

# 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);<sup>1</sup>
  - legislative instruments received between 11 August and 14 September (consideration of 10 legislative instruments from this period has been deferred);<sup>2</sup> 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.<sup>3</sup>

### 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*.<sup>4</sup> 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.

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

2 The committee examines legislative instruments received in the relevant period, as listed in the *Journals of the Senate*. See Parliament of Australia website, *Journals of the Senate*, [http://www.aph.gov.au/Parliamentary\\_Business/Chamber\\_documents/Senate\\_chamber\\_documents/Journals\\_of\\_the\\_Senate](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](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

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| <b>Purpose</b>    | To amend the <i>Crimes Act 1914</i> 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 |
| <b>Portfolio</b>  | Justice  |
| <b>Introduced</b> | House of Representatives, 13 September 2017  |
| <b>Rights</b>     | Fair trial; presumption of innocence; liberty (see <b>Appendix 2</b> )   |
| <b>Status</b>     | 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).<sup>5</sup>

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.<sup>6</sup>

### ***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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> The statement of compatibility provides the following information about the objective of the measure as:

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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.<sup>10</sup>

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.<sup>11</sup> 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*.<sup>12</sup>

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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.<sup>13</sup>

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**

**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.<sup>14</sup>

***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

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

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

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.<sup>16</sup> 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.<sup>17</sup> 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:**

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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.<sup>18</sup>

### ***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



flee from the jurisdiction.<sup>19</sup> As the measure creates a presumption against bail it engages and limits this right.<sup>20</sup>

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',<sup>21</sup> 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'.<sup>22</sup> 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

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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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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:**

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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 restriction on 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.<sup>26</sup>

### ***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'.<sup>27</sup> It is acknowledged

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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'.<sup>28</sup> 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.<sup>29</sup>

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**

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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]

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|--------------------------------|---|
| <b>Purpose</b>                 | 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 <i>Commonwealth Electoral Act 1918</i> , so as to allow the electoral commission to give ASADA commonwealth electoral roll information |
| <b>Portfolio</b>               | Finance   |
| <b>Authorising legislation</b> | <i>Commonwealth Electoral Act 1918</i>  |
| <b>Last day to disallow</b>    | 15 sitting days after tabling (tabled in the House of Representatives and the Senate, 8 August 2017)  |
| <b>Right</b>                   | Privacy (see <b>Appendix 2</b> )  |
| <b>Status</b>                  | 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).<sup>1</sup>

#### **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.

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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'.<sup>2</sup> 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'.<sup>3</sup> 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;

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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*)'.<sup>4</sup>

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.

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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.<sup>5</sup>

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).**

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

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | 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 |
| <b>Portfolio</b>  | Immigration and Border Protection   |
| <b>Introduced</b> | House of Representatives, 13 September 2017   |
| <b>Rights</b>     | Privacy; family; freedom of expression; cruel, inhuman and degrading treatment; humane treatment in detention, children's rights (see <b>Appendix 2</b> )   |
| <b>Status</b>     | 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'<sup>1</sup> 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.

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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.<sup>2</sup> 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.<sup>3</sup> Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.<sup>4</sup> 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,<sup>5</sup> 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,

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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'.<sup>6</sup> 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'.<sup>7</sup> 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',<sup>8</sup> 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.<sup>9</sup>

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...

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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.<sup>10</sup>

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.<sup>11</sup> 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

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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.<sup>12</sup> 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

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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.<sup>13</sup>

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



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.<sup>14</sup> 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

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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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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

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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.<sup>19</sup>

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',<sup>20</sup> the ability to take and retain possession of a 'prohibited thing' if found pursuant to search,<sup>21</sup> the ability to use screening equipment or detector dogs to screen a detainee's person or possessions to search for a 'prohibited thing',<sup>22</sup> and the ability to conduct strip searches to search for a 'prohibited thing'.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> In conducting such a search, an authorised

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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'.<sup>26</sup>

***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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> While the Court accepted that strip-searches may be necessary on occasion to ensure prison

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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.<sup>33</sup> 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 -

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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.<sup>34</sup>

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.<sup>35</sup> 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.

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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.<sup>36</sup>

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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'.<sup>37</sup> 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<sup>38</sup>), 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'.<sup>39</sup> The statement of compatibility does not explain what 'any other information' may entail. In light of the

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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,<sup>40</sup> 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.<sup>41</sup> 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,<sup>42</sup> and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.<sup>43</sup>

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.**

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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

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | The bills seek to introduce a range of measures including amendments to the <i>Foreign Acquisitions and Takeovers Act 1975</i> 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 |
| <b>Portfolio</b>  | Treasury  |
| <b>Introduced</b> | House of Representatives, 7 September 2017  |
| <b>Rights</b>     | Equality and non-discrimination; criminal process rights (see <b>Appendix 2</b> )   |
| <b>Status</b>     | 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'<sup>1</sup> 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

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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).<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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

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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).

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competitive in the housing market, reasonably limited the rights against discrimination on the basis of nationality.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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...<sup>10</sup>

1.131 The explanatory memorandum further explains that the measure is part of a number of initiatives to address housing affordability.<sup>11</sup>

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

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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.<sup>12</sup> 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.<sup>13</sup>

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).**

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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'<sup>14</sup> or keep the required records.<sup>15</sup> 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).<sup>16</sup>

### ***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.<sup>17</sup> 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*.

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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]**

|                                |   |
|--------------------------------|---|
| <b>Purpose</b>                 | The instrument declares Jabhat Al-Nusra as a declared terrorist organisation for the purposes of section 35AA of the <i>Australian Citizenship Act 2007</i>   |
| <b>Portfolio</b>               | Immigration and Border Protection   |
| <b>Authorising legislation</b> | <i>Australian Citizenship Act 2007</i>  |
| <b>Last day to disallow</b>    | 15 sitting days after tabling (tabled in the House of Representatives 15 August 2017 and the Senate 16 August 2017)   |
| <b>Rights</b>                  | 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 <b>Appendix 2</b> ) |
| <b>Status</b>                  | 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.<sup>1</sup> That detailed human rights assessment raised specific concerns in relation to section 33AA of the bill (now section 33A of the Citizenship Act). Section

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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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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

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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.<sup>5</sup>

### **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.<sup>6</sup>

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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.<sup>7</sup>

### **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.

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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]

|                                |  |
|--------------------------------|--|
| <b>Purpose</b>                 | 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 |
| <b>Portfolio</b>               | Foreign Affairs and Trade  |
| <b>Authorising legislation</b> | <i>Charter of the United Nations Act 1945</i>  |
| <b>Last day to disallow</b>    | 15 sitting days after tabling (tabled in the House of Representatives and the Senate 8 August 2017)  |
| <b>Rights</b>                  | Fair trial; quality of law; liberty (see <b>Appendix 2</b> )   |
| <b>Status</b>                  | Advice only  |

### Background

1.165 The committee previously examined offence provisions arising out of sanctions regulations on a number of previous occasions.<sup>1</sup> 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

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

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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.<sup>2</sup>

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).<sup>3</sup> The Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents)

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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.<sup>4</sup> 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.<sup>5</sup> 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'.<sup>6</sup>

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'.<sup>7</sup> 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.**

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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

|                   |  |
|-------------------|--|
| <b>Purpose</b>    | Seeks to establish a Commission of Inquiry into the coal seam gas industry in Australia                                |
| <b>Sponsor</b>    | Mr Bob Katter MP   |
| <b>Introduced</b> | House of Representatives, 4 September 2017   |
| <b>Rights</b>     | Fair hearing; not to incriminate oneself; privacy; freedom of expression; freedom of assembly (see <b>Appendix 2</b> ) |
| <b>Status</b>     | 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).<sup>1</sup>

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

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1 See proposed section 11.

relation to a previous bill introduced by the legislation proponent.<sup>2</sup> 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.<sup>3</sup> 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

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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.<sup>4</sup>

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.<sup>5</sup> 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

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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.<sup>6</sup>

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.<sup>7</sup> The statement of compatibility does not acknowledge the committee's previous concerns with respect to related measures.

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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]**

|                   |   |
|-------------------|---|
| <b>Purpose</b>    | 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   |
| <b>Portfolio</b>  | Treasury; Finance   |
| <b>Introduced</b> | <p>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.</p> <p>Advance to the Finance Minister Determination: Tabled in House of Representatives 9 August 2017, Senate 10 August 2017 (exempt from disallowance).</p> <p>Census and Statistics (Statistical Information) Direction 2017 (as amended): Tabled in House of Representatives 17 August 2017, Senate 4 September 2017 (exempt from disallowance).</p> |
| <b>Rights</b>     | Multiple rights (see <b>Appendix 2</b> )  |
| <b>Status</b>     | 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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

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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<sup>5</sup> appears to directly discriminate against same-sex couples on the basis of sexual orientation.<sup>6</sup> 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.<sup>7</sup>

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,<sup>8</sup> broadcasters which broadcast 'marriage law survey matter' expressing a view in relation to the 'marriage law survey question'<sup>9</sup> 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);

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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 44<sup>th</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

#### ***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'.<sup>13</sup>

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.<sup>14</sup> 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

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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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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

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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.<sup>18</sup> 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.**

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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.