidential information. The Department and Government trust their assessment of the confidentiality of the information. It is essential that information that is provided by intelligence and security agencies is protected from disclosure where it is fundamental to Australia's national security interests and the safety of the Australian community.

Right to judicial review

As stated in my previous response, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this Act.

At the time of consideration, these persons failed the character test in accordance with Australian law and had no lawful right to hold a visa allowing them to enter or remain in Australia. They have had, and continue to have, access to judicial review of this decision and some of these individuals have challenged their cancellation or refusal decisions. The Act does not affect the ability of non-citizens to contest information or the assessment of the confidentiality of information.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to liberty in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33*.

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

As noted above, persons who have had their visa cancelled, or visa application refused, on the basis of section 503A protected information will remain able to seek judicial review of their visa decision following the commencement of this amendment. This amendment does not prevent these individuals' access to judicial review should they decide to seek it. Nor does this amendment affect a person's right to seek merits review of a relevant decision to the extent that such review is provided for under existing law.

At the time of consideration, affected individuals failed the character test due to serious character concerns, and range from being members of so-called outlaw motorcycle gangs to those with serious criminal records. The safety of the Australian community was integral to these considerations. As a result of the cancellation or refusal decision, they have no lawful right to hold a visa allowing them to enter or remain in Australia and, if they are in Australia, must be detained under the Migration Act.

Should the Government have not passed the Act, the resultant release of affected individuals from immigration detention, or their ability to return to Australia, while their cases were being reconsidered would have put the Australian community at an unacceptable risk. This would understandably undermine public confidence in the integrity of Australia's migration framework. Less rights restrictive criminal justice or national security mechanisms to address the risk to the Australian community posed by affected individuals is unavailable. Since section 503A was introduced in 1998 by the *Migration Legislation Amendment (Strengthening of Provisions Related to Character and Conduct) Act*, protected information has been provided to the Department by law enforcement agencies. Validation of visa cancellation and refusal decisions that utilised this protected information is essential given the risk to the Australian community, and there are no alternative criminal justice or national security mechanisms available to address the risk posed by these individuals. As such, the measure is proportionate and effective in ensuring safety of the Australian community and integrity of Australia's migration framework.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to family life in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the obligation of non-refoulement in conjunction with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

As previously advised, the Act introduces no new decision-making capability or power, seeking only to uphold decisions already made. The considerations relating to *non- refoulement* remain unchanged in the cancellation of visas or refusal of visa application on character grounds. The validation of decisions that used information protected by section 503A will not affect Australia continuing to uphold its *non-refoulement* obligations.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to freedom of movement in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice. I reiterate and refer the committee to my previous response.

Committee question:

The committee seeks the minister's further advice as to the compatibility of the measure with the right to an effective remedy in light of the preceding analysis and the High Court's decision in *Graham v. Minister for Immigration and Border Protection; Te Puia v. Minister for Immigration and Border Protection [2017] HCA 33.*

The High Court's decision does not affect my previous advice, as the scope of this Act does not impact on the ability of affected non-citizens to challenge their visa cancellation or visa application review decisions anew. The High Court's decision in the *Graham* and *Te Puia* cases does not affect the scope of this Act, and any affected non-citizen who seeks to challenge their visa refusal or cancellation decision following the High Court's decision may do so as provided under law.

The Hon Alan Tudge MP

Minister for Human Services

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111 Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Ian

Thank you for your letter of 6 September 2017 regarding the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, requesting further information around the human rights compatibility of the legislation as assessed in the Parliamentary Joint Committee on Human Rights' (the Committee) Report 9 of 2017. Please find responses to the Committee's comments below.

Why it is necessary to extend and expand the trials (including why the extension and expansion is proposed before the final evaluation report is finalised and why no end date to the current trial is specified).

The initial decision to extend the Cashless Debit Card program in the existing sites of Ceduna, South Australia and the East Kimberley, Western Australia, was based on:

a. strong results from the interim independent evaluation, and
b. ongoing positive feedback about the impacts of the card from local people, including community leaders such as the Mayor and the Chief Executive Officers of Indigenous organisations in the regions.

The final evaluation of the Cashless Debit Card trial was released on 1 September 2017. It has seen an even further increase in positive outcomes against the three key indicators of a reduction in alcohol and drug use and gambling. The extension is necessary to allow communities to continue to see positive outcomes as demonstrated in the evaluation and through ongoing positive feedback from the community. The extension of the program in each location will be determined by disallowable legislative instruments that specify parameters including sunset dates and participant criteria. Specifying the end date in the instrument allows Parliament to accept or reject new sites by considering the impacts and level of community support for the measure on a case by case basis, including the level of community support in a specific area.

The expansion of the Cashless Debit Card is necessary to allow the Government an opportunity to build on the research findings of the interim and final reports, to help test the card and the technology that supports it in more diverse communities and settings.

The expansion also provides for a greater number of communities to see positive outcomes as have been shown in previous communities. Many communities around the country have shown an interest in the card. There is a sense of urgency from these communities, which are looking for more tools to address the devastating impact of alcohol, drugs and gambling on their people.

How the measures are effective to achieve the stated objectives (including whether there is further evidence in relation to the stated effectiveness of the trial).

The final independent evaluation concluded that the Cashless Debit Card trial "has been effective in reducing alcohol consumption and gambling in both trial sites and [is] also suggestive of a reduction in the use of illegal drugs", and "that there is some evidence that there has been a consequential reduction in violence and harm related to alcohol consumption, illegal drug use and gambling."

In particular, the evaluation reported the following findings:

- Of people surveyed who drank alcohol before the trial started, towards the end of the 12 months 41% reported drinking alcohol less frequently (up from 25% in the Wave 1 survey, which was done approximately six months into the trial); 37% of binge drinkers were doing this less frequently (up from 25% at Wave 1).
- A decrease in alcohol-related hospital presentations including a 37% reduction in Ceduna in the first quarter of 2017 compared with first quarter of 2016 (immediately prior to the commencement of the trial).
- A 14% reduction in Ceduna in the number of apprehensions under the *Public Intoxication Act* compared to the previous year.
- In the East Kimberley, decreases in the alcohol-related pick-ups by the community patrol services in Kununurra (15% reduction) and Wyndham (12%), and referrals to the sobering up shelter in Kununurra (8% reduction).
- A decrease in the number of women in East Kimberley hospital maternity wards drinking through pregnancy.
- Qualitative evidence of a decrease in alcohol-related family violence notifications in Ceduna.
- A noticeable reduction in the number of visible or public acts of aggression and violent behaviour. Nearly 40% of non-participants perceived that violence in their community had decreased.
- People are now seeking medical treatment for conditions that were previously masked by alcohol effects.
- 48% of gamblers reported gambling less (up from 32% at Wave 1).
- In Ceduna and surrounding local government areas (which covers a much bigger region that the card's operation), poker machine revenue was down 12%. This is the equivalent of almost $550,000 less spent on poker machines in the 12 month trial.
- The card has had "a positive impact in lowering illegal drug use" across the two sites.
- Of drug takers, 48% reported using illegal drugs less often (up from 24% at Wave 1).
- 40% of participants who had caring responsibility reported that they had been better able to care for their children (up from 31% at Wave 1).
- 45% of participants have been better able to save more money (up from 31% at Wave 1).
- Feedback that there has been a decrease in requests for emergency food relief and financial assistance in Ceduna.
- Merchant reports of increased purchases of baby items, food, clothing, shoes, toys and other goods for children.

- Considerable observable evidence being cited by many community leaders and stakeholders of a reduction in crime, violence and harmful behaviours over the duration of the trials

How the limitation on human rights is reasonable and proportionate to achieve the stated objectives (including the existence of safeguards and whether affected communities have been adequately consulted in relation to the extension of the trial)

This amendment does not remove the legislative safeguards protecting how, when and where the Cashless Debit Card can operate. The legislation continues to ensure that the program cannot be implemented in any location without the introduction of a disallowable instrument. These instruments can also specify other safeguards, including sunset dates and participant criteria. This provides the opportunity for the Government to co-design these parameters with interested communities, and tailor the program to meet community needs. It also allows those communities to make decisions about these arrangements in their own time, rather than being restricted by the legislation end date. These safeguards ensure that Parliament retains the right to consider each proposed application of the cashless debit card. Instead of passing legislative amendments for potential hypothetical communities and participants, Parliament can accept or reject new sites by considering the impacts and level of community support for the measure on a case by case basis.

The legislation does not indefinitely extend the Cashless Debit Card program. The legislation only removes a date beyond which the program could not continue. For the program to continue, disallowable instruments pursuant to Section 124PG(1) of the Social Security (Administration) Act 1999 must be registered on the Federal Register of Legislation and tabled before both Houses of Parliament.

Where the amendment engages human rights considerations, it does so reasonably and proportionately to pursue the following legitimate objectives:

a. reduce the amount of certain restrictable payments available to be spent on alcoholic beverages, gambling and illegal drugs; and
b. determine whether such a reduction decreases violence or harm in the Region; and
c. determine whether such arrangements are more effective when community bodies are involved; and
d. encourage socially responsible behaviour.

The right to social security is limited only in the participant's ability to use a proportion of their payment to purchase harmful goods, in an area where there are demonstrated high levels of community harm. The amendment does not detract from the eligibility of a person to receive welfare, nor reduce the amount of a person's social security entitlement.

The limitation on the right to a private life is limited to restricting a proportion of a payment being spent on harmful goods. This limitation is directly related to the objective of the Cashless Debit Card and is proportionate given the high levels of harm in potential communities, and the demonstrated positive results of the program to date.

While the program is not applied on the basis of race or cultural factors, and locations are chosen on the basis of objective criteria, to date there has been a significant proportion of Aboriginal and Torres Strait Islander people, women and Disability Support Pensioners participating. This amendment allows Government the opportunity to test the program in more diverse settings, through the Cashless Debit Card expansion.

The bill engages the right to self-determination in a proportionate way, directly limited to the objectives as the only restriction is that people are able to spend a proportion of their funds on any goods or services except alcohol, gambling and illegal drugs.

All decisions around the extension of the Cashless Debit Card have been made and will continue to be made in close partnership with community leaders. Engagement with community members and leaders has been ongoing, informally and formally (through the independent evaluation) in all locations to help Government better understand local needs and gauge interest in the extension of the program. Topics of consultation include objectives; benefits of the program in terms of community safety/wellbeing for vulnerable people; the identification of gaps and possible support services; the role of community bodies; the evaluation; and differences between the Cashless Debit Card and Income Management arrangements.

Whether the use of the cashless debit card could be restricted to instances where:

- *there has been an assessment of an individual's suitability to participate in the scheme rather than a blanket imposition based on location in a particular community, and*
- *individuals opt-in on a voluntary basis.*

While Income Management, the Australian Government's other welfare quarantining program, is targeted towards vulnerable individuals, the Cashless Debit Card is testing whether restricting the amount of cash in a community can reduce the overall social harm caused by welfare-fuelled alcohol, gambling and drug misuse at the individual and community level. The community wide impacts of these harmful goods mean that the Cashless Debit Card program is most effective when a majority of people in a community who receive a welfare payment participate in the program. In current sites, the program applies to all people who receive a working age welfare payment in Cashless Debit Card locations, with the exception of Age Pension and Veterans' Pension recipients. However, people receiving these two payments may volunteer to participate. People who earn money from other sources, such as paid work, are also able to volunteer.

The Cashless Debit Card is not designed to operate as a punitive measure. For people who do not spend a large proportion of their money on alcohol, gambling or drugs, the Cashless Debit Card has very little impact and will ensure that those receiving welfare payments and their children will have money available for life's essentials.

Another key difference between Income Management and the Cashless Debit Card is that Cashless Debit Card participants are able to use their card to purchase anything other than alcohol and gambling products, providing greater consumer choice to participants. Using a card that is delivered by a commercial provider also means less involvement from government employees. This helps people to engage in the mainstream financial market; encouraging improved financial capability and removing interference from government in people's lives.

This amendment seeks only to remove restrictions around the number of locations, the number of participants and the end date of the program as a whole, and does not change the parameters of the Bill, which were recommended for passage by the Community Affairs Legislation Committee under the *Social Security Legislation Amendment (Debit Card Trial) Bill 2015*. The same safeguards, such as sunset dates and participant criteria, will still require the introduction of a disallowable instrument.

The card is a not a panacea, but it has led to stark improvements in communities as demonstrated in the final evaluation, offering vulnerable people protection from abuse of harmful substances, and any associated harm and violence. Critically, it also promotes the human rights of children, including the right of children to the highest attainable standard of health and the right of children to adequate standards of living (articles 24, 26 and 27 of the Convention on the Rights of the Child, respectively), by ensuring that a portion of welfare payments is available to cover essential goods and services to improve living conditions for the children of welfare recipients. This amendment simply seeks to allow these positive results to continue in communities that ask for the program.

Yours sincerely

Alan Tudge

The Hon Christian Porter MP
Minister for Social Services

MC17-010169

29 AUG 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 16 August 2017 regarding the Committee's Human Rights Scrutiny Report No. 8 of 2017 which requested additional information in relation to the Social Services Legislation Amendment (Welfare Reform) Bill 2017.

Please find enclosed a response to the Committee in relation to each of the issues identified. This response includes input from the Minister for Employment, Senator the Hon Michaelia Cash, in relation to the elements of the Welfare Reform Bill which fall within her portfolio responsibilities. I have also copied this letter to Minister Cash.

Thank you for raising these matters and allowing us to provide additional information.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Attachment A

SOCIAL SECURITY LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2017

Schedules 1 – 7 - Creation of a new jobseeker payment and cessation of other payment types: ***Compatibility of the measures with the right to social security and the right to an adequate standard of living***

1.238 – The statement of compatibility acknowledges that the measure engages the right to social security. However, it is unclear whether the measures constitute a reduction in the level of attainment of the right to social security.

1.239 – Accordingly the committee requests the advice of the Minister as to

- whether the cessation of certain social security types could result in reductions in the amount payable or qualification for any new or existing social security recipients, or whether such payments will be equivalent to the types of payments that are ceasing;

The cessation of **Newstart Allowance** will not result in reductions in the amount payable to recipients or impact on qualification. All existing Newstart Allowance rules and rates will be rolled into the JobSeeker Payment.

The cessation of **Widow B Pension** will not result in reductions in the amount payable to recipients. The payment has been closed to new entrants since 20 March 1997 so ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension which is paid at the same rate as Widow B Pension.

The cessation of **Partner Allowance** will not result in reductions in the amount payable to recipients. The payment was closed to new entrants on 20 September 2003 therefore ceasing the payment does not impact qualification. Existing recipients will transition to Age Pension. Partner Allowance is paid at the lower allowance rate and therefore recipients will receive a payment increase when they transition to Age Pension.

The cessation of **Wife Pension** may result in reductions to the amount payable to a small number of recipients. Wife Pension has been closed to new entrants since 1 July 1995 so ceasing the payment does not impact qualification. On the implementation date there will be around 7,750 recipients:

- Around 2,250 will transition to Age Pension and 2,400 will transition to Carer Payment. Age Pension and Carer Payment are paid at the same rate as Wife Pension so these recipients will not experience any reduction in assistance.
- Around 2,900 Wife Pension recipients will transition to JobSeeker Payment. JobSeeker Payment will be paid at the lower allowance rate. However, transitional arrangements described in the Explanatory Memorandum will ensure that these recipients do not experience a nominal reduction in their payment rates.
- Around 200 Wife Pension recipients residing overseas will no longer be eligible for a social security payment. These recipients are under Age Pension age and would not be eligible for either another payment under an international agreement or a portable payment. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by obtaining employment.

The cessation of **Widow Allowance** will not result in reductions to the amount payable existing to Widow Allowance recipients. Widow Allowance will close to new entrants on 1 January 2018. Existing Widow Allowance recipients will gradually transition to Age Pension by 1 January 2022 as they reach Age Pension age. Widow Allowance is paid at the lower allowance rate so recipients transitioning to Age Pension will experience an increase in their payment rates. In relation to new recipients:

- Widow Allowance is only open to women over 50 born before 1 July 1955 who are no longer partnered and have become widowed, divorced or separated since turning 40 years of age, and have no recent workforce experience. All those who could be eligible would have reached Age Pension age by 1 January 2022.
- Between 1 January 2018 and 1 January 2022, women who would otherwise have been eligible for Widow Allowance will be able to claim Newstart Allowance. As a result of the Newstart Allowance upper age limit (Age Pension age), recipients will have to claim Age Pension when they reach Age Pension age.

The cessation of **Sickness Allowance** may result in small reductions to the amount payable to some recipients. Sickness Allowance criteria will be rolled into JobSeeker Payment so there will be no impact on qualification for payment. Existing recipients will be gradually transitioned to JobSeeker Payment. Sickness Allowance is paid at the same rate that Jobseeker Payment will be paid, so recipients will not experience a reduction in their base rate. However, Sickness Allowance automatically entitles a person to the Pharmaceutical Allowance supplement ($6.20 per fortnight singles, $3.10 per fortnight partnered). In line with existing Newstart Allowance rules, JobSeeker Payment recipients will be assessed to determine their eligibility for Pharmaceutical Allowance. It is estimated that around 400 former Sickness Allowance recipients will be ineligible for Pharmaceutical Allowance when they transition to JobSeeker Payment as they will not meet the relevant criteria. That is, up to 5 per cent of recipients are expected to have capacity to work of 15 hours or more per week and will therefore not automatically qualify for Pharmaceutical Allowance. They will be referred to an employment service provider where they would enter a Job Plan and undertake suitable mutual obligation activities. This represents less than 5 per cent of the Sickness Allowance population on 20 March 2020.

The cessation of **Bereavement Allowance** will not result in reduction in the amount payable to existing recipients on 20 March 2020. In relation to new recipients:

- Up to 960 people annually who would have previously claimed Bereavement Allowance will now be able to claim JobSeeker Payment or another income support payment. It is expected that the majority will claim JobSeeker Payment.
- As per existing Newstart Allowance rules, JobSeeker Payment will have a more stringent means test than Bereavement Allowance. An estimated 30 bereaved people per year will not qualify for an income support payment due to their income, assets or other circumstances, such as age.
- JobSeeker Payment will be paid at the allowance rate compared to Bereavement Allowance which is paid at the pension rate. However, JobSeeker Payment will provide a triple upfront payment to newly bereaved people to assist with the high upfront costs associated with the death of a partner. While the overall assistance provided on JobSeeker Payment will be less than that currently available on Bereavement Allowance over a 14 week period, JobSeeker Payment will provide a substantially higher level of support in the first fortnight. Additionally, many recipients leave Bereavement Allowance before the end of the 14 week bereavement period, so JobSeeker Payment recipients would receive a

higher level of overall assistance than some shorter-term Bereavement Allowance recipients due to the higher upfront payment on the JobSeeker Payment.

- If a person is eligible for another payment such as Parenting Payment Single which is paid at the pension rate, they will receive that payment with a 14 week exemption from mutual obligations, consistent with existing provisions in the Bereavement Allowance.

1.239 – whether any new or existing social security recipients would be worse off under the transitional arrangements;

Transitional arrangements will only apply to existing recipients. The impacts of transitional arrangements have been addressed in the previous question. As a result of the transitional arrangements, over 99.9 per cent of existing recipients will be the same or better off.

1.239 – what safeguards are provided in relation to the measures (for example, to ensure that individuals continue to receive social security); and

With the exception of around 200 Wife Pension recipients living overseas, all existing payment recipients impacted by the creation of JobSeeker Payment will continue to receive social security. Further information about the 200 Wife Pension recipients is provided below.

The package of measures is designed to automatically transfer existing payment recipients to the income support payment best suited to their circumstances. For example, recipients who are over Age Pension age will be transferred to Age Pension; Wife Pension recipients receiving Carer Allowance will be transferred to Carer Payment and recipients under Age Pension age will be transferred to JobSeeker Payment.

Safeguards to ensure existing recipients continue to receive social security include:

- people over Age Pension age will be deemed to satisfy the residency requirements for Age Pension, regardless of actual qualifying residence;
- recipients of Widow B Pension and Wife Pension will retain their existing exemptions from Australian Working Life Residence requirements;
- people aged 55 years or older transferring to JobSeeker Payment would be exempt from compulsory mutual obligation requirements but would be able to opt in to employment services;
- recipients aged under 55 years with significant barriers to employment will be assisted by jobactive (Stream C) or Disability Employment Services to re-enter the workforce;
- JobSeeker Payment will include mutual obligation exemptions for newly bereaved recipients; and
- Wife Pension recipients who transfer to JobSeeker Payment will continue to receive the Pensioner Concession Card while in receipt of a transitional rate of Wife Pension.

Additional safeguards will help to ensure future claimants are not precluded from accessing social security when they need it. These safeguards include:

- JobSeeker Payment eligibility criteria will be broader than current Newstart Allowance criteria to provide access for persons who have temporarily stopped working or studying to recover from illness or injury;

- exemptions from the ordinary waiting period, the liquid assets test waiting period, the income maintenance period and the seasonal work preclusion period will apply to newly bereaved claimants of JobSeeker Payment and Youth Allowance;
- JobSeeker Payment and Youth Allowance will provide additional bereavement assistance for persons who have recently experienced the death of their partner; and
- women who claim Newstart Allowance from 1 January 2018 who would have otherwise qualified for Widow Allowance will be exempted from the activity test requirements.

Schedule 8 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 also provides for the Minister for Social Services to make rules of a transitional nature in relation to the JobSeeker Payment package of measures should they become necessary, for example, as a result of an anomalous or unexpected consequence.

1.239 - if there are any reductions in the amount of social security payable (retrogressive measures), whether they pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.

The creation of JobSeeker Payment will result in approximately 2,900 Wife Pension recipients who transfer to JobSeeker Payment receiving no nominal increase in payment until the rate of the JobSeeker Payment equals or exceeds their frozen rate of Wife Pension. These recipients are all under Age Pension age and in similar circumstances as males or some single women of similar age who currently receive other activity-tested payments such as Newstart Allowance. The Government expects that those who have capacity to work, should be encouraged and supported to find work, and that this objective should apply consistently to people of working age who are in similar circumstances. Wife Pension is a dependency based payment that does not support these objectives. Removing Wife Pension and transitioning Wife Pension recipients under Age Pension age to the activity-tested JobSeeker Payment will support partnered women of working age to find employment, reduce their welfare dependence and improve their wellbeing. Pausing rate increases for these Wife Pension recipients is considered justified to achieve consistent treatment of people in similar circumstances in the longer term.

Around 200 Wife Pension recipients who are under Age Pension age and living overseas are expected to no longer be eligible for an Australian Government payment unless they return to reside in Australia. This loss of payment is consistent with the above-mentioned objectives and the residence-based nature of Australia's social security system. The Government expects that people have some reasonable connection to the Australian economy and society before being granted an Australian income support payment and this is reflected in residence requirements for payments including Age Pension, Disability Support Pension and Newstart Allowance.

Wife Pension was introduced in 1972 and is payable to the female partner of a male recipient of either Age Pension or Disability Support Pension. Wife Pension was granted without any other eligibility criteria or mutual obligations. The payment no longer reflects social and economic norms regarding women's workforce participation or government expectations in relation to income support.

While 200 overseas recipients under Age Pension age are expected to cease income support, their partners will continue to receive their Age Pension or Disability Support Pension. Additionally, a large proportion (over 75 per cent) of the 200 Wife Pension recipients overseas currently receive a part-rate of payment, suggesting they already have access to

other income sources besides Australian income support. The implementation date of 20 March 2020 will allow these recipients to return to Australia where they can continue to receive social security payments, or adjust to their new circumstances by finding new or further employment.

Schedule 10 – Start date for Newstart and Youth Allowance payments: ***Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.251 The preceding analysis raises questions as to whether the measure is a proportionate limit on the right to social security and the right to an adequate standard of living.

1.252 – The committee therefore seeks the advice of the Minister as to:

- how the measure is effective to achieve (that is, rationally connected to) the objective; and
- how the limitation is a reasonable and proportionate measure to achieve the stated objective (including why existing measures are insufficient to achieve the stated objective of the measure, the existence of relevant safeguards and the period of time a person may be required to go without payment or back pay).

Approximately two thirds of job seekers connect with their jobactive/Transition to Work provider within two days. Over one third of job seekers wait longer than this to connect with their jobactive/Transition to Work provider. These delays are inconsistent with community expectations that those on income support are taking all reasonable efforts to connect with employment services and find work as quickly as possible. By being connected more quickly to employment services, job seekers are more readily able to access assistance to build their skills and experiences and help them find a job faster.

The Committee notes concerns over the time period between the date a claim for payment is made and the date the requirement to attend an interview with an employment services provider. There are existing processes in place to ensure that once a job seeker submits their claim that they engage the Department of Human Service to be referred to employment services. The booking of the interview with the Department of Human Services (where the job seeker is referred to jobactive/Transition to Work) forms part of the process for the claimant when submitting an online claim for Newstart or Youth Allowance (other).

The Department of Human Services has appointments available for the claimant to book, usually within two days of them submitting their claim and also monitors the availability of appointments so the interview can be conducted in a timely manner. It is the responsibility of the claimant to book the interview with the Department of Human Services to finalise their income support claim. The sooner the claimant books this appointment the quicker the Department of Human Services can organise their jobactive/Transition to Work provider appointment.

The Committee also notes concerns over how the Schedule 10 interacts with the Ordinary Waiting Period. The intent of Schedule 10 is that the Ordinary Waiting Period will apply in the same way to job seekers who are subject to RapidConnect and to job seekers who are not subject to RapidConnect. For those job seekers subject to Schedule 10, but who are also required to serve an Ordinary Waiting Period, it would be served concurrently with time taken to connect with employment services. This ensures that job seekers who are subject to RapidConnect and an Ordinary Waiting Period will not have to wait longer to receive their payment than job seekers who are not subject to RapidConnect.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to privacy***

1.270 – The right to privacy is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is a permissible limitation on that right.

1.271 – The committee therefore seeks further advice from the minister as to how the measure is effective to achieve and proportionate to its objectives, including

- whether overseas experience indicates that this trial will be effective to achieve its objectives;

Drug testing of certain welfare recipients has been legislated in at least fifteen states in the United States of America on either a fully rolled-out or trial basis and is also conducted in New Zealand as a pre-employment option that potential employers can request.

The international evidence that is available on the effectiveness of drug testing of welfare recipients is limited as many overseas experiences have not been evaluated comprehensively, the evaluations have not been published or the results are not comparable to the trial proposed in Schedule 12.

The measure in Schedule 12 uses drug testing in combination with other interventions through Income Management and assessments by an appropriately qualified medical professional. This measure is designed to support job seekers with substance abuse issues to better manage their payments and to access treatment where appropriate. To the best of the Government's knowledge, this model has not been implemented previously in any other country.

The benefits of mandatory treatment in helping people overcome substance abuse issues are well documented through evaluations of Australian drug courts. The trials of the Cashless Debit Card also provide evidence of the effectiveness of welfare quarantining in reducing drug usage.

This measure is being implemented as a trial in order to assess the effectiveness of this particular model in the Australian welfare context as a way of helping to identify where drug abuse might be a barrier to work and supporting people to undertake treatment. There will be a comprehensive evaluation of all aspects of the trial.

- whether there will be a process to apply to remove income quarantining measures if no longer necessary or if special circumstances exist;

Income Management is an existing welfare quarantining mechanism applied to help vulnerable recipients and has been in place in a number of locations across Australia since 2007. The Income Management program has been established as an effective financial stabiliser, especially in the short and medium term.

The use of Income Management as part of the drug testing trial is designed to assist individual job seekers with proven drug use to manage their payments and to reduce further drug use by restricting their capacity to spend their payments on illicit drugs. Income Management is not just about limiting access to cash but also ensuring that payments are directed towards meeting the person's priority needs, such as housing and utilities.

Under the trial, job seekers who test positive to a drug test will be placed on Income Management for 24 months. This is an appropriate period that will enable the job seeker to stabilise their financial arrangements.

There will be safeguards in place for removing people from Income Management earlier than 24 months (or not placing them on Income Management). These safeguards have been strengthened in response to comments made by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest No.8 of 2017. These comments noted it might be appropriate to review the provisions in the *Social Services Legislation Amendment (Welfare Reform) Bill 2017* governing when and how the Secretary might make determinations to remove people from Income Management. In response, the Government will propose an amendment to the provisions in the Bill to limit the Secretary's discretion to make determinations to remove people from Income Management.

As a result of the proposed amendment, the Secretary must determine that a person is not subject to the income management regime if the Secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing. This is designed to balance the objectives of Income Management as part of the drug testing trial and the needs of individuals whose wellbeing is at serious risk.

The drug test provider may also withdraw or revoke a referral to Income Management if they become aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid, for example the job seeker provided evidence of legal medications which could have caused this result.

In addition, the decision that a person is subject to Income Management, based on a referral from a third party (such as the drug testing provider), is a decision under social security law. Recipients have the right to appeal any decision made under social security law in accordance with existing review and appeal provisions in the *Social Security (Administration Act) 1999*.

A person can also come off Income Management at any point by obtaining employment and exiting the welfare system.

- whether there will be additional safeguards in place in relation to the disclosure of drug test results, particularly to law enforcement, immigration authorities, other agencies and the public and the nature of those safeguards; and

Under existing privacy and confidentiality laws, including in the *Privacy Act 1988* and the Social Security (Administration) Act, protected information about a person can only be disclosed in limited circumstances. For example, under social security law, this includes for the purposes of administering that law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest.

Any information obtained as part of the drug testing trial, including test results, will be protected information and therefore covered by these existing laws.

Section 38FA in Schedule 12 also allows for the creation of Drug Test Rules via legislative instrument that will set out certain details relating to the establishment and operation of the trial. This includes the rules for conducting the tests, including the taking of samples, carrying out of the tests and disclosure of results. These rules will provide additional safeguards to ensure the operation of the drug testing and the conduct of the drug testing provider is consistent with the requirements under the Privacy Act and the confidentiality provisions in the Social Security (Administration) Act.

It is intended that an exposure draft copy of the Drug Testing Rule will be tabled by the Department of Social Services when it appears at the hearings for the Senate Community Affairs Legislation Committee's inquiry into the Welfare Reform Bill on 30 August 2017. These draft rules may be subject to change following further consultation with the health and alcohol and other drug sectors and the procurement of the drug testing provider.

Disclosure of test results will only occur in accordance with the existing privacy laws and the Drug Test Rules. Test results will not be shared with police, immigration or other authorities, specifically as part of this trial.

Under the existing confidentiality provisions in the Social Security (Administration) Act personal information can be disclosed to the police or state authorities in very limited circumstances where it has been certified as being in the public interest. This includes in relation to certain offences, to prevent or lessen a threat to the life, health or welfare of a person, or for child protection purposes. For example, where a recipient threatens the health, safety and welfare of their child, the Secretary can release relevant information to the appropriate authorities in order for these concerns to be investigated and addressed as necessary. These processes will remain in place. Information collected as part of the drug test testing would only be disclosed where relevant and necessary under these processes. This information will not be shared routinely as part of the trial itself.

- the availability of less rights restrictive measures to achieve the objectives of the trial.

There are some existing mechanisms in place which enable job seekers to self-disclose to the Department of Human Services (DHS) or their employment services provider that they have substance abuse or dependency issues. For example, job seekers may disclose drug and alcohol abuse or dependency as part of the Job Seeker Classification Instrument (a tool used to determine a person's relative disadvantage in the labour market in order to stream them to the appropriate employment services) and have this recorded as a vulnerability indicator on their record. Job seekers may also provide medical evidence of drug or alcohol dependency for the purposes of claiming an exemption from mutual obligation requirements or as part of an assessment of their capacity to work.

Data from the 2013 National Drug Strategy Household Drug Use Survey reveals that 24.5 per cent of unemployed people reported recent drug use. However, administrative data from the DHS system shows that less than two per cent of job seekers in most locations self-disclose their drug or alcohol dependency issues through these existing mechanisms.

This indicates that while some job seekers do already disclose their drug abuse or dependency issues and receive support from DHS and/or their employment services provider to address these issues, many do not.

This measure is designed to trial a new approach to identifying job seekers with drug use issues and assisting them through Income Management and referral to appropriate treatment to address their barriers to employment and find work. As noted above, there will be a comprehensive evaluation of all aspects of the trial.

To the extent that the measure at Schedule 12 engages or limits the right to privacy, including by seeking to collect new forms of protected information through drug testing, this is reasonable and proportionate to the objective of better identifying job seekers who have drug abuse issues that may be a barrier to work but have not necessarily self-disclosed these issues in order to support them to address those barriers.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to social security and the right to an adequate standard of living***

1.282 – The right to social security and an adequate standard of living is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.283 - The committee requests the Minister's advice as to as to the effectiveness and proportionality of the measure including:

- whether recipients will be informed that they may request a retest or provide evidence of legal medications, and how these processes will occur;

Job seekers who are selected for an initial drug test will first attend an appointment with the Department of Human Services. During this appointment, they will be notified of the requirement to undergo a drug test. They will also be advised:

- that they can provide evidence of any legal medications or other substances that they are taking which may affect the test result,
- that they may request a re-test if they dispute the result of the test, and
- their review and appeal rights in relation to any decision made under social security law following a positive test result.

Job seekers will also have a short pre-test interview with the drug testing provider to help identify any legal medications a job seeker may be taking which could interfere with the accuracy of the test result. Job seekers will also have the opportunity to provide evidence of any legal medication or other substances they are taking after the test, including after the results of the test are available, and have this taken into account.

It is intended that the sample taken by the drug testing provider will be split into two samples. This is common practice with other forms of testing used in Australia. If the job seeker requests a re-test, this will be done using the second sample.

Job seekers who request a re-test will have to repay the cost of the re-test if the result is again positive. This is designed to discourage job seekers from requesting frivolous re-testing where they know they have used illicit drugs. Job seekers will be informed of the possible repayment of the cost of the re-test prior to confirming that they want to proceed with a re-test. Job seekers will not have to pay for the cost of the re-test if the result is negative.

- whether there is a mechanism to challenge or review the imposition of income management;

It should be noted that Income Management does not reduce the amount of payment a recipient receives, it just changes the way in which they receive their payment.

Under Income Management, the majority of a recipient's payment is paid into an Income Management account and quarantined for basic essentials. Recipients are still be able to buy items at a wide range of approved merchants and pay bills with their quarantined funds; however, these funds are not able to be used on harmful products, such as alcohol, cigarettes or gambling. The remaining, non-quarantined amount is paid into their regular bank account and accessible as cash to pay for discretionary items.

As noted above, recipients have the right to appeal any decision made under social security law, including a decision to place a person on Income Management. Under existing review

and appeal mechanisms in the Social Security (Administration) Act, recipients can request a review of the decision by a DHS Authorised Review Officer and, if they disagree with the decision by this officer, can appeal the decision to the Administrative Appeals Tribunal.

As outlined above, the drug test provider may also withdraw or revoke a referral to Income Management to the Secretary if a re-test is conducted and the result is negative; or if the provider becomes aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid, for example the job seeker provided evidence of legal medications which could have caused this result.

- whether a person can successfully have their rate of repayment reduced where they would experience severe hardship, but their circumstances are similar to others;
- further detail as to how the discretion of delegates will operate to consider the vulnerability of those with drug dependencies and ensure that their payments are not reduced such that they are unable to afford basic needs;

This measure will only reduce a job seeker's income support payment through the repayment of the cost of a positive drug test, other than the initial test, or re-test. Recipients will not have to repay the cost of their first positive test or the cost of any negative test result. This means that recipients who test positive to their first test but then abstain from further drug use and do not record any further positive results will experience no reductions in payment.

The amount that will be repaid for the cost of a positive drug test will be an amount set to represent the lowest cost of a test available to the Government, and not the cost of the test they were given. The exact costs of each of the drug tests to be used under the trial – saliva, urine and hair – will depend on the drug testing provider contracted to deliver the tests. The Government will approach the market to engage a suitable drug testing provider or providers which represent best value for money to deliver the required range of drug testing methods. Consideration will be given to ensuring the drug testing methods used in the trial are cost-effective.

If the job seeker is required to pay for the cost of a drug test, the cost will be repaid through deductions from the job seeker's fortnightly payment. To protect the job seeker from potential hardship, deductions to pay for the cost of a test would be set at a small percentage of the job seeker's fortnightly payment which will be determined by the Department of Social Services Secretary, capped at no more than 10 per cent. This is significantly lower than the standard rate for recovery of social security debts, which is 15 per cent.

Job seekers will also be able to have their repayment percentage reduced if required to ensure they are not placed in hardship. This is consistent with existing arrangements for repayment of debts through payment withholdings, and the process for application of this reduction will also be the same as existing arrangements.

- whether there will be limits placed on the disclosure of drug test results to law enforcement, immigration authorities or other agencies; and

As noted above, disclosure of test results will only occur in accordance with existing privacy laws, including in the Privacy Act and the Social Security (Administration) Act. There will be further safeguards set out in the Drug Test Rules under section 38FA in Schedule 12.

- whether there are less rights restrictive methods to achieve the objectives of the measure.

As outlined above, the measure at Schedule 12 is designed to trial a new approach to identifying job seekers with drug abuse issues and assisting them to address their barriers to employment, including support through Income Management to manage their payments to meet their priority needs.

This trial will not remove access to social security payments. Income Management does not change the amount received, just the way it is received. Income Management is designed to better ensure that the priority needs of vulnerable individuals (such as those with proven drug use issues) are met, ensuring these individuals are better placed to maintain an adequate standard of living.

As noted above, job seekers will not be required to repay the costs of their first positive test; they will only be required to repay any second or subsequent positive test. The use of repayment of these positive tests is designed to test this as a means of deterring further drug abuse. There are safeguards in place to ensure that the job seeker is only required to repay an amount equivalent to the lowest cost option of any test used under the trial and that the repayment percentage can be reduced (including to nil) in cases of financial hardship.

Schedule 12 – Mandatory drug-testing trial: ***Compatibility of the measure with the right to equality and non-discrimination***

1.291 The right to equality and non-discrimination is engaged by this measure. The preceding analysis raises questions as to the compatibility of the measure with this right.

1.292 - The committee seeks further advice from the Minister as to whether the measure is proportionate to its objective, in particular whether there are less rights restrictive alternatives to the measure to achieve the objective.

Drug or alcohol dependency is a known barrier to work or to undertaking activities to find or prepare for work. In 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

This is a significant number of job seekers; however, as outlined above, data from the 2013 National Drug Strategy Household Drug Use Survey indicates that there may be many more job seekers with drug and/or alcohol abuse issues who are not being identified.

Supporting job seekers with drug and/or alcohol abuse issues to seek treatment will better enable them to meet the mutual obligation requirements associated with their payments and ultimately find and maintain a job. This trial is designed to test a new way of identifying job seekers in these circumstances and providing them with support. To the extent that the trial is targeted at people with drug abuse issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues.

Research indicates that certain groups within the population may be at greater risk of developing harmful drug use behaviours or undergoing drug-related harm. These groups may require particular targeting in terms of education, treatment and prevention programs.[1]

In relation to the potential use of risk profiling, it was intended that this would be used to inform the selection of job seekers for the trial in order to maximise the chances of

[1] http://www.aihw.gov.au/alcohol-and-other-drugs/data-sources/ndshs-2013/ch8/

identifying job seekers who may have drug abuse issues and may need help to address their barriers to work.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: ***Compatibility of the measures with the right to equality and non-discrimination***

1.309 – The preceding analysis indicates that Schedules 13 and 14 engage the right to equality and non-discrimination.

1.310 – The committee seeks further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect the rights of people with disabilities relating to alcohol or drugs.

Schedule 13

Drug or alcohol dependency is known barrier to work or to undertaking activities to find or prepare for work. As highlighted in 2016-17 there were 22,133 temporary incapacity exemptions given to 16,157 job seekers because they had a drug and/or alcohol dependence issues that prevented them from meeting mutual obligation requirements, such as job search.

Allowing people to be exempt from their mutual obligations due to drug or alcohol issues supports a disengagement from the employment services support process, and from potential referral to treatment, which may impede a person's return to work in the longer term.

This measure is designed to ensure that job seekers with drug and alcohol abuse issues remain connected to their employment services provider so that they can be supported to engage in appropriate activities to address their barriers to work.

As per existing arrangements, the provider will work with the job seeker to develop a Job Plan that is individually tailored and responds to their issues and needs. This could include drug and/or alcohol treatment where appropriate.

People who have a disability, such as acquired brain injury or liver disease, that may have been caused or exacerbated by drug and/or alcohol abuse will remain eligible to apply for a temporary incapacity exemption on the basis of this disability if it is impacting on their ability to meet their mutual obligation requirements. Job seekers that have other circumstances not connected to drug or alcohol misuse which impact their ability to meet their mutual obligation requirements may also qualify for another type of exemption. This may include circumstances, such as domestic violence, temporary caring responsibilities or a major personal crisis.

To the extent that this measure is targeted at people with drug and/or alcohol misuse or dependency issues, this is reasonable and proportionate to the objective of ensuring that these job seekers get the support they need to address their issues, noting that other exemptions will continue to be available.

Schedule 14

As part of the tightening of reasonable excuse, job seekers, including those with disabilities related to drugs or alcohol, will be able to unconditionally use reasonable excuse due to drug

or alcohol dependency only once. Job seekers will then have the choice of seeking treatment, if it is available and appropriate, which will help them meet their mutual obligation requirements. If job seekers elect not to undertake treatment they will no longer be able to use drug or alcohol dependence as a reasonable excuse if they do not meet their mutual obligation requirements.

This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or alcohol as a reasonable excuse unless they agree to participate in treatment, if it is available and appropriate. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment (see further detail on available protections in the response to 1.311 and 1.316). Those with drug or alcohol conditions that do not impair the ability to meet their requirements or who agree to participate in treatment will not be affected by the tightening of reasonable excuse.

1.311 - Noting that the details of what is to constitute a 'reasonable excuse' is to be provided by legislative instrument, the committee seeks the Minister's advice on the safeguards to be included in this instrument.

The instrument will include a number of safeguards to ensure that job seekers with drug or alcohol dependency affecting their ability to meet their requirements are not adversely affected by the measure through no fault of their own. The intent of the measure is to remove the ability for job seekers to repeatedly use reasonable excuse only in those instances where they have previously had it accepted and subsequently refused available and appropriate treatment.

Accordingly, the instrument will specify that drug or alcohol dependency cannot be considered as a reasonable excuse only if it has been previously used and accepted and if the individual has refused to participate in appropriate and available treatment. This would mean that the only time job seekers would not be able to have their drug or alcohol considered as a reasonable excuse would be if they had decided not to participate in treatment. In any instance where the job seeker had made a decision to participate in available and appropriate treatment, drug and alcohol dependence would be required to be considered in determining if the job seeker had a reasonable excuse (as per current arrangements).

As an additional protection, it will be specified in the instrument that if appropriate treatment is not available for the job seeker, then the existing reasonable excuse provisions will continue to apply.

More broadly, the instrument will continue to specify those matters that must be taken into account when deciding whether a job seeker has a reasonable excuse. The instrument will not limit the discretion of the decision-maker to take into account any factor that may provide a reasonable excuse (except for drug and alcohol dependency while refusing to participate in appropriate treatment).

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: ***Compatibility of the measures with the right to social security and an adequate standard of living***

1.315 – The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to social security and an adequate standard of living.

1.316 – The committee further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether adequate safeguards are available to protect people from suffering deprivation.

Schedule 13

This measure recognises that, while job seekers with substance misuse issues may be unable to undertake job search or other work-related activities, they should be encouraged to pursue treatment to overcome their barriers to work.

A job seeker's rate of payment is not impacted by whether or not they have an exemption from their mutual obligation requirements. As such, this measure will not change the amount of income support a job seeker receives.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation or participation requirements.

Mutual obligation activities are tailored by employment service providers to the job seeker's needs, taking into account their individual circumstances. This may include drug or alcohol treatment. Intensive treatment (such as residential rehabilitation) which prevents the job seeker from participating in any other activities will fully meet the job seekers requirements. Less intensive treatment (such as fortnightly counselling) will contribute to meeting their requirements and the job seeker may have to undertake other activities, depending on their circumstances and capacity.

Job seekers (other than those participating in the trial) undertaking treatment will have this included in their Job Plan as a voluntary activity. This means that compliance action, such as a financial penalty, will not apply if the job seekers ceases to undertake that activity or fails to attend. However, in these circumstances, the job seekers will be required to undertake other activities to meet their mutual obligation requirements.

Limiting access to certain exemptions where the reason is wholly or predominantly attributable to drug or alcohol misuse or dependency is reasonable and proportionate to the objective of ensuring that job seekers are encouraged to address their substance-related issues rather than remaining disengaged.

Schedule 14

The impacts of Schedule 14, the tightening of reasonable excuse, on the rights to social security and an adequate standard of living are reasonable and proportionate. This measure is the least restrictive method of achieving the policy objective of ensuring that job seekers are unable to repeatedly use drug or alcohol as a reasonable excuse. Job seekers will also only be affected by the measure if they continually fail to meet their mutual obligation requirements and refuse to participate in available and appropriate treatment. Those with drug or alcohol conditions that do not impair the ability to meet their requirements will not be affected.

The protections outlined in the response to 1.311 will ensure that only those job seekers who actively refuse to participate in treatment will be unable to repeatedly use reasonable excuse

due to drugs or alcohol. Additionally, all job seekers, whether or not they subsequently refuse to participate in treatment, will be able to use drug or alcohol dependency as a reasonable excuse once. This will ensure that job seekers are not adversely affected if they are unaware of what treatment is available in their area.

To ensure that all job seekers who elect to participate in treatment are able to do so, their usual mutual obligation requirements will be reduced, depending on the amount of hours of treatment required.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses: *Compatibility with the right to protection of the family and the rights of the child*

1.319 – The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to protection of family and the rights of the child.

1.320 – The committee seeks further information from the Minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- whether less rights restrictive measures would be workable; and
- whether there are adequate safeguards to protect the rights of children.

Schedule 13

As outlined above, whether a job seeker is granted an exemption or not doesn't change the amount of income support they receive.

Where a job seeker's request for an exemption is rejected on the basis that it is wholly or predominantly related to substance dependency or misuse, they will remain connected to their employment services provider and need to satisfy mutual obligation requirements, tailored to their individual circumstances. Job seekers who are the principal carer of a dependent child aged under 16 years are subject to part-time mutual obligation requirements of 15 hours per week. This recognises their caring role and is designed to ensure they are able to balance their caring responsibilities with their participation obligations.

Ensuring that parents with substance misuse or dependency issues remained connected and can be referred to appropriate treatment will put these parents in a better position to overcome their issues, find a job and provide for their families. As noted above, job seekers undertaking treatment will have this included in their Job Plan as a voluntary activity (unless participating in the trial under Schedule 12) and will not be subject to a financial penalty if they cease to undertake that activity or fail to attend.

Family Tax Benefit, which is paid to parents to assist with the costs of children, is not subject to mutual obligation or participation requirements and will not be impacted by this measure.

Schedule 14

As a result of the tightening of reasonable excuse in Schedule 14, job seekers who continually fail to meet their usual mutual obligation requirements due to drug or alcohol dependence, and actively refuse to participate in treatment to which they have been referred, may face financial penalties. In some cases, where these job seekers are parents, this may indirectly have flow on impacts to their children (although in no circumstances would the application of

a financial penalty impact family payments, including rent assistance where paid with the family payments).
However, the primary purpose of the measure is to incentivise job seekers with serious drug or alcohol issues into treatment. Continued drug or alcohol dependency by parents to an extent that they are repeatedly unable to meet their requirements is likely to have significant adverse effects for the child. Children in this circumstance would likely be better off if their parents participated in the treatment they need. Also, as part of the tightening of reasonable excuse measure, no significant increase in the number of financial penalties applied is expected. Further, given that the ultimate policy objective is to ensure job seekers address drug and alcohol barriers so that they are able to more quickly move into paid work, this will be beneficial for children as there is evidence that when parents are in paid employment this improves outcomes for children.

Schedule 15 – Compliance Framework: ***Payment suspension for mutual obligation failures - Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.329 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.330 – The committee requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its legitimate objective, in particular, what criteria will apply to whether a person is considered to have a 'reasonable excuse' for failing to comply with a mutual obligation requirement.

Schedule 15, which would allow the implementation of the targeted compliance framework, is reasonable and proportionate in achieving the objective of encouraging job seekers to remain engaged with employment services and actively seeking and accepting suitable work.

The measure will ensure that only those who are deliberately and repeatedly not complying with their mutual obligation requirements will face financial penalties. Job seekers will generally only face any lasting financial penalty if they have missed five requirements within six months and had their requirements assessed as suitable for their particular circumstances by both their employment service provider and the Department of Human Services. Prior to this, job seekers who miss requirements without reasonable excuse will have their payment suspended until they re-engage, with any missed payment back-paid.

Reasonable excuse criteria will be largely identical to those applying under current arrangements. When determining if an individual has a reasonable excuse, decision makers will be required to consider if the job seeker's failure was directly contributed to by:

- lack of access to safe, secure and adequate housing;
- literacy and language skills;
- an illness, injury, impairment or disability;
- a cognitive, neurological, psychiatric or psychological impairment or mental illness;
- a drug or alcohol dependency;
- unforeseen family or caring responsibilities;
- criminal violence (including domestic violence and sexual assault);
- adverse effects of the death of an immediate family member or close relative; or
- working or attending a job interview at the time of the failure.

The instrument does not limit the discretion of decision-makers, who will also be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of repeated use of drug or alcohol dependency if the person has actively refused treatment).

Schedule 15 – Compliance Framework: Financial penalties for refusing work - *Compatibility of the measure with the right to social security and right to an adequate standard of living*

1.340 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.341 – The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.342 – The committee therefore requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, and in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available, for instance, whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- whether there are any safeguards in relation to the application of the measure

Waivers are not appropriate for job seekers who turn down suitable work. This is because, by definition, any job seeker who turns down suitable work is able to work to help support themselves.

Job seekers may only be penalised for turning down work, where the work is suitable. That is, where it meets a range of legislated criteria, including that the person has the skills required to do the work, or will be trained to do so, the work would not aggravate any medical or psychological condition, the work meets all relevant safety and wage legislation, commuting time to and from the work is reasonable and the person has appropriate childcare available.

The presence of waivers undermines the efficacy of penalties for refusing work. As was highlighted in the statement of compatibility of human rights, the vast majority of serious penalties are waived under current arrangements. Further, as part of the policy development process for the development of the targeted compliance framework, consultation with Department of Human Services' staff reported that the cycle of assessments and the ability for cash-in-hand workers and serially non-compliant job seekers to remain on payment is exacerbated by the ability to too easily waive the eight week non-payment period for serious failures. A large number of recipients do not serve applied eight week non-payment penalty periods, having them provisionally waived by simply agreeing to participate in a Compliance Activity. Many recipients reportedly attend Compliance Activity appointments necessary to unconditionally waive the penalty and re-start their payment, but do not attend any other appointments or participate in the Compliance Activity. The Department of Human Services' staff reported that recipients in this situation are often very knowledgeable about the compliance system and pre-empt advice about how to receive payment again.

Although not able to be waived, the penalty for refusing an offer of suitable work will be halved. Also, as is currently the case, compliance penalties will not affect family payments. Further, job seekers who turn down suitable work under the new framework will continue to have access to support during crises delivered by welfare organisations and funded under the Emergency Relief program, administered by the Department of Social Services.

Schedule 15 – Compliance Framework: Repeated non-compliance penalties- ***Compatibility of the measure with the right to social security and right to an adequate standard of living***

1.350 – The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.351 – The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.352 – The committee therefore requests the advice of the Minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, in particular:

- whether the waiver was being misused or was ineffective;
- whether there are less rights restrictive options that are reasonably available;
- whether there are any safeguards in relation to the application of the measure (such as, crises or when a person is unable to meet basic necessities);
- whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and
- what criteria will be set out in the legislative instrument as matters the Secretary must or must not consider as constituting persistent noncompliance.

The measure is proportionate and reasonable and will be fairer and less harsh than the current framework for the vast majority of job seekers who are generally compliant. Job seekers will only face penalties where they repeatedly and persistently do not meet their requirements without reasonable excuse, refuse work or voluntarily become unemployed. The response to 1.342 outlines the protections for refusing suitable work or voluntarily becoming unemployed under the new framework.

Existing protections for the 200,000 job seekers who have some sort of exemption from their mutual obligations or are fully meeting their obligations through approved activities will also be preserved.

In addition, numerous safeguards will exist to ensure that only those job seekers who are deliberately and persistently non-compliant will face financial penalties. This recognises the fact that the majority of job seekers consistently do the right thing and should not have payment deducted, when payment suspension (with back-pay) alone is sufficient to get them to re-engage. Job seekers will generally have to miss a minimum of five appointments in six months, without good reason, before they actually lose money. In contrast, job seekers may lose money for their first failure under the current one-size-fits-all system.

To ensure that job seekers with circumstances affecting their ability to meet their requirements are not unfairly penalised, job seekers will also have their capabilities assessed

twice before they face any loss of money, by both their provider (on their third failure) and the Department of Human Services (on their fourth failure). Job seekers whose vulnerabilities have impacted their ability to meet agreed commitments will be able to renegotiate their job plan at either of these assessments and have their demerits reset to zero (allowing a further five failures without reasonable excuse before any payment is lost). These protections are in contrast to the current framework, where job seekers on average have almost four penalties applied before they undergo a Comprehensive Compliance Assessment to see if they have any vulnerabilities.

Regarding the inability for penalties for persistent and deliberate non-compliance to be waived, as with penalties for refusing work, the vast majority of penalties for repeated non-compliance are waived under current arrangements, undermining the deterrent effect of penalties – particularly for persistently non-compliant job seekers.

Although not able to be waived, the maximum penalty for persistent non-compliance will be halved. Also, as is currently the case, compliance penalties will not affect family payments. As with job seekers facing penalties for refusing work, job seekers facing financial penalties for persistent non-compliance will continue to have access to support during crises delivered by welfare organisations and funded under the Emergency Relief program, administered by the Department of Social Services.

The legislative instrument determining the circumstances in which the Secretary must or must not be satisfied that a person has persistently committed mutual obligation failures will specify the number and timeframe within which prior failures must have been committed to constitute persistent non-compliance. However, the determination of individual failures contributing to a finding of persistent non-compliance will continue to be guided by the reasonable excuse provisions and instrument. As outlined above, reasonable excuse criteria will be largely identical to those applying under current arrangements. It should also be reiterated that the instrument does not limit the discretion of decision-makers, who will continue to be able to consider any other factor that directly prevented job seekers from meeting their requirements (with the exception of drug or alcohol dependency if the person has refused treatment).

Schedule 17 – Information gathering powers and referrals for prosecution:
Compatibility of the measure with the right to privacy

1.361 – The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right to privacy.

1.362 – The committee therefore seeks the advice of the Minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

The proposed changes within schedule 17 are aimed at achieving a legitimate objective, by preventing the need to obtain, via a search warrant, information already obtained administratively. This not only provides administrative benefits to the Department of Human

Services and the Australian Federal Police, but also benefits those persons providing the information, typically third parties, by reducing the burden placed on them.

The limitation of the right to privacy of this measure is reasonable and proportionate.

In cases where this measure is used to obtain evidence from individuals other than the person under investigation for welfare fraud, this method does not impose any additional interference to their privacy, family, home or correspondence. This is because any evidence obtained under this measure would previously have been obtained using a search warrant, sometimes after they had already provided this information for administrative purposes.

In cases where this measure is used to obtain information from the individual under administrative investigation, this information is only obtained for the purposes of ensuring the sustainability and integrity of the social security system. This does not entail any risk of reputational harm, except where an individual commits an offence by providing false or incomplete information. This measure does not change the scope of information being provided and only requires individuals to make a limited disclosure of information necessary for the proper administration of the social security system.

Schedule 17 – Information gathering powers and referrals for prosecution: ***Compatibility of the measure with the right not to incriminate oneself***

1.367 – The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right not to incriminate oneself.

1.368 – The committee therefore seeks the advice of the Minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the exceptions to the 'use/derivative use' immunities are sufficiently circumscribed).

As outlined above, the proposed changes within schedule 17 are aimed at achieving a legitimate objective, by preventing the need to obtain, via a search warrant, information already obtained administratively. This not only benefits the administration of the Department of Human Services and the Australian Federal Police, but also benefits those persons providing the information, typically third parties, by reducing the burden placed on them.

The limitation on the right to self-incrimination is reasonable and proportionate. The common law right to silence preventing use of the information or documents against the person providing them is retained, other than in proceedings for the provision of false information. In these circumstances, this measure is a proportionate limitation on an individual's right to freedom from self-incrimination, because the Department of Human Services depends on individuals disclosing complete and accurate information in order to ensure the sustainability and integrity of the social security system.

This limitation is also consistent with section 9.5.1 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement,* which deals with the privilege against self-

incrimination. The Guide states that the privilege against self-incrimination does not apply "where it is alleged that a person has given false or misleading information".

Schedule 18 – Exempting social security laws from disability discrimination Law: *Compatibility of the measure with the right to equality and non-discrimination*

1.376 – The committee therefore seeks further information from the Minister as to how the broad exemption of all social security law is permissible under international law, in particular why such an exemption is required in view of section 45 of the Disability Discrimination Act.

The *Disability Discrimination Act 1992* plays a vital role in protecting people with disability from unfair treatment and promoting equal rights, opportunity and access. These changes are required to align social security and disability discrimination law to ensure consistent treatment in relation to social security entitlements.

Payments under social security law are made to eligible people on the basis of a variety of factors such as their health, disability, age, income and asset levels. This ensures that Australia's social security system is targeted based on people's circumstances and need.

As noted in the Explanatory Memorandum, the *Social Security Act 1991* has been exempt from the operation of the disability discrimination law since the Disability Discrimination Act commenced in 1992. This ensures that pensions and allowances, including for those with disability, can be appropriately targeted to particular groups without this being considered discriminatory.

The amendments at Schedule 18 will ensure that this existing exemption from the Disability Discrimination Act in relation to pensions and allowances applies consistently to all of the social security law, in line with its original intent. This does not change eligibility for payments under social security law (which will continue to be appropriately targeted according to their purpose) or the broader protections that the Disability Discrimination Act provides to people with disability.

Section 45 of the Disability Discrimination Act is designed to ensure that special measures – i.e. programs, facilities, employment opportunities – that exist and are limited to people with disabilities in order to particularly support their participation are not considered to be discriminatory under the Act. Special measures could be considered a form of positive discrimination towards people with disabilities. This section of the Act does not relate to the exemption of social security law from the Disability Discrimination Act.

The Government considers that the appropriate ways of ensuring that the disability discrimination law applies consistently across social security law is through the amendments proposed at Schedule 18.

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 6 September 2017 concerning the *Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017* ('the Regulations').

The Regulations allow the Australian Prudential Regulation Authority (APRA) to collect data on debt held by the agricultural sector and share it with the Department of Agriculture and Water Resources (DAWR) for the purpose of assisting DAWR to perform its functions and exercise its powers. This is consistent with existing arrangements for APRA to collect and share financial sector information with the Australian Bureau of Statistics and the Department of Health.

I consider that the limitations on the right to privacy imposed by the Regulations are reasonable for the achievement of the stated objective and that there are adequate and effective safeguards in place with respect to the right to privacy.

As the Committee notes, the explanatory statement identifies improved targeting of assistance measures to farmers as an objective of the Regulations. Reflecting this, the relevant reporting standard (ARS 750.0) only seeks to collect information on the amount and nature of debt at a state and agricultural activity level.

In addition to the recent public consultation on the collection of the data, APRA will consult further on the publication of statistics on agricultural lending later this year. This will provide a further opportunity to address any concerns about confidentiality.

In collecting, sharing and using the information in question, APRA and DA WR must comply with the *Privacy Act 1988* ('Privacy Act') and the *Australian Prudential Regulation Authority Act 1998* ('APRA Act').

To support compliance, APRA and DAWR are entering into a Cooperative Working Agreement that outlines the two agencies' use of the data. This covers DAWR's policies and procedures to maintain the confidentiality of data, and stipulates that DAWR will only publicly release data obtained from APRA if that data is prepared by APRA for public release, consistent with its obligations. APRA will prepare that data in such a way that it will not be possible to derive information relating to any particular person.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

When preparing that data for public release, APRA will comply with its internal policy and procedure for the Release of Statistics, which exceeds the legal requirements in the APRA Act and the Privacy Act. This policy contains further measures to ensure confidentiality and privacy are maintained when releasing the data publicly, including a privacy risk assessment and a confidentiality analysis that measures an entity's representation in a statistic.

In addition to the above, the application of the Australian Public Service Code of Conduct to APRA and DAWR provides for additional protection of confidential information.

Yours sincerely

The Hon Scott Morrison MP

28 / 9 / 2017

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

---

1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

---

[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

---

1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Where a statutory exception, defence or excuse to an offence is provided in proposed legislation, these defences or exceptions must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent in the context of an offence provision.

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

---

5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights