Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

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

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

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

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

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

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

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

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

Table of contents

Chapter 1

New and continuing matters

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

- legislative instruments received between 13 October and 2 November (consideration of 2 legislative instruments from this period has been deferred);[1] 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 five legislative instruments that were previously deferred.[2]

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*.[3] 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 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.

2 These are: the Appeals Rule 2017 [F2017L01197]; the ASIC Client Money Reporting Rules 2017 [F2017L01333]; the Discipline Rule 2017 [F2017L01196]; Health Insurance (Approved Pathology Undertakings) Approval 2017 [F2017L01293]; and the Torres Strait Regional Authority Election Rules 2017 [F2017L01279].

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

Response required

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

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017; and

Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017

Purpose	Seeks to establish a Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse
Portfolio	Social Services
Introduced	House of Representatives, 26 October 2017
Rights	Right to an effective remedy, privacy, equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Eligibility to receive redress under the Commonwealth Redress Scheme

1.7 The Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the bill) seeks to establish a redress scheme (the scheme) for survivors of institutional child sexual abuse.

1.8 A person is eligible for redress under the scheme if the person was sexually abused, that sexual abuse is within the scope of the scheme, and the person is an Australian citizen or permanent resident.[4] Proposed subsections 16(2) and (3) of the bill provide that the proposed Commonwealth Redress Scheme Rules (the rules) may also prescribe that a person is eligible or not eligible for redress under the scheme.[5]

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

1.9 The right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law. Article 2 of the Convention on the Rights of the Child (CRC)

4 See proposed section 16 of the bill.

5 Proposed section 117(1) of the bill provides that the minister may, by legislative instrument, make rules prescribing matters required or permitted by the bill to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the bill.

further provides that states parties to the CRC must respect and ensure the right to equality and non-discrimination specifically in relation to children.

1.10 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'.

1.11 'Discrimination' encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination). The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[6]

1.12 As acknowledged in the statement of compatibility, by precluding persons who are not Australian citizens or permanent residents from being eligible for the scheme, the restrictions on eligibility for the scheme discriminate on the basis of nationality or national origin.

1.13 Persons who are the victim of violations of human rights within Australia's jurisdiction are entitled to a remedy for breaches of those rights irrespective of their residency or citizenship status.[7] However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.14 The statement of compatibility explains that the restrictions on eligibility of non-citizens and non-permanent residents are necessary to achieving legitimate aims of ensuring the scheme receives public support and protecting against large scale fraud. In relation to the latter, the minister explains:

> Non-citizens and non-permanent residents…will be ineligible to ensure the integrity of the Scheme. Verification of identity documents for non-citizens and non-permanent residents would be very difficult. Opening the Scheme to all people overseas could result in organised overseas groups lodging large scale volumes of false claims in attempts to defraud the Scheme, which could overwhelm the Scheme's resources and delay the processing of legitimate applications.[8]

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6 *Althammer v Austria*, HRC 998/01, [10.2]

7 For a further discussion of the right to an effective remedy, see further below.

8 Statement of Compatibility (SOC) 70.

1.15 The objective of ensuring the integrity of a scheme to provide redress for victims of sexual abuse (such as protection against fraudulent claims) may be capable of being a legitimate objective for the purposes of human rights law, but the statement of compatibility does not provide sufficient information about the importance of this objective in the specific context of the measures. 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. In relation to the explanation in the statement of compatibility as to the difficulty in verifying documents for non-citizens and non-permanent residents, it is noted that reducing administrative burdens or administrative inconvenience alone will generally be insufficient for the purposes of permissibly limiting human rights under international human rights law. It is also not clear whether there is evidence to suggest that large scale volumes of attempted fraud of the scheme may arise from precluding non-citizens from the scheme, noting that the Royal Commission into Institutional Responses to Child Sexual Abuse concluded that it saw 'no need for any citizenship, residency or other requirements, whether at the time of the abuse or at the time of the application for redress'.[9]

1.16 In relation to the proportionality of the measure, a relevant factor in determining whether a limitation on human rights is proportionate is whether it is the least rights restrictive means of achieving the stated objective of the measure. In this respect, the statement of compatibility notes that it will be possible to deem additional classes of people eligible for redress under the rules. The statement of compatibility explains that:

> This rulemaking power may be used to deem the following groups of non-citizen, non-permanent residents eligible: those currently living in Australia, those who were child migrants, and those who were formerly Australian citizens or permanent residents.[10]

1.17 It is not clear from the information provided why it is necessary to include these classes of eligibility in a separate legislative instrument,[11] rather than in the primary legislation. Inclusion in the primary legislation of the classes of non-nationals foreshadowed in the statement of compatibility as being likely to be ruled eligible by the minister may be a less rights-restrictive means of achieving the stated objective of the measure.

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9 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 347.

10 SOC 69-70.

11 The power to determine eligibility by way of legislative instrument will be discussed further below in relation to the right to an effective remedy.

Committee comment

1.18 The preceding analysis indicates that the right to equality and non-discrimination on the basis of nationality or national origin is engaged and limited by the bill. This is because a person will only be eligible for the scheme if they are an Australian citizen or Australian permanent resident notwithstanding that the right to an effective remedy for a violation of human rights applies regardless of citizenship or residency status.

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

- **whether the restriction on non-citizens' and non-permanent residents' eligibility for redress under the scheme is aimed at achieving a legitimate objective for the purposes of human rights law (including any information or evidence to explain why the measure addresses a pressing and substantial concern);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the restriction on non-citizens' and non-permanent residents' eligibility for the scheme is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.20 Article 2(3) of the ICCPR requires State parties to ensure that persons whose human rights have been violated have access to an effective remedy. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law, and to make reparation to individuals whose rights have been violated. Effective remedies can involve restitution, rehabilitation and measures of satisfaction – such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices – as well as bringing to justice the perpetrators of human rights violations. Such remedies should be appropriately adapted to take account of the special vulnerabilities of certain categories of persons, including, and particularly, children.

1.21 The redress scheme seeks to provide remedies in response to historical failures of the Commonwealth and other government and non-government organisations to uphold human rights, including the right of every child to protection by society and the state,[12] and the right of every child to protection from all forms of

12 Article 24 of the International Covenant on Civil and Political Rights: see Statement of Compatibility (SOC) 70.

physical and mental violence, injury or abuse (including sexual exploitation and abuse).[13] As acknowledged in the statement of compatibility, by implementing a redress scheme for victims who were sexually abused as children, the scheme promotes the right to state-supported recovery for child victims of neglect, exploitation and abuse under article 39 of the CRC.[14]

1.22 The power in proposed subsections 16(2) and (3) to determine eligibility by way of the proposed rules is broad and, in particular, the minister has a very broad power to determine persons to be ineligible for the scheme. It is noted that in media reports concerning the introduction of the bill, the minister foreshadowed that he proposes to exclude persons from being eligible if they have been convicted of sex offences, or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences.[15]

1.23 International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[16] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. The breadth of the power to determine eligibility or ineligibility contained in the bill may therefore engage and limit the right of survivors of sexual abuse to an effective remedy. The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by this aspect of the bill.[17]

1.24 Limitations on the right to an effective remedy may be permissible if it is demonstrated that the limitation addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.25 While the statement of compatibility discusses limiting eligibility of persons on the basis of survivors' nationality and residency status,[18] no information is provided in the statement of compatibility as to the rationale for a broad power to

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13 Articles 19 and 34 of the Convention on the Rights of the Child: see SOC, 69.

14 See also Committee on the Rights of the Child, *General Comment No.13: Article 19: The right of the child to freedom from all forms of violence,* CRC/C/GC/13 (2011) 14-15.

15 See 'Child sex abuse redress scheme to cap payments at $150,000 and exclude some criminals' (26 October 2017): http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256.

16 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria* ECHR 30985/96 (26 October 2000) [84].

17 The statement of compatibility does acknowledge this right is engaged in relation to other aspects of the bill, discussed further below.

18 See pages 69-70. This aspect of the bill is discussed above in relation to the right to equality and non-discrimination.

determine eligibility or ineligibility by way of the proposed rules. As limited information has been provided in the statement of compatibility on this point, it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill, and whether such a limitation is permissible.

Committee comment

1.26 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine eligibility and ineligibility for the scheme by way of the proposed Commonwealth Redress Scheme Rules. This is because the broad rule-making power to determine eligibility or ineligibility may be exercised in a way that is compatible with this right.

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

- **whether the power to determine eligibility or ineligibility in the proposed rules is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

Power to determine when a participating institution is not responsible for sexual or non-sexual abuse

1.28 Proposed section 21 of the bill sets out when a participating institution is responsible for abuse. Subsection 21(7) provides that a participating institution is not responsible for sexual or non-sexual abuse of a person if it occurs in circumstances prescribed by the rules as being circumstances in which a participating institution is not, or should not be treated as being, responsible for the abuse of a person.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.29 The statement of compatibility does not acknowledge that the right to an effective remedy is engaged by the power to determine by way of rules when a participating institution is not responsible for sexual or non-sexual abuse. However, as noted earlier, broad rule-making powers conferred on the executive may be incompatible with the right to an effective remedy where those powers are exercised in a manner that is incompatible with the right. Further, where public officials or state agents have committed violations of human rights, states parties concerned

may not relieve perpetrators from personal responsibility through the granting of amnesties, legal immunities and indemnities.[19]

1.30 The explanatory memorandum provides that proposed subsection 21(7) is intended to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible. The explanatory memorandum states by way of example that such circumstances may include where child sexual abuse was perpetrated by another child and the institution could not have foreseen this abuse occurring and could not be considered to have mismanaged the situation.[20]

1.31 As limited information has been provided in the statement of compatibility on this point, it is not possible to determine the extent to which the right to an effective remedy may be engaged and limited by this aspect of the bill, and whether such a limitation is permissible. It is not clear from the available information whether there may be less rights-restrictive measures available, including setting out the grounds for when it may be 'unreasonable' for an institution to be responsible for abuse, in the primary legislation.

Committee comment

1.32 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine by way of the proposed Commonwealth Redress Scheme Rules when a participating institution is not responsible for sexual abuse or non-sexual abuse.

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

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

Bar on future civil liability of participating institutions

1.34 Proposed sections 39 and 40 of the bill provide that where an eligible person receives an offer of redress and chooses to accept that offer, the person releases and

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19 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add.1326 (2004) [18]; see also UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* UNGA Res 60/147 (2006) 8-9.

20 Explanatory memorandum 16-17.

forever discharges all institutions participating in the scheme from all civil liability for abuse of the person that is within the scope of the scheme, and the eligible person cannot (whether as an individual, a representative party or a member of a group) bring or continue any civil claim against those participating institutions in relation to that abuse.

Compatibility of the measure with the right to an effective remedy for breaches of human rights

1.35 As noted earlier, the right to an effective remedy requires State parties to the ICCPR to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations, and further requires that State parties may not relieve perpetrators from personal responsibility for breaches of human rights.

1.36 Insofar as the bill requires persons who accept an offer of redress under the scheme to relinquish their right to seek further civil remedies from responsible institutions for sexual abuse and related non-sexual abuse, the bill may engage and limit the right to an effective remedy. Such limitations will be permissible under international human rights law where the measure pursues a legitimate objective and is rationally connected to and proportionate to that objective.

1.37 The statement of compatibility acknowledges that the right to an effective remedy may be engaged and limited by this aspect of the bill, but considers that any limitation is reasonable, necessary and proportionate to ensuring the scheme's integrity and proper functioning.[21] In particular, the statement of compatibility explains:

> Due to its non-legalistic nature, redress through the Scheme will be a more accessible remedy for eligible survivors than civil litigation. Entitlement to redress is determined based on a standard of 'reasonable likelihood', which is lower than the standard for determining the outcome of civil litigation, which is the balance of probabilities. The availability of redress is dependent on the extent to which Territory government and non-government institutions opt-in to the Scheme. Consultation has shown that institutions are not likely to opt-in to the Scheme if they remained exposed to paying compensation through civil litigation in addition to paying monetary redress. Attaching the release to entitlement to all elements of redress is necessary to encourage institutions to opt-in and to make redress available to the maximum number of survivors.[22]

1.38 Maximising the amount of redress available to survivors of childhood sexual abuse is likely to be a legitimate objective for the purposes of international human

21 SOC, 70, 73.

22 SOC, 70.

rights law. Releasing institutions from further liability so as to increase the likelihood of opting into the scheme appears to be rationally connected to this objective.

1.39 Questions arise, however, in relation to the proportionality of the measure, and in particular whether there are adequate safeguards in place. Relinquishing a person's opportunity to pursue civil litigation and possible common law damages is a significant decision for a victim of abuse to make, particularly as the amount to be provided under the redress scheme is capped at $150,000.[23] The minister explains that, in order to acknowledge the limitation on the right to an effective remedy that arises from this aspect of the bill:

> …the Scheme will deliver free, trauma informed, culturally appropriate and expert Legal Support Services. These services will be available to survivors for the lifetime of the Scheme at relevant points of the application process, and will assist survivors to understand the implications of releasing responsible institutions from further liability. This means that survivors will be able to make an informed choice as to whether they wish to accept their offer and in doing so release the institution from civil liability for abuse within the scope of the Scheme or seek remedy through other avenues.[24]

1.40 Notwithstanding the description of the proposed legal support services described in the statement of compatibility, the bill itself includes limited detail as to the provision of legal advice to survivors of sexual abuse. Proposed section 37(1)(g) of the bill requires that a written offer of redress to an eligible person 'gives information about the opportunity for the person to access legal services under the scheme for the purposes of obtaining legal advice about whether to accept the offer'. The provision of legal services under the scheme is to be determined by legislative instrument.[25] Further information as to the content of the proposed rules relating to the provision of legal services would assist in determining whether this will serve as a sufficient safeguard so as to support the proportionality of the measure.[26]

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23 See SOC, 66.

24 SOC 70-71.

25 See proposed section 117(2)(a) of the bill.

26 It is noted that the recommendation as to the provision of legal services of the Royal Commission into Institutional Responses to Child Sexual Abuse was that 'a redress scheme should fund, at a fixed price, a legal consultation for an applicant before the applicant decides whether or not to accept the offer of redress and grant the required releases': Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) Recommendation 64, 390

Committee comment

1.41 The preceding analysis raises questions as to whether requiring persons who are eligible for redress to release and discharge institutions participating in the scheme from future civil liability for abuse of the person is a proportionate limitation on the right to an effective remedy.

1.42 The committee therefore seeks the advice of the minister as to the proportionality of the measure, in particular the content of the proposed rules relating to the provision of legal services under the scheme.

Information Sharing Provisions

1.43 Proposed section 77 of the bill sets out the circumstances in which the Commonwealth Redress Scheme Operator[27] (the Operator) may disclose protected information. 'Protected information' is defined in proposed section 75 of the bill as information about a person obtained by an officer for the purposes of the scheme that is or was held by the department. The Operator can disclose such protected information if it was acquired by an officer in the performance of their duties or in the exercise of their powers under the bill if the Operator certifies that the disclosure is necessary in the public interest to do so in a particular case or class of case, and the disclosure is to such persons and for such purposes as the Operator determines.[28] Disclosure may also be made by the Operator to certain persons set out in the bill, including the secretary of a department, the chief executive of Centrelink and the chief executive of Medicare.[29]

Compatibility of the measure with the right to privacy

1.44 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.

1.45 The information sharing powers of the Operator in proposed section 77 of the bill engage and limit the right to privacy by providing for the disclosure of protected information. As acknowledged in the statement of compatibility, this protected information may include highly sensitive information about child sexual abuse the person has experienced.[30]

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27 The Commonwealth Redress Scheme Operator is the Secretary to the Human Services Department (or the Department administered by the Minister administering the *Human Services (Centrelink) Act 1997*), and is responsible for operating the scheme, including making offers of redress to the person.

28 Proposed section 77(1)(a) of the bill.

29 Proposed section 77(1)(b) of the bill.

30 SOC 71.

1.46 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.

1.47 The statement of compatibility acknowledges that the right to privacy is engaged by the information sharing provisions in the bill, which includes proposed section 77. However, the statement of compatibility explains any limitation by the information sharing provisions on the right to privacy is permissible, as the provisions are 'necessary to achieve the legitimate aims of assessing eligibility under the Scheme and protecting children from abuse, and are appropriately limited to ensure that they are a proportionate means to achieve those aims'.[31]

1.48 The stated objective of protecting children from abuse is a legitimate objective under international human rights law. Collecting, using and disclosing this information to relevant bodies so as to prevent abuse and provide redress is likely to be rationally connected to this objective.

1.49 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 the broad rationale for allowing persons to obtain and disclose protected information for the purposes of the scheme as follows:

> To establish eligibility, survivors will be required to supply the Scheme with personal information including highly sensitive information about the child sexual abuse they experienced. To progress the application to assessment, limited survivor and alleged perpetrator details will be provided, with the survivor's consent, to the participating institutions identified in their application. Participating institutions will be able to use this information in a limited way to facilitate making insurance claims and to institute internal disciplinary procedures where an alleged perpetrator or person with knowledge of abuse is still associated with the institution. Participating institutions will be required to provide the Scheme with specific information pertaining to survivors and alleged perpetrators, including survivor and the alleged perpetrator's involvement with the institution, any related complaints of abuse made to the institution and details of any prior payments made to the survivor. This collection and exchange of information is necessary for the eligibility assessment process and information under the Scheme will be subject to confidentiality. Outside of Scheme representatives, only survivors and those they nominate will have access to records relating to their application. Strict offence provisions will be put in place to mitigate risks of unlawful access,

31 SOC 72.

disclosure, recording, use, soliciting or offering to supply Scheme information.[32]

1.50 However, the statement of compatibility does not appear to address the proportionality of the bill insofar as it relates to the Operator's disclosure powers in proposed section 77. The power in proposed section 77 for the Operator to disclose information is very broad: the Operator can disclose protected information to 'such persons and for such purposes as the Operator determines', provided the Operator considers it necessary in the public interest to do so.[33] It is not clear from the statement of compatibility whether it is strictly necessary to include such a broad category of persons to whom disclosure may be made by the Operator under the Act, and what circumstances will constitute a 'public interest', which raises concerns that these information sharing provisions may not be sufficiently circumscribed.

1.51 Another relevant factor in assessing proportionality is whether there are adequate safeguards in place to protect the right to privacy. It is noted that there are penalties in place for persons who engage in unauthorised recording, disclosure or use of protected information.[34] However, the powers of the Operator to disclose information in the public interest in proposed section 77 do not appear to be accompanied by safeguards present in other information sharing provisions in the bill, such as a requirement that the Operator consider the impact disclosure may have on a person to whom the information relates. By way of contrast, it is noted that there is a separate provision in section 78 of the bill addressing disclosure of protected information to certain agencies (such as the Australian Federal Police or state and territory police forces) for the purposes of law enforcement or child protection, where there is a safeguard in place that requires the Operator to have regard to the impact the disclosure might have on the person,[35] as well as a requirement that the Operator is satisfied that disclosure of the information is reasonably necessary for the enforcement of the criminal law or for the purposes of child protection.[36] Further, disclosure for other purposes such as for the purpose of the participating institution facilitating a claim under an insurance policy must only occur if there has been consideration to the impact that disclosure might have on the person who has applied for redress.[37] It is not clear from the statement of compatibility why such safeguards are available in relation to some information sharing provisions in the bill, but not in relation to the Operator's disclosure powers in proposed section 77.

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32 SOC 71.

33 Proposed section 77(1(a) of the bill.

34 Proposed sections 81-84 of the bill.

35 See proposed section 78(3) of the bill.

36 See proposed section 78(1) of the bill.

37 Proposed section 79(3) of the bill.

Committee comment

1.52 The preceding analysis raises questions as to whether the compatibility of the proposed disclosure powers of the Operator in proposed section 77 of the bill is a proportionate limitation on the right to privacy.

1.53 The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether there are adequate safeguards in place in relation to disclosure by the Operator of protected information).

Absence of external merits review and removal of judicial review

1.54 The bill establishes a system of internal review of determinations made under the scheme.[38] No provision is provided for in the bill for determinations to be able to be subject to external merits review. Pursuant to the internal review procedure, a person may apply to the Operator to review a determination made in relation to redress and the Operator must cause that determination to be reviewed by an independent decision-maker to whom the Operator's power under this section is delegated, and who was not involved in the making of the determination.[39] A person reviewing the original determination must reconsider the determination and either affirm, vary, or set aside the determination and make a new determination.[40] When reviewing the original determination, the person may only have regard to the information and documents that were available to the person who made the original determination.[41]

1.55 The Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017 (the consequential amendments bill) exempts decisions made under the scheme from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).[42]

Compatibility of the measure with the right to a fair hearing

1.56 Article 14(1) of the ICCPR requires that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A determination of a person's entitlement to redress as a result of sexual abuse, and a finding of responsibility on the part of institutions for such abuse, involves the

38 Proposed Part 4-3 of the bill.

39 Proposed sections 87 and 88 of the bill.

40 Proposed section 88(2) of the bill.

41 Proposed section 88(3) of the bill.

42 Schedule 3 of the consequential amendments bill.

determination of rights and obligations and therefore is likely to constitute a suit at law. [43]

1.57 The absence of external merits review and the removal of a form of judicial review may engage and limit the right to a fair hearing, as it limits survivors' opportunities to have their rights and obligations determined by an independent and impartial tribunal. However, the statement of compatibility does not acknowledge that the right to a fair hearing is engaged by the measures.

1.58 A limitation on the right to a fair hearing may be permissible if it pursues a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.59 The explanatory memorandum to the consequential amendments bill explains the rationale for limiting the scheme to internal review and the removal of judicial review. In particular, the explanatory memorandum explains that judicial review may cause undue administrative delays under the scheme, and the internal review mechanism is intended to prevent re-traumatising victims through having to re-tell their story of past institutional child sexual abuse.

1.60 Preventing re-traumatisation of victims of sexual abuse is likely to be a legitimate objective under international human rights law. However, in circumstances where the victim themselves may choose to pursue external review (by way of merits review or judicial review) if they are unsatisfied with the decision, it is not clear based on the information provided that preventing victims from pursuing external review if dissatisfied with the internal decision would be an effective means of achieving this objective.

1.61 Further, the explanatory memorandum explains that, when internally reviewing the decision, the Operator or independent decision-makers are not permitted to have been involved in making the original decision under review. However, it is unclear whether the internal review mechanism provides greater or lesser scope for independent and impartial review than that which would be provided by the (external) Administrative Appeals Tribunal. It is not clear, therefore, whether the internal review mechanism is an effective substitute for external review.

Committee comment

1.62 The preceding analysis indicates that the right to a fair hearing may be engaged by the absence of external merits review of determinations made under the scheme, and the removal of judicial review.

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

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43 See UN Human Rights Committee, *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and to Fair Trial* (2007) [16].

- **whether the absence of external merits review and removal of judicial review pursues a legitimate objective;**
- **whether the measures are rationally connected to (that is, effective to achieve) that objective;**
- **whether the measures are a proportionate means of achieving the stated objective.**

Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311]

Purpose	Provides for matters necessary for the effective operation and administration of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Portfolio	Prime Minister and Cabinet
Authorising legislation	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 16 October 2017). Notice of motion to disallow currently must be given by 7 December 2017
Right	Privacy (see **Appendix 2**)
Status	Seeking additional information

Disclosure of certain documents and information to the public by the Registrar of Aboriginal and Torres Strait Islander Corporations

1.64 Subregulation 55(1) of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (the regulations) provides that, for the purposes of paragraph 658-1(1)(k) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), the Registrar of Aboriginal and Torres Strait Islander Corporations (registrar) has the function of making certain documents, and information in those documents, available to the public. Subregulation 55(3) provides that these documents may include documents containing personal information within the meaning given by subsection 6(1) of the *Privacy Act 1988* (Privacy Act).[1]

Compatibility of the measure with the right to privacy

1.65 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.

1.66 The statement of compatibility states that the regulations are operative in nature and therefore do not raise any human rights issues. However, in allowing for a person's personal information to be made available to the public, the measure may engage and limit the right to privacy.

1 'Personal Information' is defined in section 6(1) of the Privacy Act means information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.

1.67 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.

1.68 In the absence of further information in the explanatory statement or statement of compatibility, it is not possible to determine whether the power given to the registrar to make information (including personal information) available to the public is in pursuit of a legitimate objective and is rationally connected to that objective.

1.69 Questions also arise as to whether the measure is proportionate. In order to be proportionate, limitations on the right to privacy must be no more extensive than what is strictly necessary to achieve the legitimate objective of the measure, and be accompanied by adequate safeguards to protect the right to privacy. It is noted that the Registrar may make documents available to the public that (relevantly) the registrar 'considers appropriate to make available to the public'.[2] It is not clear from the explanatory statement or statement of compatibility as to how, and under what circumstances, the registrar may consider it appropriate that documents (which may contain personal information) should be disclosed to the public. For example, it is not clear whether the registrar's state of satisfaction is subject to any objective criteria, such as a requirement that the registrar's consideration of appropriateness is reasonable.

Committee comment

1.70 The preceding analysis raises questions as to whether the power of the registrar to make documents (which may include personal information) available to the public is compatible with the right to privacy.

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

- **whether the measure pursues a legitimate objective;**
- **whether the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the measure is a proportionate means of achieving the objective (including whether any limitation on the right to privacy is the least rights-restrictive measure available, and whether there are adequate safeguards in place to protect the right to privacy).**

2 Clause 55(1)(b) of the instrument.

Advice only

1.72 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.

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

Purpose	Proposes to amend the *Marriage Act 1961* to define marriage as a union of two people
Sponsor	Senator Dean Smith
Introduced	Senate, 15 November 2017
Rights	Equality and non-discrimination; freedom of religion; respect for the family (see **Appendix 2**)
Status	Advice only

Background

1.73 On a number of occasions the committee has previously considered private member and senator's bills that have sought to amend the *Marriage Act 1961* (Marriage Act) to permit same sex marriage.[1] To the extent relevant, the committee's previous reports and human rights assessments are referred to below.

Changes to the Marriage Act to permit same-sex marriage

1.74 Under the Marriage Act 'marriage' is defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[2] This current definition of marriage means only marriages between a man and a woman can be solemnised in Australia or recognised from overseas.[3]

1.75 The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (the bill) seeks to make a number of changes to the Marriage Act in order to permit same-sex couples and people who are legally recognised as neither male nor female to marry.[4] Proposed section 5(1) would amend the definition of marriage to 'the union

1 Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], Freedom to Marry Bill, *Report 8 of 2016* (9 November 2016) 33-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112-124.

2 Marriage Act section 5(1).

3 See, Explanatory Memorandum (EM) 5.

4 See, EM 5.

of two people to the exclusion of all others'.[5] This definition of marriage would apply across the Marriage Act so that in addition to allowing two people of any gender to marry it also provides for the recognition of same-sex marriages which have been solemnised overseas.[6]

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

1.76 The statement of compatibility explains that by allowing same-sex marriage, the right to equality and non-discrimination is engaged and promoted:

> By defining marriage as the union of '2 people' rather than 'a man and a woman', the Bill allows couples to marry regardless of their sex or gender. The Bill also allows for recognition of foreign marriages between two adults under Australian law, regardless of sex or gender. The Bill provides all people in Australia with equal rights with respect to marriage, removing discrimination on the basis of sexual orientation, gender identity, or intersex status.[7]

1.77 Under article 26 of the International Covenant on Civil and Political Rights (ICCPR), state parties are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which includes sex and 'any other status'. While sexual orientation is not specifically listed as a protected ground, the United Nations Human Rights Committee (the UNHRC) has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[8]

1.78 By restricting marriage to between a man and a woman, the current Marriage Act directly discriminates against same-sex couples on the basis of sexual orientation. The bill proposes to remove this restriction.

1.79 The committee's previous reports noted that in *Joslin v New Zealand* (2002) the UNHRC determined that the right to marry in article 23 of the ICCPR is confined to a right of opposite-sex couples to marry. As set out below, international

5 Item 3, proposed section 5(1).

6 Under the Marriage Act, a foreign marriage will be recognised in Australia if it was a valid marriage in the foreign country and would be recognised as valid under Australian law if it had taken place in Australia.

7 Statement of compatibility (SOC) 19.

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

jurisprudence has evolved since that time.[9] The statement of compatibility explains, in relation to *Joslin*, that while the right to marry under article 23 does not oblige states to legislate to allow same-sex couples to marry, 'it is clear that there are no legal impediments to Australia taking this step.'[10] Moreover, international jurisprudence has recognised that same-sex couples are equally as capable as opposite-sex couples of entering into stable, committed relationships and are in need of legal recognition and protection of their relationship.[11]

1.80 Since *Joslin v New Zealand* was decided in 2002, there has been a significant evolution of the legal treatment of same-sex couples internationally. The ICCPR is a living document and is to be interpreted in accordance with contemporary understanding. The UNHRC has emphasised that the ICCPR should be 'applied in context and in the light of present-day conditions'.[12] Since the committee last reported on proposed amendments to permit same sex couples to marry, in November 2016 the UNHRC has provided further views on the Australian Marriage

9 See *Joslin v New Zealand*, UN Human Rights Committee, Communication No. 902/1999 (2002) at [8.3]: 'In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant'. For further analysis of this case in light of the right to equality and non-discrimination in the context of the proposed measures see, Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44th Parliament* (10 November 2015) 114 at [1.494]. Compare, UNHRC, Concluding Observations on the Six Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017); *G v Australia*, UNHRC, communication No. 2172/2012, CCPR/C/119/D/2172/2012 (15 June 2017); ; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

10 SOC 19.

11 See European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04 (2010) [99]; European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015) [165]; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

12 UN Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998 (5 August 2002) [10.3]. See also European Court of Human Rights, *Oliari v Italy*, Application Nos 18766/11 and 36030/11 (2015).

Act, same-sex marriage and issues of discrimination.[13] Accordingly, it is arguable that the definition of marriage under the ICCPR is in the process of evolving to include same-sex marriage.

1.81 Additionally, while international jurisprudence has not recognised a right to same-sex marriage under article 23 of the ICCPR, such that state parties are required to remove any prohibition on same-sex marriage, it is clear that a law which prohibits marriage on the grounds of sexual orientation engages the right to equality and non-discrimination. By removing the current prohibition on same-sex couples marrying, the bill promotes the right to equality and non-discrimination. In this respect, the UNHRC in its recent Concluding Observations called on Australia to amend the Marriage Act:

> [The UNHRC] is concerned about the explicit ban on same-sex marriage in the Marriage Act 1961 (Cth) that results in discriminatory treatment of same-sex couples, including in matters related to divorce of couples who married overseas…
>
> …The State party should revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford equal protection to LGBTI [lesbian, gay, bisexual, trans and/or intersex] persons, couples and families, taking also into account the Committee's Views in communications No. 2172/2012, G v. Australia, and 2216/2012, C. v Australia.[14]

1.82 This statement and the decisions referred to indicate that current Australian law is incompatible with the right to equality and non-discrimination. By extending

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13 See, *G v Australia*, UNHRC, communication No. 2172/2012, CCPR/C/119/D/2172/2012 (15 June 2017): which concerned a refusal in NSW to change the sex on the birth certificate of a married, female transgender person unless she divorced her female spouse. Australia argued that this requirement was reasonable and proportionate to the legitimate aim of consistency with the Marriage Act which defines marriage as being between a man and a woman. The UNHRC stated that, irrespective of whether the aim was legitimate, the interference with the right to privacy and family life was not necessary and proportionate. In relation to the right to equality and non-discrimination, the UNHRC did not consider that the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate was based on reasonable and objective criteria, and therefore constituted discrimination on the basis of marital and transgender status. Accordingly, the UNHRC determined Australia had breached the right to equality and non-discrimination and the right to privacy and family life; *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017): the UNHRC found that Australia's denial of access to divorce proceedings to a same-sex couple who married overseas breached the right to equality and non-discrimination. See, also, UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

14 UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

the definition of marriage to include a union between two persons, the measure addresses key aspects of the UNHRC's determination that Australia should revise its laws, as the effect of amending the definition of marriage would be to permit same-sex and gender diverse couples to marry as well as recognising foreign same-sex marriages. As noted in the statement of compatibility, by enabling the recognition of foreign same-sex marriages, the rights and responsibilities pertaining to the dissolution of those foreign marriages will also apply equally to all lawful marriages.[15]

1.83 Given that discrimination on the grounds of sexual orientation is recognised as a ground against which state parties are required to guarantee all persons equal and effective protection, the committee has previously concluded that extending the definition of marriage to include a union between two people (rather than only for opposite-sex couples) promotes the right to equality and non-discrimination.

Committee comment

1.84 The committee notes that the UN Committee on Human Rights has stated that Australia should revise its laws including the Marriage Act to ensure equal protection of LGBTI persons, couples and families.

1.85 The committee has previously concluded that expanding the definition of marriage to include same-sex couples promotes the right to equality and non-discrimination.

1.86 Noting these previous conclusions regarding the right to equality and non-discrimination, the committee draws the human rights implications of this measure to the attention of the parliament.

Compatibility of the measure with the right to respect for the family

1.87 To the extent that the bill would expand the protections afforded to married couples under Australian domestic law to same-sex couples, they may engage the right to respect for the family. The statement of compatibility states that by 'providing the ability to lawfully marry to all couples, the Bill more accurately recognises the diversity of relationships and families in the Australian community, and ensures their equal status under Commonwealth law.'[16]

1.88 As noted in the committee's previous reports, the right to respect for the family under international human rights law applies to a diverse range of family structures, including same-sex couples, and the bill is consistent with this right. For example, recognising the diversity of family structures worldwide, the UNHRC has adopted a broad conception of what constitutes a family, noting that families 'may

15 SOC 20. This would address the violation that the UNHRC found against Australia in respect of the right to equality and non-discrimination for Australia's denial of access to divorce proceedings to a same-sex couple who married overseas *C v Australia*, UNHRC, communication No 2216/2012, CCPR/C/119/D/2216/2012 (3 August 2017).

16 EM, SOC 19.

differ in some respects from State to State… and it is therefore not possible to give the concept a standard definition'.[17] Consistent with this approach, the European Court of Human Rights noted in 2010 that same-sex couples without children fall within the notion of family, 'just as the relationship of a different-sex couple in the same situation would'.[18]

1.89 Similarly, the UN Committee on the Rights of the Child noted in 1994 that the concept of family includes diverse family structures 'arising from various cultural patterns and emerging familial relationships', and stated:

> …[the Convention on the Rights of the Child (CRC)] is relevant to 'the extended family and the community and applies in situations of nuclear family, separated parents, single-parent family, common-law family and adoptive family'.[19]

1.90 The committee's previous reports considered that this statement on family diversity, along with the UNHRC's inclusion of sexual orientation as a prohibited ground of discrimination against a child and a child's parents, is consistent with the view that the CRC extends protection of the family to same-sex families.[20] It further considered that the UNHRC has recognised that 'the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large'.[21] Moreover, as noted above, the UNHRC's recent Concluding Observation called on Australia to:

> revise its laws, including the Marriage Act, to ensure, irrespective of the results of the Australian Marriage Law Postal Survey, that all its laws and policies afford *equal protection to LGBTI persons, couples and families* (emphasis added).[22]

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17 UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security* (2008).

18 European Court of Human Rights, *Schalk and Kopf v Austria*, Application No 30141/04, (2010) [93]-[94].

19 UN Committee on the Rights of the Child, *Report on the Fifth Session*, 5th session, UN Doc CRC/C/24 (8 March 1994) Annex 5 ('Role of the Family in the Promotion of the Rights of the Child'). See also UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003).

20 UN Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003). Privacy, family life and home life are protected by article 16 of the CRC, as well as by article 17(1) of the ICCPR, which states that: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

21 UN Committee on the Rights of the Child, *Report on the Twenty-eighth Session*, 28th session, UN Doc CRC/C/111 (28 November 2001) [558].

22 UNHRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6 (9 November 2017).

1.91 Accordingly, amending the definition of marriage to a union of two people would promote the right to the protection of the family as recognised as a matter of international human rights law.

Committee comment

1.92 The committee notes that the UN Committee on Human Rights has stated that Australia should revise its laws including the Marriage Act to ensure equal protection of LGBTI persons, couples and families.

1.93 The previous human rights assessments concluded that expanding the definition of marriage promotes the right to respect for the family as recognised as a matter of international human rights law.

1.94 Noting these previous conclusions regarding the right to respect for the family, the committee draws the human rights implications of this measure to the attention of the parliament.

Compatibility of the measure with rights of the child

1.95 As the bill relates strictly to marriage it does not directly engage the rights of the child.[23] As noted in the statement of compatibility the bill 'retains the existing consent, marriageable age and prohibited relationship requirements under the Marriage Act.'[24] The regulation of marriage provides legal recognition for a relationship between two people, which in and of itself has no impact on whether the persons in that relationship have children—there are many married couples who do not have children and many unmarried couples that do have children.

1.96 Further, the bills would not amend any laws regulating adoption, surrogacy or in vitro fertilisation (IVF), including existing laws that allow same-sex couples to have children. Previous reports considered that such laws therefore fall outside the scope of the committee's examination of the bill for compatibility with human rights.

1.97 In addition, the committee's previous reports noted that whether or not a child's parents or guardians are married has no legal effect on the child. In compliance with the requirements of international human rights law, there are no laws in Australia that discriminate against someone on the basis of their parents'

23 There is one amendment which would engage the rights of the child, namely a consequential amendment to Part III of the Schedule to the Marriage Act, which would recognise that when a minor is an adopted child and wishes to get married, consent to the marriage is in relation to two adopted parents (removing a reference to 'husband and wife'). This marginally engages, but does not promote or limit, the rights of the child: see item 65.

24 EM, SOC 19.

marital status.[25] Therefore, amending the definition of marriage in the Marriage Act will not affect the legal status of the children of married or unmarried couples.

1.98 The committee's previous reports noted that the CRC refers to 'parents' and 'legal guardians' interchangeably and refers to 'family' without referencing mothers or fathers.[26] The preamble notes that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[27] There is no reference to marriage in the CRC. Provisions in the CRC relating to a child's right to know its parents and a right to remain with its parents,[28] are not engaged by the bill, which is limited to the legal recognition of relationships.

1.99 There is an obligation in the CRC to take into account the best interests of the child 'in all actions concerning children', and this legal duty applies to all decisions and actions that directly or indirectly affect children. The UN Committee on the Rights of the Child has said that this obligation applies to 'measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure'.[29] This applies to the legislature in enacting or maintaining existing laws, and the UN Committee on the Rights of the Child has given the following guidance as to when a child's interests may be affected:

> Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.[30]

1.100 In this regard, the committee's previous reports considered that it is not certain whether the legal recognition of a parent's relationship would have a major impact on a child. If it were considered to have a major impact on a child, then it is necessary to assess whether legislating to allow same-sex marriage would promote

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25 See article 2 of the CRC which states that all rights should be ensured to children without discrimination of any kind, irrespective of the child's or parent's social origin or birth. See also article 26 of the ICCPR which requires state parties to guarantee equal protection against discrimination on any ground, including social origin, birth or other status.

26 Fathers are not mentioned in the CRC and mothers are only referred to in the context of pre and postnatal care.

27 See the Preamble to the CRC.

28 See articles 7 and 9 of the CRC.

29 UN Committee on the Rights of the Child*, General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (2013) [19].

30 UN Committee on the Rights of the Child, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (2013) [20].

or limit the rights of the child to have his or her best interests assessed and taken into account as a primary consideration.

1.101 There is some evidence to suggest that legal recognition of same-sex couples would promote the best interests of children of those couples. The previous human rights assessment identified some evidence suggesting that children living with cohabiting, but unmarried, parents may do less well than those with married parents.[31] That analysis also noted that there is also some evidence that children of same-sex parents 'felt more secure and protected' when their parents were married.[32]

1.102 Further, to the extent that any existing laws provide greater protection for married couples compared to non-married couples, the previous human rights assessment of the measures considered that extending the protection of marriage to same-sex couples may indirectly promote the best interests of the child.

Committee comment

1.103 The committee notes that the previous human rights assessments of the measures concluded that, as they are limited to the legal recognition of a relationship between two people, and do not regulate procreation or adoption, the rights of the child are not engaged by the bills.

1.104 The committee further notes that the previous human rights assessments concluded that, to the extent that the obligation to consider the best interests of the child is engaged, the measures do not limit, and may promote, the obligation to consider the best interests of the child.

Solemnising marriages - exceptions for ministers of religion and religious marriage celebrants

1.105 The Marriage Act currently grants a minister of religion[33] of a recognised denomination discretion as to whether or not to solemnise a marriage[34] and this bill

31 See, Lixia Qu and Ruth Weston, Australian Institute of Family Studies, *Occasional Paper No. 46: Parental marital status and children's wellbeing* (2012).

32 Christopher Ramos, Naomi G Goldberg and M V Lee Badgett, Williams Institute, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experience and Impact of Marriage on Same-sex Couples* (2009) 10.

33 Under section 5 of the Marriage Act a 'minister of religion' is defined as '(a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by: (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or (ii) such other person or authority acting on behalf of that body or organisation as is prescribed; to be an authorised celebrant for the purposes of this Act."

proposes to continue this approach. Under the bill, provided that a minister of religion is authorised by their religion to solemnise marriages, they will continue to be able to refuse to solemnise marriages on religious grounds where this is in accordance with their religious doctrines, tenets and beliefs; where necessary to avoid injury to the religious susceptibilities of adherents of that religion; or where the minister's religious beliefs do not allow the minister to solemnise the marriage.[35]

1.106 The bill would also extend this discretion to existing marriage celebrants if they elect to register as religious marriage celebrants.[36] New marriage celebrants registered after the bill commences will not be able to be identified as a religious marriage celebrant unless they are a minister of religion.[37]

1.107 In relation to solemnising marriages of defence force personnel overseas, the bill would provide similar discretion to chaplains, who are ministers of religion, to refuse to solemnise marriages under the Marriage Act.[38] However, the bill also provides that the Chief of Defence force may authorise an officer to be an authorised celebrant to solemnise marriages of defence force members overseas.[39]

1.108 The bill would amend the *Sex Discrimination Act 1984* (Sex Discrimination Act) to give effect to these religious exemptions under the bill. However, civil marriage celebrants or authorised celebrants (who are not ministers of religion, religious marriage celebrants or chaplains) would be required to perform the function of solemnising marriages (including marriages of same-sex couples) regardless of their individual beliefs.[40]

Compatibility of the measure with the right to freedom of religion and conscience

1.109 Article 18 of the ICCPR protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and teaching. As set out above, considerable scope is provided under the bill to permit ministers of religion, chaplains and current marriage celebrants who elect to be

34 See, Marriage Act section 47. 'Recognised denominations' are defined under section 26 of the Marriage Act as those religious bodies or religious organisations that are declared by the Governor-General for the purposes of the Marriage Act. The Marriage (Recognised Denominations) Proclamation 2007 lists over 140 religious organisations as 'recognised denominations' for the purposes of section 26 the Marriage Act.

35 See, item 20, proposed section 47.

36 See, item 21, proposed section 47A.

37 EM 7.

38 EM 5.

39 EM 5.

40 SOC 21.

registered as religious celebrants to decline to perform same-sex marriages on the basis of their religious beliefs. This individual discretion exists notwithstanding the particular view of same-sex marriage that a denomination of religion has adopted.

1.110 In contrast to religious celebrants, under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws. The amendments in the bill would mean that civil marriage celebrants (who are not ministers of religion, chaplains or religious celebrants) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. These provisions will also apply to military officers who are authorised to perform marriages overseas (except chaplains).[41] It would apply even if the civil celebrant or authorised celebrant (who is not a minister of religion or religious celebrant) had a religious or personal objection to the marriage of same-sex couples. New civil marriage celebrants will be unable to register as religious marriage celebrants unless they are a minister of religion. It is noted that civil marriage celebrants are not necessarily secular and may hold strong religious or personal views in relation to solemnising marriages.[42]

1.111 The proposed measure therefore engages and limits the right to freedom of religion and belief under article 18 of the ICCPR. Article 18 distinguishes the right to freedom of thought, conscience, religion or belief, which is protected unconditionally, from the freedom to manifest religion or conscientious beliefs. Article 18(3) of the ICCPR permits limitations on the freedom to manifest one's religion, conscientious belief or conscientious objection that are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.[43] The right can be permissibly limited as long as it can be demonstrated that the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and a proportionate means of achieving that objective.

1.112 The statement of compatibility explains that the measure pursues a legitimate objective by extending the operation of the Marriage Act to same-sex couples and ensuring that the operation of the Marriage Act is non-discriminatory. The statement of compatibility provides a range of evidence that indicates that addressing issues of discrimination on the grounds of sexual orientation is a pressing and substantial concern.[44] Accordingly, consistent with the committee's previous

41 SOC 21.

42 See, for example, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012) 45-46; Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (February 2017) xiii-xiv, 18.

43 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].

44 SOC 21.

reports, the measure pursues a legitimate objective for the purposes of international human rights law of promoting equality and non-discrimination. The committee's previous reports also considered that the measure is rationally connected to this objective.[45] That is, providing that civil celebrants cannot decline to solemnise a marriage on the basis of sexual orientation, would appear to be effective to achieve the objective of promoting non-discrimination.

1.113 The UNHRC has also concluded that the right to exercise one's freedom of religion may be limited to protect equality and non-discrimination.[46] As set out above, the right to equality and non-discrimination has been extended to sexual orientation. The committee's previous reports considered that it is therefore permissible to limit the right to exercise one's freedom of religion or belief in order to protect the equal and non-discriminatory treatment of individuals on the grounds of sexual orientation, provided that limitation is proportionate.

1.114 The question is therefore whether, by providing an exemption from anti-discrimination laws for ministers of religion, chaplains and religious celebrants and not for civil marriage celebrants on an ongoing basis, the measure is proportionate to the objective of promoting equality and non-discrimination.

1.115 In assessing the proportionality of the limitation, it is relevant that civil celebrants, acting under the Marriage Act, are performing the role of the state in solemnising marriages.[47] The statement of compatibility argues in this respect that:

> …the performance of marriage ceremonies by marriage celebrants on behalf of the state is not sufficiently closely connected to the observance, practice, worship or teaching of religion or belief in order to justify the limitation on the right to non-discrimination. A personal moral objection to same-sex marriage is also not a sufficient basis to permit discrimination in marriage ceremonies or marriage related services.[48]

1.116 There is support for this view in international jurisprudence. In *Eweida and Ors v United Kingdom*,[49] the European Court of Human Rights dismissed Ms Ladele's complaint that she was dismissed by a UK local authority from her job as a register

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45 Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], *Report 8 of 2016* (9 November 2016) 33-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112 124.

46 See, *Eweida & Ors v United Kingdom* [2013] ECHR 37.

47 On this point, in the context of civil marriage celebrants in South Africa and Canada, see *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19 [97]; *Barbeau v British Columbia (A-G*) 2003 BCCA 251; *Halpern v Canada (A-G)* [2003] 65 OR (3d) 161 (CA) [53].

48 SOC 22.

49 *Eweida & Ors v United Kingdom* [2013] ECHR 37.

of births, death and marriages because she refused on religious grounds to have civil partnership duties of same-sex couples assigned to her. The court upheld the finding of the UK courts that the right to freedom of religion (under article 9 of the European Human Rights Convention) did not require that Ms Ladele's desire to have her religious views respected should 'override [the local authority's] concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community'.[50]

1.117 The statement of compatibility further explains that the intention behind introducing the category of a military officer who is an authorised celebrant is to ensure that members of the Australian defence force overseas will have a non-religious option to marry available to them.[51] Noting that military chaplains would be able to refuse to perform marriages on religious grounds, providing that officers would not be able to refuse to solemnise marriages because of sexual orientation or that the couple is of the same sex would appear to be a least rights restrictive approach. There could otherwise be a risk that members of the Defence Force overseas who are in a same sex-couple relationship would not be able to access the services of a marriage celebrant to solemnise a marriage on an equal and non-discriminatory basis.

1.118 The measures more generally appear to constitute a proportionate limitation on the right to freedom of religion because they maintain the exception for ministers of religion as well as introducing exceptions for current marriage celebrants who register as religious marriage celebrants. A concern has been raised that currently there are some civil marriage celebrants who solemnise marriages on a religious basis, however, because their organisation is not a 'recognised denomination' or because they are not recognised by a religious body as being authorised to solemnise marriages, they do not qualify as ministers of religion.

1.119 By allowing existing celebrants to register as religious celebrants without requiring that they qualify as ministers of religion the bill provides substantial protection for the freedom of religion or belief of individuals who may have made a decision to become civil celebrants on the basis that the current law only allows opposite-sex couples to marry. Such arrangements serve as a significant protection for these individuals in relation to their freedom of religion or belief, as they provide the option to all existing civil celebrants to be able to decline to solemnise marriages on the basis of their religious beliefs. The scope afforded to freedom of religion or

50 *London Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] ICR 532.

51 SOC 21.

belief is greater under this bill than some of the previous bills the committee has considered which sought to allow same-sex couples to marry.[52]

1.120 The absence of an exception from anti-discrimination laws for new civil celebrants and existing civil celebrants (who chose not to register as religious celebrants) that officiate a civil marriage ceremony generally aligns with the existing distinction in the position of religious and civil marriage celebrants. For those who solemnise marriages on a religious basis, the exemption from anti-discrimination law applies if they satisfy the definition of 'ministers of religion' in section 5 of the Marriage Act, which is broadly drafted to cover a person who has authority to solemnise marriages in accordance with the rites or customs of a religious body or organisation.[53] By contrast, civil celebrants have authority conferred under the Marriage Act as they are performing the secular role of the *state*, not of any religious group. Accordingly, consistent with the committee's previous reports, not granting new civil celebrants the discretion to refuse to solemnise same-sex marriages on the ground that the couple are of the same sex, regardless of their personal religious views, is very likely to be a proportionate limitation on the right to freedom of religion or belief as a matter of international human rights law to ensure the right of same-sex couples to equality and non-discrimination.

Committee comment

1.121 Under the Marriage Act registered civil celebrants are required to abide by existing anti-discrimination laws.

1.122 Under the bill, ministers of religion, chaplains and existing civil celebrants who register as religious celebrants would be able to decline to marry a same-sex couple on religious grounds.

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52 See, Parliamentary Joint Committee on Human Rights, Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], *Report 8 of 2016* (9 November 2016) 34-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) 112-124.

53 'Recognised denominations' are defined under section 26 of the Marriage Act as those religious bodies or religious organisations that are declared by the Governor-General for the purposes of the Marriage Act. The Marriage (Recognised Denominations) Proclamation 2007 lists over 140 religious organisations as 'recognised denominations' for the purposes of section 26 the Marriage Act; Under section 5 of the Marriage Act a 'minister of religion' is defined as '(a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by: (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or (ii) such other person or authority acting on behalf of that body or organisation as is prescribed; to be an authorised celebrant for the purposes of this Act."

1.123 However, existing civil celebrants who do not opt to be registered as religious celebrants; new civil celebrants; and other authorised marriage celebrants (who are not ministers of religion or chaplains) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex.

1.124 Civil marriage celebrants may hold strong personal religious beliefs and the committee notes the discussion of these celebrants who are not ministers of religion in the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* and the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*.[54]

1.125 Prohibiting new civil celebrants from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex may engage and limit the right to freedom of religion under article 18 of the ICCPR, insofar as a civil celebrant has a religious objection to the marriage of same-sex couples.

1.126 Consistent with the committee's previous conclusions, the preceding analysis indicates that in the circumstances this limitation is proportionate and permissible under international human rights law.

1.127 However, it is also noted that there is some scope for Australia to determine exactly how to formulate the appropriate balance between the right to equality and non-discrimination, on the one hand, and the protection of the right to freedom of religion or belief, on the other hand.

1.128 Noting the preceding human rights assessment, the committee draws the human rights implications of this measure to the attention of the parliament.

Bodies established for religious purposes may refuse to provide facilities, goods or services

1.129 The Sex Discrimination Act provides that it is unlawful to discriminate against a person in the provision of goods, services or facilities, on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.[55] However, section 37 the Sex Discrimination Act provides an exemption to a body established for religious

54 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012) 45-46; Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (February 2017) xiii-xiv, 18

55 Sex Discrimination Act, section 22.

purposes, for any other act or practice, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

1.130 Proposed new section 47B of the Marriage Act would similarly provide that a body established for religious purposes will be able to refuse to provide facilities, goods or services provided on a commercial or non-commercial basis provided that:

- the facility, goods or service to be provided relates to the solemnisation of a marriage; and
- the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.[56]

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

1.131 Permitting bodies established for religious purposes to refuse to provide facilities, goods or services related to the solemnisation of a marriage on religious grounds, engages the right to equality and non-discrimination. This is because it would permit discrimination in access to these facilities, goods and services. More specifically, it would allow a religious body to refuse to provide goods, services or facilities for the marriage of a same-sex couple on religious grounds. The measure reflects aspects of the current exemption from compliance with substantive protections under anti-discrimination law for bodies established for religious purposes.[57]

1.132 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected (that is, effective to achieve) and proportionate to, that objective.[58]

1.133 In this respect, the measure appears to pursue the objective of promoting the right to freedom of religion. Permitting religious bodies to refuse to provide facilities, goods and services related to the solemnisation of a marriage on religious grounds would appear to be rationally connected to this objective. While the statement of compatibility does not directly address whether the measure is proportionate in respect of the right to equality and non-discrimination, it does indicate that the measure is sufficiently circumscribed with respect to promoting the right to freedom of religion.[59] The statement of compatibility explains that the scope

56 EM 10-11; proposed section 47B.

57 Sex Discrimination Act, section 36.

58 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

59 SOC 22.

of exemptions from anti-discrimination laws under the bill for religious bodies are consistent with existing definitions:

> The Bill uses the same definition as the Sex Discrimination Act to ensure that bodies established for religious purposes can lawfully refuse to provide facilities, goods or services for a marriage on religious grounds. In contrast, service providers and commercial businesses that are not established for religious purposes cannot lawfully refuse to provide facilities, goods or services to a couple where this would amount to unlawful discrimination.[60]

1.134 Additionally, as set out above, significant exemptions are already provided from existing anti-discrimination laws for bodies established for a religious purpose on the basis of religion.[61] The statement of compatibility further explains why the exemption is restricted to religious bodies rather than applying more broadly:

> It is reasonable that this exemption is restricted to religious organisations rather than commercial businesses or individuals, because the hiring of facilities and delivery of goods and services is connected to marriage but one step removed from the solemnisation of the marriage itself.[62]

1.135 Restricting the exemption to religious bodies is a less extensive limitation on the right to non-discrimination than if this exemption were to apply more broadly to commercial businesses or individuals. The measure would appear to be broadly consistent with current Australian anti-discrimination law, although this is not determinative of the question of proportionality. The scope of exceptions to anti-discrimination laws has never been subject to a foundational review by the committee for human rights compatibility.

Committee comment

1.136 Existing anti-discrimination laws provide exemptions to bodies established for religious purposes where an act or practice conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

1.137 Proposed section 47B of the Marriage Act would provide that a body established for religious purposes will be able to refuse to provide facilities, goods or services related to the solemnisation of a marriage where the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.

60 SOC 21.

61 See, Sex Discrimination Act, section 37.

62 SOC 21-22.

1.138 The preceding analysis indicates that this measure promotes the right to freedom of religion. The committee draws the human rights implications of this measure to the attention of the parliament.

Chapter 2

Concluded matters

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

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

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

Purpose	To amend the *Crimes Act 1914* to allow parole to be revoked without notice; remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable witness into evidence; remove the requirement for vulnerable witnesses to be available to give evidence at committal proceedings and to be cross examined; strengthen child sexual abuse offences including introducing new offences; introduce increased maximum penalties for child abuse offences; introduce mandatory minimum sentences for certain offences; introduce a presumption against bail for a person alleged to have committed serious child sex offences; introduce matters in respect of which the court must have regard when sentencing an offender; insert a presumption in favour of cumulative sentences; provide child sex offenders serve full terms of imprisonment unless there are exceptional circumstances; provide additional sentencing options; provide that if an offender is refused parole on the basis of information that could prejudice national security this information does not need to be disclosed
Portfolio	Justice
Introduced	House of Representatives, 13 September 2017
Rights	Fair trial; presumption of innocence; liberty (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the bill) in

its *Report 11 of 2017*, and requested a response from the Minister for Justice by 1 November 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 1 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Mandatory minimum sentencing

2.5 Schedule 6 of 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*)*.[2]

2.6 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.[3]

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

2.7 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.[4] Depriving an individual of their liberty must be reasonable, necessary and proportionate in all the circumstances in order to avoid being arbitrary.

2.8 As outlined in the initial human rights analysis, an offence provision which requires mandatory minimum sentencing engages the right to be free from arbitrary detention.[5] 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.

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1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 2-14.

2 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.

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

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

5 See, for example, *A v Australia* (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; UN 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).

2.9 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.

2.10 The statement of compatibility acknowledges that the mandatory minimum sentences engage and limit the right to liberty but argues that this limitation is permissible.[6] The statement of compatibility provides the following information about the objective of the measure as:

> …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.[7]

2.11 Reflecting the gravity of a particular offence at a general level appears to be a function of the maximum term of imprisonment as set out in legislation. As such, based on the information provided, the initial analysis stated that it was unclear that this identified objective relates to proposed mandatory sentencing. However, the analysis noted that 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.

2.12 Further, the initial analysis assessed that 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.

2.13 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

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6 Statement of Compatibility (SOC) 9.

7 SOC 10.

previous conviction.[8] This may be a relevant factor in relation to the proportionality of the measure. However, regardless of the type of offence, there is a 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*.[9]

2.14 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.[10]

2.15 However, in relation to the discretion as to setting the minimum non-parole period, the previous analysis noted that 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).

2.16 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.

2.17 The committee therefore sought 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;

8 SOC 10.

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

10 SOC 10.

- 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.

Minister's response

2.18 The minister's response provides some further information about the objective of the measure and its importance including related to the rights of the child. In relation to how the measure is effective to achieve its stated objective, the minister's response states:

> The Government considers that mandatory minimum sentences should be used only rarely and reserved for the most serious offences. Mandatory minimums are already in place for terrorist offenders and people smugglers, and the Government is firmly of the view that—with the safeguards set out in the Bill—the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.
>
> Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring that serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

2.19 As such the minister's response appears to argue that, as the proposed mandatory minimum sentences are reserved for serious offences against children, they are generally connected to risks posed to the community. It argues that mandatory minimum sentencing will address these risks through incapacitation as well as allowing for access to targeted treatment programs while in prison. On this basis the measure may be rationally connected to its stated objective of ensuring community protection. However, it would have been useful if the minister had also provided information about the particular risks posed to the community in relation to offenders that have committed these particular categories of criminal offence.

2.20 The minister's response usefully responds to each of the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.21 A measure will not be a proportionate limitation on human rights where it is not necessary to achieve the stated objective (that is, it is not the least rights restrictive approach). If the exercise of judicial discretion in sentencing is already effective to achieve the stated objective of the measure then mandatory sentencing will not be the less rights restrictive approach. In relation to why the exercise of judicial discretion is inappropriate or ineffective to achieve the stated objective of the measure, the minister's response argues that:

> Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning the majority of convicted offenders are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just 6 months.
>
> Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to stand as a yardstick for the courts in applying more appropriate penalties for Commonwealth child sex offences. The appropriateness of Parliament setting minimum sentences in addition to maximum penalties has been upheld by the High Court.

2.22 The statistics cited may indicate that judicial discretion is inadequate to address the legitimate objective of the measure. However, it is also possible that the percentage and length of custodial sentences may be an appropriate exercise of judicial discretion that takes into account all the circumstances of an individual case.

2.23 In relation to the committee's request as to whether less rights restrictive alternatives are reasonably available, the minister's response states:

> The mandatory minimum sentencing scheme provides the courts with enough discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes.

2.24 While courts may still have a limited degree of discretion in setting the non-parole period, this does not appear to be sufficient for the measure to be the least rights restrictive approach. It would have been useful if the minister's response had considered whether less rights restrictive measures such as, for example, guidelines as to sentencing would have been sufficient to address the legitimate objective of the measure.

2.25 In relation to 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 minister's response states:

> The safety and protection of children is the Government's paramount concern. Individuals convicted of serious child sex offences or who are repeat offenders deserve to spend time in jail for their offences. This protects the community by ensuring that these offenders receive significant penalties and that they are removed from the streets.
>
> The Government understands that sentencing decisions involve the careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing scheme includes mechanisms for courts to retain appropriate discretion in determining the most suitable sentence in each individual case.
>
> Additionally, under Commonwealth law, courts have the discretion to determine the appropriate treatment of people with cognitive disability or mental impairment in the criminal justice system. Mental impairment is defined in the Criminal Code Act 1995 (Criminal Code) as including senility, intellectual disability, mental illness, brain damage and severe personality disorder. These protections have not been limited by the Bill.

2.26 The minister's advice that the courts will maintain discretion as to the appropriate treatment of people with cognitive disabilities or mental impairment, is likely to be an important safeguard in respect of these individuals. However, outside these circumstances, based on the information provided there does not appear to be any other specific safeguards to ensure a person is not deprived of liberty for a length of time that is not reasonable, necessary and proportionate in all the circumstances. That is, even if the circumstances of the offence and the offender did not warrant the mandatory minimum sentence there are no additional safeguards to prevent the application of this sentence.

2.27 In relation to the scope of judicial discretion that will be maintained by the measure, the minister's response explains:

> The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

2.28 Some discretion is retained by the court in relation to aspects of sentencing, however, it is significantly limited. While courts will retain the ability to set the minimum non-parole period, the sentence will still be required to be the mandatory minimum. In this respect, it is noted that the grant of parole after an offender has

served their minimum non-parole period is a manner of discretion. Further, while the court may be able to apply discounts by up to 25 percent to the mandatory minimum sentence on the basis of a guilty plea or for cooperation, the scope of this discretion appears to be limited with reference to the minimum penalty as well as in relation to grounds for a discount. Accordingly, it is unclear that the courts will be able to take fully into account the particular circumstances of the offence and the offender in determining an appropriate sentence.

2.29 The minister's response also provides the following information on whether the bill could be amended to clarify that the mandatory minimum sentence is not intended to be used as a 'sentencing guidepost':

> The introduction of the mandatory minimum sentencing scheme provides direction to the courts in relation to sentences for serious child sex offences. Importantly, the mandatory minimums are not intended to be seen as a suggested penalty but rather as a floor for penalties. The courts should exercise their discretion with regard to the [sic] both the minimum and maximum penalty for an offence and determine a sentence of a severity appropriate in all the circumstances of the case.
>
> With the exception of a limited number of offences (such as terrorism, treason and espionage), the Crimes Act 1914 does not prescribe how a non-parole period should be determined. Furthermore, there is no common law principle requiring a judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period. As such, there is no need to amend the Bill in the manner suggested.

2.30 In light of this explanation, should the bill proceed, the amendment or clarification is not required.

2.31 More generally, the UN Human Rights Committee found in *Nasir v Australia* that mandatory minimum sentencing is not *per se* incompatible with the right to be free from arbitrary detention.[11] Nevertheless mandatory sentencing involves a risk that the application of a mandatory minimum may not be reasonable, necessary and proportionate in the individual case.[12] Accordingly, there is a risk that the measure may operate in such individual cases in a manner which is incompatible with the right to liberty and the right to be free from arbitrary detention.

Committee response

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

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11 *Nasir v Australia*, UN Human Rights Committee (17 November 2016) [7.7].

12 See, UN Human Rights Committee, General comment 35, liberty and security of person; UN Human Rights Committee, Concluding observations on Australia 24/07/2000, A/55/40, paras. 498-528

2.33 The preceding analysis indicates that the measure may risk being incompatible with the right to liberty where the mandatory minimum sentence is not reasonable, necessary and proportionate in all the circumstances of the individual case.

Right to have a sentence reviewed by a higher tribunal

2.34 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.

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

Minister's response

2.36 The minister's response to the committee's inquiries in this regard states:

> The mandatory minimum sentencing regime set out in the Bill does not impact on the right to have a sentence reviewed by a higher court. All avenues of appeal remain available. Nor do the reforms impact the current requirement for the courts to consider all the circumstances, including the sentencing factors listed in section 16A of the Crimes Act 1914, when fixing a non-parole period. Additionally, although the Bill introduces mandatory minimums for certain child sex offences in respect of the head sentence, the courts will exercise discretion over the non-parole period. It is therefore not the case that appellate courts would have nothing to review.

2.37 The minister's response articulates that there will be some scope provided to an appellate court to review a sentence. However, when a trial judge imposes the prescribed mandatory minimum sentence, the scope of review provided by an appellate court will, as set out above, be more limited aside from the minimum non-parole period. Nevertheless, noting the information provided by the minister and that international human rights law jurisprudence has not directly addressed this issue, the measure engages, but may not limit, the right to have a sentence reviewed by a higher tribunal.

Committee response

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

2.39 The preceding analysis indicates that, based on international jurisprudence, the measure engages, but may not limit, the right to have a sentence reviewed by a higher tribunal.

Conditional release of offenders after conviction

2.40 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.[13]

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

2.41 As noted above, the right to liberty includes the right not to be arbitrarily detained. The initial analysis stated that, 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 reflect the gravity of these offences, and to ensure that the community is protected from child sex offenders.[14]

2.42 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. The initial analysis noted that given the proposed presumption in favour of actual imprisonment, incarceration may be unconnected to the specific risk posed by a particular offender. Accordingly, it is not evident that the presumption is effective to achieve community protection.

2.43 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.[15] However, this does not explain why the exercise of judicial discretion as to sentencing is insufficient to achieve the stated objective of

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

14 SOC 11.

15 SOC 11.

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.

2.44 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.[16] The initial analysis stated that, 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 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 risk that such a deprivation of liberty may not be necessary in all the circumstances of each individual case.

2.45 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.

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

- 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.

Minister's response

2.47 In relation to whether the measure is effective to achieve its stated objective, the minister's response states:

> Yes, as the intention is to increase imprisonment of child sex offenders. Additionally, the presumption in favour of Commonwealth child sex

16 SOC 11.

> offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.
>
> The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

2.48 As such the minister's response appears to argue that being found guilty of this category of criminal offence is generally connected to risks posed to the community. It argues that mandatory minimum sentencing will address these risks through incapacitation as well as allowing for access to targeted treatment programs while in prison. On this basis the measure may be rationally connected to its stated objective of ensuring community protection.

2.49 The minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.50 In relation to why the exercise of judicial discretion by judges who have experience in sentencing is inappropriate or ineffective in achieving the stated objective, the minister's response states:

> As discussed above, the issuing of wholly suspended sentences for child sex offenders has resulted in sentences that do not adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment allows courts to consider all the circumstances when setting the pre-release period under a recognizance release order.

2.51 Given the category of offence, the issuing of wholly suspended sentences for child sex offences may indicate that judicial discretion is inadequate to address the legitimate objective of the measure. However, depending on the circumstances, it is also possible that sentencing an individual offender to a suspended sentence could be an appropriate exercise of judicial discretion that takes into account all the circumstances of an individual case.

2.52 In relation to whether less rights restrictive alternatives are reasonably available, the minister's response states that:

> This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

2.53 This approach will continue to provide courts with some degree of discretion in relation to length of incarceration. Further, as noted above, the court will retain discretion to make a recognisance order in 'exceptional circumstances'. In relation to

what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognisance order, the minister's response states:

> 'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

2.54 Accordingly, the minister's response provides a useful explanation as to why it may not be practical or desirable to define 'exceptional circumstances' in legislation. However, it does appear that the threshold of 'exceptional circumstances' is intended to operate as a significant hurdle to sentencing a person to a suspended sentence rather than imprisonment in custody. Much will also depend on how 'exceptional circumstances' are interpreted by the court as to whether this is a sufficient safeguard against the risk of arbitrary detention.

Committee response

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

2.56 The preceding analysis indicates that, noting the existence of safeguards, the measure may be compatible with the right not to be arbitrarily detained in a range of circumstances. However, depending on how these safeguards are applied, there is some degree of risk that the measure could operate so as to be incompatible with the right to liberty if incarceration is not reasonable, necessary and proportionate in all the circumstances of the individual case.

Presumption against bail

2.57 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.

2.58 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.[17]

Compatibility of the measure with the right to release pending trial

2.59 The right to liberty includes the right to release pending trial. Article 9(3) of the ICCPR provides that the 'general rule' for people awaiting trial is that they should not be detained in custody. The UN Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[18] As the measure creates a presumption against bail it engages and limits this right.[19]

2.60 The initial human rights analysis assessed that 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',[20] 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.

2.61 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.

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17 Explanatory Memorandum (EM) 41.

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

19 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.

20 SOC 10.

2.62 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'.[21] However, as noted in the previous analysis, 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 courts are failing to consider the serious nature of an offence in determining whether to grant bail.[22]

2.63 Further, to the extent that the concern is that issues of community risk are not being given sufficient weight in bail applications, it was 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 raised 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.

2.64 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.[23] However, the previous analysis stated that the bill does not specify the threshold for rebutting this presumption, including what constitutes 'exceptional circumstances' to justify bail.

2.65 While bail may continue to be available in some circumstances, based on the information provided, it was unclear that the presumption against bail is a proportionate limitation on the right to release pending trial.[24] The previous analysis outlined that, 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

21 SOC 10.

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

23 SOC 10.

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

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.

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

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) 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.

Minister's response

2.67 In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern and how the measure is effective to achieve that objective, the minister's response states:

> Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and repeat offenders. The presumption against bail for this cohort of the most serious child sex offenders is a necessary and effective crime prevention measure for a crime that targets our children.

2.68 Accordingly, the minister's response appears to indicate that the offences to which the presumption applies create particular risks while a person is on bail. On this basis the presumption against bail would appear in broad terms to be rationally connected to the stated objective of 'community protection.'

2.69 The minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate.

2.70 In relation to why the current balancing exercise undertaken by bail authorities and courts is insufficient to address the stated objective of the measure, the minister's response does not directly address whether the current regime is sufficient to address the stated objective of the measure. However, the minister explains that it is 'appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail'. The minister points to this being of particular importance in relation to 'Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect'.

2.71 In relation to whether less rights restrictive alternatives are reasonably available, the minister's response states:

> The Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this on its own has not proven to be sufficient to protect the community.

2.72 Beyond this statement, no further information is provided as to why less rights restrictive approaches to achieving the objective of the measure are not reasonably available. As such there continues to be 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.

2.73 In relation to 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 minister's response states:

> The presumption against bail is rebuttable and provides judicial discretion determining whether a person's risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption, which is not limited to specific criteria.

2.74 Providing a rebuttable presumption will continue to allow for judicial discretion as to whether pre-trial detention is warranted in a particular case. However, a presumption against bail fundamentally alters the starting point of an inquiry as to the grant of bail. That is, unless there is countervailing evidence, a person will be incarcerated pending trial. There is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable necessary and proportionate in the individual case.

2.75 In relation to the committee's request for advice as to the threshold for displacing the rebuttal of the presumption against bail, the minister's response states:

> The Bill does not require there to be 'exceptional circumstances' to justify bail. Rather, the person charged or convicted of the child sex offence will need to satisfy the court that circumstances exist to grant bail. The presumption was deliberately not defined by reference to specific criteria to ensure that appropriate discretion is retained and that the courts can take individual circumstances into account.

2.76 It is acknowledged that there may be appropriate reasons for not providing a definition of what is needed to satisfy the court that circumstances exist for a grant of bail. The fact that the presumption is rebuttable is a relevant safeguard that may assist to ensure that a person is denied bail where it is not reasonable, necessary and proportionate in all the circumstances. However, as set out above, a rebuttable presumption against bail remains a serious limitation on the right to release pending trial. International jurisprudence indicates that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.[25] As set out above, *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147, the ACT Supreme Court considered that the presumption against bail in section 9C of the ACT Bail Act, in the circumstances, was not consistent with the requirement a person awaiting trial not be detained in custody as a general rule. In this case, there is a potential risk that if the threshold for displacing the rebuttable presumption is too high it may result in loss of liberty where it is not reasonable, necessary and proportionate in the individual case. Accordingly, the measure may not be a proportionate limitation on the right to be released pending trial.

Committee response

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

2.78 The preceding analysis indicates that there is a risk that if the threshold for displacing the rebuttable presumption against bail is too high, it may result in loss of liberty in circumstances that may be incompatible with the right to release pending trial.

Power to restrict information provided to offenders

2.79 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

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

of the bill would provide that information does not need to be disclosed to an offender where in the opinion of the Attorney-General this information is likely to prejudice national security.[26]

Compatibility of the measure with the right to a fair hearing

2.80 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.

2.81 The statement of compatibility acknowledges that the right to a fair hearing is engaged but states that 'it is necessary to protect confidential information, such as intelligence information, that would prejudice national security'.[27] It was acknowledged that this is likely, in broad terms, to constitute a legitimate objective for the purposes of international human rights law.

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

2.83 It was 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.

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

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26 EM 51.

27 SOC 12.

28 SOC 12.

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

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

Minister's response

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

> The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 18 of the Crimes Act.
>
> It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.
>
> A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. In practice, the measures are likely to only apply to offenders with terrorist links. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the community—could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

2.86 This information provided by the minister indicates that the measure is likely to be rationally connected to its objective, and the minister's response usefully responds to the questions asked by the committee that relate to whether the measure is reasonable, necessary and proportionate. In relation to the inability of

affected individuals to contest or correct information on which the refusal of parole is based, the minister's response states:

> The reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions, including those which are refused on national security grounds, are subject to judicial review in the *Federal Court under the Administrative Decisions (Judicial Review) Act 1977*.

2.87 While noting that nothing prevents the Attorney-General from providing an overview of relevant information, if it does not prejudice national security, there is nothing in the legislation which requires that this information be provided. Accordingly, a person may be unable to contest evidence in relation to the grant of the parole. This raises a particular concern that the measure contains insufficient safeguards to ensure it is no more rights restrictive than necessary. It is noted that the ability of a person to reply to adverse information against them is an important aspect of the right to a fair hearing.

2.88 The minister's response appears to point to the continued availability of judicial review as a relevant safeguard:

> A parole decision is an administrative decision that is made having regard to a range of matters that are listed in section 19ALA of the *Crimes Act 1914*. The decision of the Attorney-General is appealable and subject to review in the Federal Court. Once before a court, the ordinary rules of evidence in relation to a civil proceeding will apply. Proposed section 22B in the Bill is restricted to parole decisions made under Part IB of the *Crimes Act 1914* and will not bind a court reviewing the decision of the Attorney-General.

2.89 While the availability of judicial review may operate as an important safeguard, it does not fully address the concern that a person may be unable to respond to allegations in the context of a parole decision. As such, the measure may not be a proportionate limitation on the right to a fair hearing.

Committee response

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

2.91 The preceding analysis indicates that the measure may raise concerns in relation to the right to a fair hearing.

2.92 The committee recommends that consideration be given to amending the bill to require that, where information is being withheld and it would not prejudice national security, the person be provided with an overview of the relevant information or document, prior to the making of the parole decision.

Reverse burden offence

2.93 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

2.94 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.

2.95 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.

2.96 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 initial human rights analysis identified that 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.

2.97 The committee therefore requested 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.

Minister's response

2.98 In response to the committee's inquiries in this regard, the minister provided an explanation as to the elements of the offences and why they are appropriate:

> Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the Criminal Code to criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:
>
> - the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
> - the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
>   - the sender, or
>   - a participant who is, or who the sender believes to be, at least 18 years of age; or
>   - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
> - the child was under 16, or the sender believed the child was under 16.
>
> Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.
>
> Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.
>
> The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief

about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant believes the child is under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

2.99 The minister's response identifies the objective of the reverse burden and absolute liability aspects of the offences as having a deterrent effect. In light of the types of offences, this is likely to constitute a legitimate objective for the purposes of international human rights law. The minister's response further indicates that these measures are likely to be rationally connected to this objective with reference to the elements of the offences and investigatory techniques. In relation to the proportionality of the limitation on the right to be presumed innocent, the minister's response argues that the scope of these measures maintain the defendant's right to a defence. The minister's response explains that the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 or under the age of 18 respectively. This belief is a matter peculiarly within his or her knowledge and not readily available to the prosecution. Accordingly,

these reverse burden and absolute liability offences are likely to be a proportionate limitation on the right to be presumed innocent.

Committee response

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

2.101 The committee notes that the offences are likely to be compatible with the right to be presumed innocent.

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

Purpose	Seeks to enable the Minister for Immigration and Border Protection to prohibit certain items in immigration detention facilities. The bill also amends the search and seizure powers in immigration detention, including the use of strip searches to identify and seize prohibited items
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 13 September 2017
Rights	Privacy; family; freedom of expression; cruel, inhuman and degrading treatment; humane treatment in detention, children's rights (see **Appendix 2**)
Previous report	11 of 2017
Status	Concluded examination

Background

2.102 The committee first reported on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (the bill) in its *Report 11 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 1 November 2017.[1]

2.103 The minister's response to the committee's inquiries was received on 2 November 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.104 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'[2] if the minister is satisfied that:

1 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) 19-34.

2 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).

(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.

2.105 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.

Compatibility of the measure with the right to privacy

2.106 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 states parties do not arbitrarily interfere with a person's private and home life.

2.107 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.[3] 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 parties to provide detainees with a minimum of services to satisfy basic needs, including means of communication and privacy.[4] Persons in detention, including those in detention serving a term of imprisonment for a criminal offence, have the right to correspond under necessary supervision with families and reputable friends on a regular basis.[5]

2.108 Where a person is detained for an immigration purpose, 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 determination of their visa application and/or removal from Australia.

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

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

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

2.109 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. The initial human rights analysis stated that, therefore, while the precise items to be prohibited remain to be determined by legislative instrument,[6] by establishing the mechanism by 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.

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

2.111 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'.[7] 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'.[8] 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',[9] 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.[10]

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

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

8 SOC 24.

9 SOC 25.

10 SOC 25.

2.112 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…
>
> 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.[11]

2.113 The initial analysis noted that 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.

2.114 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. The initial analysis outlined that 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 and statement of compatibility note that immigration detention facilities accommodate a number of higher risk detainees who have

11 SOC 24.

entered immigration detention directly from a correctional facility, including child sex offenders and members of outlaw motorcycle gangs.[12] 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 or other 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 were cited as raising serious concerns that the measure is overly broad and may not be the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

2.115 Further, the initial analysis stated that 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.[13] 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.

2.116 The committee therefore sought 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).

12 Explanatory Memorandum 2; SOC 24.

13 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), para 8.

Minister's response

2.117 In response to the committee's inquiries as to whether the measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective, the minister explains in his response the difficulties associated with maintaining the current approach to the possession of mobile phones by detainees in which 'Illegal Maritime Arrival' detainees are not permitted mobile phones, but other detainees are permitted. In particular, the minister explains:

> Removing things such as mobile phones from the Immigration Detention Network (IDN) altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees, staff and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics from other detainees. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff.

1.17 It appears from the minister's response that the current policy of prohibiting possession of mobile phones from a specific group, referred to as "Illegal Maritime Arrivals", has led to the use of mobile phones as a commodity within immigration detention. It is acknowledged that risks may be associated with applying a case-by-base or individual-risk-based approach, and a blanket policy may be operationally easier. However, the current 'two-tier' system is a policy which also appears not to be based on the risk posed by the individual,[14] and raises the same concerns regarding whether it is a proportionate limit on the right of affected persons to privacy and to correspond with family and friends. It is not clear from the minister's response why it is necessary to address the problems of current policy by expanding the prohibition to all detainees and to an even broader range of items, rather than allowing access to mobile phones to those persons who are currently denied such access.

2.118 In any event, significant concerns remain insofar as the proposed amendments could significantly restrict the reasonable expectation of privacy of low or no risk detainees due to the behaviour of high risk detainees. It follows from the information provided in the statement of compatibility and the minister's response that a substantial proportion of persons who are not high risk individuals and are in immigration detention will be subject to these amendments. There would appear to

14 This policy has been in force since 2010: for a summary, see *SZSZM v Minister for Immigration & Ors* [2017] FCCA 819 at [37]-[42].

be other, less rights restrictive, options available to mitigate risk, such as separate housing facilities for high risk detainees, whose behaviour is the stated rationale for the measures.

2.119 Further, concerns remain as to the adequacy of the safeguards to protect against arbitrary application. In this respect, the minister's response states:

> The Department of Immigration and Border Protection (the Department) uses an intelligence led, risk based approach to focus on mitigating the risks, including security risks, posed by the complex composition of the detention network. The Department has implemented a broad suite of program management initiatives aimed at defining its objectives and associated program requirements, in order to sufficiently identify emerging issues before they impact negatively on the IDN. These initiatives include the development and implementation of a risk management framework designed specifically to identify and counter associated risks. The Onshore Immigration Detention Network Risk Management Framework provides a range of tools, including a centrally administered national risk register that enables a standardised approach to both strategic and operational risk assessment and reporting.
>
> As part of the process of identifying emerging issues, the Department monitors detention population and capacity, incident analysis trends, intelligence reports and other statistics to support assessment of risks and associated decisions, as part of due diligence business processes. Sitting under the national risk framework, tactical risk assessments are also conducted in relation to the implementation of new business policies or procedures.
>
> Prior to making an item a 'prohibited thing' the Minister will need to be satisfied that possession of the thing is prohibited by law in a place or places in Australia; or 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. This satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.
>
> As the proposed amendments will enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities; the Minister will be able to respond quickly if operational requirements change or as emerging risks are identified. However, as the prohibition is by way of legislative instrument, any decisions by the Minister to prohibit an item will be open to scrutiny by Parliament thus providing an appropriate balance of transparency.

2.120 It is noted that the minister's assessment of making an item a 'prohibited thing' is informed by the intelligence-based briefings pursuant to the Department of Immigration's risk management framework. However, concerns remain that the breadth of the minister's power means that the threshold to declare an item as a prohibited item is low, as the minister need only be satisfied that an item *might* pose

a risk. For this reason, concerns remain that the minister's power is overly broad. Further, it is noted that the proposed instrument appears to be exempt from disallowance.[15] For the purposes of international human rights law, serious concerns remain that prohibiting items through a non-disallowable legislative instrument is not a sufficient safeguard to protect detainees' right to privacy. It is also noted that broad powers and discretions conferred on the executive may themselves be incompatible with international human rights law where the scope of the power and manner of its exercise is not identified with sufficient clarity.[16]

Committee response

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

2.122 The preceding analysis indicates that, noting the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones), there is a risk that the operation of section 251A(2) would be incompatible with the right to privacy. This is because the scope of the power, and the absence of sufficient safeguards, is such that the power could be exercised in a way that is likely to be incompatible with the right to privacy.

2.123 Noting that the items to be prohibited will be determined by legislative instrument, if the bill is passed, the committee will consider the human rights implications of the legislative instrument further once it is received.

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

2.124 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 be able to specify by legislative instrument that items including mobile phones, computers and SIM cards will be 'prohibited things', the measure engages and 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

15 See the minister's response to the Inquiries of the Scrutiny of Bills Committee in *Scrutiny of Bills Digest 13 of 2017* (15 November 2017) pp 118-119.

16 See *Hasan and Chaush v Bulgaria* (2000) ECHR Application no. 30985/96 (26 October 2000), [84].

> 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.[17]

2.125 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.

2.126 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.

2.127 However, the initial analysis explained that there are questions as to whether the measure is a proportionate interference with the right to respect for the family. 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 was 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 was 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 was 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 raised 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.

17 SOC 26.

2.128 Accordingly, the committee sought 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. It was noted that 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) would assist in determining the proportionality of the measure.

Minister's response

2.129 The minister's response firstly reiterates the government's view, outlined above in relation to the right to privacy, that prohibiting certain items for all detainees rather than on an individual case-by-case basis was 'the only way to implement such a measure without risking the health, safety or security of all persons in the facility'. The minister further explained that this provided 'a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees'. In this respect, the concerns raised above in relation to the right to privacy apply equally in the context of the right to protection of the family.

2.130 The minister's response also gave a detailed outline of the other communication avenues available to detainees to maintain contact with their families:

> Detainees are able to access a variety of communication avenues to maintain contact with family. These include landline phones, internet, fax, post services and visits from community members. Landline phones, fax and post facilities are available 24 hours a day, seven days a week with no limits on access. Internet is available to detainees through a booking system, generally between the hours of 6 am to 11.59 pm. Each facility has different visiting hours, which are available on the Department's website.
>
> Detainees are not required to lodge a request to use the landline phones, fax or post facilities. The booking system to access the internet is straightforward and there are no delays in this process. The application process for personal visits has a processing time of up to five business days. The application process for visits by legal representatives, agents or consular officials has a processing time of one business day. Visit applications are available via the Facilities and Detainee Services Provider (FDSP) and departmental websites.
>
> Landline to landline calls are free of charge. An Individual Allowance Program is in place within detention facilities, allowing detainees to earn up to 60 points per week (one point equals one dollar). Detainees can use these points to 'purchase' phone cards for international and mobile calls, and postage stamps, all of which are charged at standard rates. Use of internet and fax facilities are all free of charge.

> Detainees are able to access these communication channels in private settings. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

2.131 The further information provided by the minister provides more clarity as to the extent of access available to detainees to communicate with their families. These alternative communication channels are relevant to the question of proportionality. Concerns remain in relation to the extent to which detainees may have access to communication with family overseas as a result of the implementation of this measure. In particular, mobile telephones may allow detainees to receive calls and messages free of charge, including from those overseas and those on mobile devices. In contrast, requiring detainees to purchase phone cards for international and mobile calls (where such calls are charged at standard rates) through an Individual Allowance Program may involve considerably more expense for detainees. There may also be other practical difficulties which may limit or preclude contact with family members overseas, for example if the detainee has not earned sufficient points through the Individual Allowance Program to purchase a phone card.

2.132 Whether the other alternative communication channels are sufficiently extensive and offer sufficient privacy to allow detainees to communicate with their families will depend on the extent of access available in a specific immigration detention centre. For example, where private rooms with phones are accessible to detainees, and that access is readily available (for example, there are a sufficient number of private rooms available so that detainees can access the rooms at short notice and with little wait time), that may tend to suggest that the measure is a proportionate limitation on the right not to be subjected to arbitrary interference with family. However, if such facilities were limited or not readily available or accessible, it is unlikely that the availability of landline phones in private booths and in accommodation areas would overcome the significant impact on detainees' ability to privately communicate with their families, as such facilities do not offer the same level of privacy as the use of a mobile telephone which could be used at any time of day and in a private setting (such as in a detainee's room). As the minister's response indicates, visiting times for the detention centres differ by facility, and are subject to

the express stipulation that the opening times can vary, which is also relevant to the proportionality of the measure.[18]

Committee response

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

2.134 In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right not to be subjected to arbitrary or unlawful interference with family. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy rather than as legislative protections provides a less stringent level of protection.

2.135 The committee recommends that the implementation of the measure in each detention centre be monitored by government to ensure that individuals are able to maintain an adequate and sufficiently private level of communication with families that is consistent with the right not to be subjected to arbitrary or unlawful interference with family.

Compatibility of the measure with the right to freedom of expression

2.136 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.[19] The initial analysis stated that, 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.

2.137 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

18 See https://www.border.gov.au/about/immigration-detention-in-australia/locations

19 ICCPR, article 19(2).

> 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 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.[20]

2.138 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.[21]

2.139 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.[22] 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.[23]

2.140 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. The previous analysis outlined that this raised questions as to whether the measure is

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20 SOC 26.

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

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

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

sufficiently circumscribed and the least rights restrictive way to achieve the stated objective for the purposes of international human rights law.

2.141 The committee therefore sought 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.

Minister's response

2.142 The minister's response provides the following information in this regard:

> As noted in respect to the previous response regarding arbitrary or unlawful interference with family, the Government is of the view that the extensive nature of the facilities provided to detainees, their open availability and the manner in which they are provided ensures that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation on the freedom of expression. The measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

2.143 As noted earlier in relation to the right not to be subject to arbitrary or unlawful interference with family, whether the alternative communication facilities are sufficiently extensive so as to not impermissibly limit freedom of expression will depend on the extent of access available in a specific immigration detention centre. However, it is noted that the alternative communication facilities do not appear to provide an equivalent opportunity for individuals to be able to communicate (for example through writing, taking videos and photographs) on matters such as conditions of detention as that provided by mobile phones, computers and other electronic devices such as tablets. The alternative communication facilities also impose greater restrictions on possession of reading materials or publications that people in Australia may otherwise be free to access and read, which limits detainees' ability to seek and receive information and all kinds of ideas through media of their choice. Therefore, notwithstanding the alternative facilities available, serious concerns remain that the implementation of the measure may not be the least rights-restrictive way to achieve the stated objective of the measure.

Committee response

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

2.145 In light of the broad wording of the power to prohibit certain items from detention centres (including mobile phones, computers and other electronic devices such as tablets), there is a serious risk that the implementation of this measure may impermissibly limit detainees' right to freedom of expression. The alternative means of communication available to detainees as a matter of policy may be capable of addressing some of these concerns. However, it is noted that providing for these alternative means of communication as a matter of policy

rather than through legislative protections provides a less stringent level of protection.

2.146 The committee recommends that the implementation of the measure in each detention centre be monitored by government to ensure that individuals are able to maintain sufficient access to communication channels that are consistent with the right to freedom of expression.

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

2.147 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.[24]

2.148 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',[25] the ability to take and retain possession of a 'prohibited thing' if found pursuant to search,[26] the ability to use screening equipment or detector dogs to screen a detainee's person or possessions to search for a 'prohibited thing',[27] and the ability to conduct strip searches to search for a 'prohibited thing'.[28] 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.[29]

2.149 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.[30] In conducting such a search, an authorised officer who conducts a search 'must not use force against a person or property, or

24 Section 252A of the Migration Act.

25 Proposed section 252(2)(c).

26 Proposed section 252(4A).

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

28 Proposed amendment to section 252A(1).

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

30 Proposed section 252BA.

subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.[31]

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

2.150 Article 7 of the ICCPR provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[32] 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.[33] 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.[34]

2.151 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.[35] 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.[36] 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.[37] While the Court accepted that strip-searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the Court emphasised that prisoners must

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31 Proposed section 252BA(6).

32 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.

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

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

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

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

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

be detained in conditions which are compatible with respect for their human dignity.[38]

2.152 As noted in the initial analysis, 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.

2.153 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.

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

Additional protections

Additionally, the amendments seek to introduce a number of provisions to protect detainees and their property. These include section 252BA - 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.

2.154 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.[39]

2.155 The initial analysis assessed that the safeguards set out in the statement of compatibility and contained in section 252A of the Migration Act indicate that there is oversight of the conduct of strip searches. However, it was 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.[40] 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', which is any item declared to be prohibited by the minister. 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 serious questions as to whether the

39 SOC 28.

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

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.

2.156 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', it was noted that 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 (such as age, gender, disability or mental health concerns), and any access to review to challenge the use of force.

2.157 In relation to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee sought 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).

2.158 In relation to the right to humane treatment in detention, the committee sought 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.

Minister's response

2.159 The minister's response restates the safeguards that exist currently in the Migration Act that regulate the conduct of strip searches in immigration detention facilities and also reiterates that these existing safeguards are complemented by further safeguards proposed in the bill. The minister further explains that departmental operating procedures state that strip searches are a measure of last resort, that detainees must be treated with respect and dignity when being strip searched, and strip searches should be applied only when other less intrusive measures have proven inconclusive or insufficient. These operating procedures appear to be departmental policy rather than a legal requirement.

2.160 As to the safeguards in place relating to the use of force by authorised officers, the minister's response explains:

> In some cases the use of force and/or restraint while in held [sic] immigration detention may be necessary in order to achieve lawful and operational outcomes in the IDN.

> The Department has developed a set of principles that guide the application of use of force and/or restraint in the immigration detention environment. These principles ensure that any application of use of force or restraint used in immigration detention will not meet the threshold levels of severity of harm so as to be torture or cruel, inhuman or degrading treatment or punishment and are only used as a last resort. The principles set out that:
>
> - conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
> - reasonable force and/or restraint should only be used as a measure of last resort
> - reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping immigration detention or destruction of property
> - reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary. If the management of a detainee can be achieved by other means, force must not be used
> - the use of force and/or restraint must not include cruel, inhumane or degrading treatments
> - the use of force and/or restraint must not be used for the purposes of punishment
> - the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
> - the use of excessive force on a detainee may constitute an assault.
>
> It is important to note that all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant reporting protocols.

2.161 The minister's response also provides information on the training that is provided to authorised officers who are authorised to conduct searches under proposed sections 252AA and 252A, as well as the relevant qualifications that must be obtained by authorised officers. In particular, the minister explains that authorised officers receive training in relation to the use of reasonable force, including training of legal responsibilities, duty of care and human rights, mental health awareness, and managing conflict through negotiation. There is also specific training in relation to conducting strip searches.

2.162 The advice from the minister as to the policies and procedures that govern the conduct of strip searches and use of force is relevant to the assessment of whether the proposed expanded search and seizure powers are of sufficient gravity to potentially breach the absolute prohibition on torture, or cruel, inhuman and

degrading treatment or punishment. It is also relevant in determining whether the proposed powers may constitute inhumane treatment contrary to article 10. It is noted that departmental policies and procedures are less stringent than legislation. Departmental policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny or accountability as if the policies governing strip searches (such as that such searches be a measure of last resort) were enshrined in legislation.

2.163 It is also noted that while the minister's response outlines the training curriculum and qualifications required to be obtained by authorised officers undertaking searches or using reasonable force in immigration detention, there is not sufficient information provided as to the substance of the training curriculum (for example, the content and extent of the training relating to 'duty of care and human rights') to determine whether that training is sufficient to meet Australia's obligations under articles 7 and 10 of the ICCPR.

2.164 The minister's response also outlines internal and external oversight mechanisms that govern the treatment of persons detained in immigration detention. The minister explains that internally, the department undertakes an internal audit of the detention control framework and has a 'Detention Assurance' team which works with stakeholders to ensure improvement of immigration detention services and processes. Externally, the Department works with several external bodies (the Minister's Council on Asylum Seekers and Detention, the Commonwealth Ombudsman, the Australian Human Rights Commission and the Australian Red Cross) to provide for regular access to immigration detention facilities to allow for review of the management of the facilities. The minister also provides the following information relating to complaints management processes available to detainees:

> Complaints and feedback are integral to the continuous improvement process for the Department and its contractors. Complaints might come from a number of sources, including detainees, visitors, departmental staff and contractors.
>
> Detainees have a right to lodge a complaint or provide feedback on any aspect of their immigration detention without hindrance or fear of reprisal. To that end, the FDSP is required to have in place a complaints management system to manage complaints or feedback from detainees as well as members from the community and other stakeholders.
>
> Detainees are also able to make complaints directly to the Commonwealth Ombudsman, the Australian Human Rights Commission, the police and state / territory child welfare authorities.
>
> All complaints are investigated and a written response provided to the complainant.

2.165 These internal and external mechanisms offer a degree of oversight and access to review for persons subject to the new search and seizure powers or use of

force provisions in the bill. It is noted, however, that these mechanisms may not be sufficient for the purpose of ensuring compliance with the prohibition on torture, cruel, inhuman and degrading treatment, particularly where the oversight mechanisms are internal and discretionary or administrative, and taken in the context of the broadened power to conduct strip searches or use force in the proposed law. The UN human rights committee has held that complaints against maltreatment must be investigated promptly and impartially by competent authorities,[41] that compensation must be available to victims of such treatment, and any perpetrators of such treatment be appropriately punished.[42] It is unclear that the policies meet these standards. This raises a further concern that there may not be adequate protection of the right to an effective remedy for violations of human rights. In the absence of legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force (including compensation for any mistreatment), there remains a risk that the exercise of the proposed powers may be incompatible with the prohibition on torture, or cruel, inhuman and degrading treatment or punishment or may constitute inhumane treatment of persons in detention.

Committee response

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

2.167 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the use of force and/or restraint must not be excessive) are contained in departmental policies rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with the prohibition on torture, cruel, inhuman and degrading treatment and which may constitute inhumane treatment of persons in detention.

2.168 It is also unclear that the available mechanisms to investigate complaints of mistreatment and provide remedies are sufficient to meet the standards required under international human rights law.

2.169 The committee recommends that the additional departmental safeguards governing the use of force and search and seizure powers that are currently included in departmental policy be included in the Migration Act.

41 *Kalamiotis v Cyprus,* UNHRC No. 1486/06 [7.3].

42 See *Guridi v Spain,* CAT 212/02 [6.6]-[6.8].

Compatibility of the measures with the right to bodily integrity

2.170 The right to privacy extends to protecting a person's bodily integrity. Body searches, and in particular strip searches, are an invasive procedure and may violate a person's legitimate expectation of privacy. The initial analysis assessed that 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.[43]

2.171 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.

2.172 As noted at [2.111] 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'.[44] 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 [2.153] above.

2.173 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, the initial analysis noted that 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).

43 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].

44 SOC 25.

This raised concerns as to whether this aspect of the bill is the least rights restrictive option available.

2.174 It was 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[45]), 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'.[46] The statement of compatibility does not explain what 'any other information' may entail.

2.175 The committee therefore sought 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.

Minister's response

2.176 In response to the committee's inquiries in this regard, the minister's response states:

> For the same reasons noted in the response to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the Government is of the view that the limitation on the right to bodily integrity is proportionate. The power to conduct a strip search currently exists under section 252A of the Migration Act and importantly, strip searches conducted under section 252A will remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that 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 be conducted by an authorised officer of the same sex as the detainee
> - must not be conducted on a detainee who is under 10
> - must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs

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

46 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).

- 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.

2.177 As noted in the initial analysis and above in relation to the prohibition on torture, cruel, inhuman and degrading treatment or punishment, while section 252A of the Migration Act contains a number of safeguards, concerns remain in particular that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort) are only addressed as matters of departmental policy rather than as a safeguard in the legislation. Concerns remain, therefore, that the measure is not the least rights restrictive measure and may be exercised in such a way that is incompatible with the right to bodily integrity.

2.178 It is also noted that the minister has not specifically addressed the committee's concerns raised in the initial analysis that the bases on which an officer may form a suspicion on reasonable grounds that a person may be in possession of a prohibited thing may not be sufficiently circumscribed. As noted in the initial analysis, in light of the 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, serious concerns remain as to whether this aspect of the bill is a proportionate limitation on the right to privacy.

Committee response

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

2.180 There are serious concerns that the bases upon which an officer may form a suspicion on reasonable grounds that a person may be in possession of a prohibited thing may not be sufficiently circumscribed, and therefore may not be a proportionate limitation on the right to privacy.

2.181 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the use of force and/or restraint must not be excessive) are contained in departmental policies rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with the right to privacy.

2.182 The committee recommends that the additional departmental safeguards governing the use of force and search and seizure powers that are currently included in departmental policy be included in the Migration Act.

Compatibility of the measures with the rights of children

2.183 While the Migration Act prohibits strip searches of children under the age of 10,[47] 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.[48] 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,[49] and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.[50]

2.184 The initial analysis identified that, 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, it does not specifically acknowledge that the rights of the child in particular are engaged or limited by the bill.

2.185 The committee therefore sought 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 CRC.

Minister's response

2.186 In relation to the compatibility of the measure with the rights of the child, the minister's response states:

> The Government has made significant efforts to ensure children are no longer in immigration detention. The Government is of the view that the amended search and seizure powers, with their associated internal and external oversight mechanisms are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child. The amended search and seizure powers seek to reduce the risk to the health, safety and security of persons in the facility, or the order of the facility and complements the strip search powers currently in the Act.
>
> While the power to strip search a person between 10 and 18 years of age remains, the search can only occur by power of a Magistrate. It is clearly stated in departmental operating procedures that strip searches are a

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

48 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).

49 Article 37(a).

50 Article 37(c).

measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures — such as walk-through devices, hand-held scanners or x-rays
- searching — such as a pat down search.

Strip searches under section 252A will also remain subject to rules currently set out at section 252B, which include (but are not limited to) that 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 be conducted by an authorised officer of the same sex as the detainee
- Must not be conducted on a detainee who is under 10
- Must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- 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.

The Department has also developed 'The Child Safeguarding Framework' (the framework) which provides the blueprint for how the Department will continue to build and strengthen its policies, processes and systems to protect children in the delivery of all relevant departmental programmes, and asserts the pre-eminence of 'the best interests of the child' as a key consideration in decision-making processes that affect minors.

The framework clearly establishes the Department's expectations of staff and contracted service providers, who engage, interact and work with children. It outlines high-level actions and strategies that the Department and our contracted service providers will take to provide a safe environment for children and their families within the existing legislative and policy parameters. The policy requires that a departmental officer or contracted service provider must immediately report a child-related incident to their supervisor and the Department's Child Wellbeing Branch, in accordance with local operating procedures and within the relevant departmental system.

2.187 It is noted that there are a number of safeguards included in the Migration Act (such as the requirement that the strip search of a child may only occur by power of a Magistrate) and in departmental policies that are designed to protect the rights

of children in detention who may be subject to the proposed search and seizure powers and proposed use of force powers. However, it is also noted that a number of the safeguards, in particular the requirement that the bests interests of the child be a key consideration in decision-making processes and the requirement that strip searches be undertaken as a measure of last resort, are contained in a departmental framework rather than in legislation. As noted earlier, departmental policies and procedures are less stringent than legislation insofar as such policies can be removed, revoked or amended at any time, and are not subject to the same levels of scrutiny as if the safeguards were enshrined in legislation. Therefore, concerns remain that the proposed search and seizure powers and use of force provisions may be exercised in such a way that is incompatible with children's rights.

Committee response

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

2.189 While there are a number of safeguards in the Migration Act regulating the proposed search and seizure and use of force powers in relation to children, concerns remain that a number of significant safeguards (including the requirement that strip searches only be conducted as a matter of last resort and that the best interests of the child be a key consideration in the decision-making process) are contained in departmental policies and frameworks rather than in legislation. There is therefore a risk that the proposed powers may be exercised in a way that is incompatible with children's rights.

2.190 The committee recommends that the additional safeguards governing the use of force and search and seizure powers on children that are currently included in departmental policy and the Child Safeguarding Framework be included in the Migration Act.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017 [F2017L01353]; and
- Social Security (Administration) (Recognised State/Territory Authority – Northern Territory Department of Health) Determination 2017 [F2017L01371].

3.2 The committee continues to defer its consideration of the following legislation:

- Federal Financial Relations (National Partnership Payments) Determination No. 123 (August 2017) [F2017L01143]; and
- Federal Financial Relations (National Partnership Payments) Determination No. 122 (July 2017) [F2017L01148].

Appendix 2

Short guide to human rights

4.1 The following guide contains short descriptions of human rights regularly considered by the committee. State parties to the seven principal human rights treaties are under a binding obligation to respect, protect and promote each of these rights. For more detailed descriptions please refer to the committee's *Guide to human rights*.[1]

4.2 Some human rights obligations are absolute under international law, that is, a state cannot lawfully limit the enjoyment of an absolute right in any circumstances. The prohibition on slavery is an example. However, in relation to most human rights, a necessary and proportionate limitation on the enjoyment of a right may be justified under international law. For further information regarding when limitations on rights are permissible, please refer to the committee's *Guidance Note 1* (see Appendix 4).[2]

Right to life

*Article 6 of the International Covenant on Civil and Political Rights (**ICCPR**); and article 1 of the Second Optional Protocol to the ICCPR*

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [4.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

4.5 The right to life requires there to be an effective official investigation into deaths resulting from state use of force and where the state has failed to protect life. Such an investigation must:

- be brought by the state in good faith and on its own initiative;
- be carried out promptly;

1 Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015).

2 Parliamentary Joint Committee on Human Rights, Guidance Note 1 (December 2014).

- be independent and impartial; and
- involve the family of the deceased, and allow the family access to all information relevant to the investigation.

Prohibition against torture, cruel, inhuman or degrading treatment

*Article 7 of the ICCPR; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)*

4.6 The prohibition against torture, cruel, inhuman or degrading treatment or punishment is absolute. This means that torture or cruel, inhuman or degrading treatment or punishment is not permissible under any circumstances.

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [4.9] to [4.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [4.18]).

Non-refoulement obligations

Article 3 of the CAT; articles 2, 6(1) and 7 of the ICCPR; and Second Optional Protocol to the ICCPR

4.9 Non-refoulement obligations are absolute and may not be subject to any limitations.

4.10 Australia has non-refoulement obligations under both the ICCPR and the CAT, as well as under the Convention Relating to the Status of Refugees and its Protocol (**Refugee Convention**). This means that Australia must not under any circumstances return a person (including a person who is not a refugee) to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

4.11 Effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to complying with non-refoulement obligations.

Prohibition against slavery and forced labour

Article 8 of the ICCPR

4.12 The prohibition against slavery, servitude and forced labour is a fundamental and absolute human right. This means that slavery and forced labour are not permissible under any circumstances.

4.13 The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another person and subjecting them to 'slavery-like' conditions.

4.14 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work that they have not voluntarily consented to, but which they do because of either physical or psychological threats. The prohibition does not include lawful work required of prisoners or those in the military; work required during an emergency; or work or service that is a part of normal civic obligations (for example, jury service).

4.15 The state must not subject anyone to slavery or forced labour, and ensure adequate laws and measures are in place to prevent individuals or companies from subjecting people to such treatment (for example, laws and measures to prevent trafficking).

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

4.16 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty. It applies to all forms of deprivation of liberty, including detention in criminal cases, immigration detention, forced detention in hospital, detention for military discipline and detention to control the spread of contagious diseases. Core elements of this right are:

- the prohibition against arbitrary detention, which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances, and be subject to regular review;
- the right to reasons for arrest or other deprivation of liberty, and to be informed of criminal charge;
- the rights of people detained on a criminal charge, including being promptly brought before a judicial officer to decide if they should continue to be detained, and being tried within a reasonable time or otherwise released (these rights are linked to criminal process rights, discussed below);
- the right to challenge the lawfulness of any form of detention in a court that has the power to order the release of the person, including a right to have

access to legal representation, and to be informed of that right in order to effectively challenge the detention; and

- the right to compensation for unlawful arrest or detention.

Right to security of the person

4.17 The right to security of the person requires the state to take steps to protect people from others interfering with their personal integrity. This includes protecting people who may be subject to violence, death threats, assassination attempts, harassment and intimidation (for example, protecting people from domestic violence).

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [4.6] to [4.8]). The obligations on the state include:

- a prohibition on subjecting a person in detention to inhumane treatment (for example, lengthy solitary confinement or unreasonable restrictions on contact with family and friends);
- monitoring and supervision of places of detention to ensure detainees are treated appropriately;
- instruction and training for officers with authority over people deprived of their liberty;
- complaint and review mechanisms for people deprived of their liberty; and
- adequate medical facilities and health care for people deprived of their liberty, particularly people with disability and pregnant women.

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

- people lawfully within any country have the right to move freely within that country;
- people have the right to leave any country, including the right to obtain travel documents without unreasonable delay; and
- no one can be arbitrarily denied the right to enter or remain in his or her own country.

Right to a fair trial and fair hearing

Articles 14(1) (fair trial and fair hearing), 14(2) (presumption of innocence) and 14(3)-(7) (minimum guarantees) of the ICCPR

4.20 The right to a fair hearing is a fundamental part of the rule of law, procedural fairness and the proper administration of justice. The right provides that all persons are:

- equal before courts and tribunals; and
- entitled to a fair and public hearing before an independent and impartial court or tribunal established by law.

4.21 The right to a fair hearing applies in both criminal and civil proceedings, including whenever rights and obligations are to be determined.

Presumption of innocence

Article 14(2) of the ICCPR

4.22 This specific guarantee protects the right to be presumed innocent until proven guilty of a criminal offence according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt (the committee's *Guidance Note* 2 provides further information on offence provisions (see Appendix 4)).

Minimum guarantees in criminal proceedings

Article 14(2)-(7) of the ICCPR

4.23 These specific guarantees apply when a person has been charged with a criminal offence or are otherwise subject to a penalty which may be considered criminal, and include:

- the presumption of innocence (see above, [4.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [4.6] to [4.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time the act was committed;
- anyone found guilty of a criminal offence cannot be given a heavier penalty than one that applied at the time the offence was committed; and
- if, after an offence is committed, a lighter penalty is introduced into the law, the lighter penalty should apply to the offender. This includes a right to benefit from the retrospective decriminalisation of an offence (if the person is yet to be penalised).

4.25 The prohibition against retrospective criminal laws does not apply to conduct which, at the time it was committed, was recognised under international law as being criminal even if it was not a crime under Australian law (for example, genocide, war crimes and crimes against humanity).

Right to privacy

Article 17 of the ICCPR

4.26 The right to privacy prohibits unlawful or arbitrary interference with a person's private, family, home life or correspondence. It requires the state:

- not to arbitrarily or unlawfully invade a person's privacy; and
- to adopt legislative and other measures to protect people from arbitrary interference with their privacy by others (including corporations).

4.27 The right to privacy contains the following elements:

- respect for private life, including information privacy (for example, respect for private and confidential information and the right to control the storing, use and sharing of personal information);
- the right to personal autonomy and physical and psychological integrity, including respect for reproductive autonomy and autonomy over one's own body (for example, in relation to medical testing);
- the right to respect for individual sexuality (prohibiting regulation of private consensual adult sexual activity);
- the prohibition on unlawful and arbitrary state surveillance;
- respect for the home (prohibiting arbitrary interference with a person's home and workplace including by unlawful surveillance, unlawful entry or arbitrary evictions);

- respect for family life (prohibiting interference with personal family relationships);
- respect for correspondence (prohibiting arbitrary interception or censoring of a person's mail, email and web access), including respect for professional duties of confidentiality; and
- the right to reputation.

Right to protection of the family

*Articles 17 and 23 of the ICCPR; and article 10 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)*

4.28 Under human rights law the family is recognised as the natural and fundamental group unit of society and is therefore entitled to protection. The right requires the state:

- not to arbitrarily or unlawfully interfere in family life; and
- to adopt measures to protect the family, including by funding or supporting bodies that protect the family.

4.29 The right also encompasses:

- the right to marry (with full and free consent) and found a family;
- the right to equality in marriage (for example, laws protecting spouses equally) and protection of any children on divorce;
- protection for new mothers, including maternity leave; and
- family unification.

Right to freedom of thought and religion

Article 18 of the ICCPR

4.30 The right to hold a religious or other belief or opinion is absolute and may not be subject to any limitations.

4.31 However, the right to exercise one's belief may be subject to limitations given its potential impact on others.

4.32 The right to freedom of thought, conscience and religion includes:

- the freedom to choose and change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others (including through wearing religious dress);
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion and to have non-religious beliefs protected (for example, philosophical beliefs such as pacifism or veganism).

4.33 The right to freedom of thought and religion also includes the right of a person not to be coerced in any way that might impair their ability to have or adopt a religion or belief of their own choice. The right to freedom of religion prohibits the state from impairing, through legislative or other measures, a person's freedom of religion; and requires it to take steps to prevent others from coercing persons into following a particular religion or changing their religion.

Right to freedom of opinion and expression

*Articles 19 and 20 of the ICCPR; and article 21 of the Convention on the Rights of Persons with Disabilities (**CRPD**)*

4.34 The right to freedom of opinion is the right to hold opinions without interference. This right is absolute and may not be subject to any limitations.

4.35 The right to freedom of expression relates to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It may be subject to permissible limitations.

Right to freedom of assembly

Article 21 of the ICCPR

4.36 The right to peaceful assembly is the right of people to gather as a group for a specific purpose. The right prevents the state from imposing unreasonable and disproportionate restrictions on assemblies, including:

- unreasonable requirements for advance notification of a peaceful demonstration (although reasonable prior notification requirements are likely to be permissible);
- preventing a peaceful demonstration from going ahead or preventing people from joining a peaceful demonstration;
- stopping or disrupting a peaceful demonstration;
- punishing people for their involvement in a peaceful demonstration or storing personal information on a person simply because of their involvement in a peaceful demonstration; and
- failing to protect participants in a peaceful demonstration from disruption by others.

Right to freedom of association

Article 22 of the ICCPR; and article 8 of the ICESCR

4.37 The right to freedom of association with others is the right to join with others in a group to pursue common interests. This includes the right to join political parties, trade unions, professional and sporting clubs and non-governmental organisations.

4.38 The right prevents the state from imposing unreasonable and disproportionate restrictions on the right to form associations and trade unions, including:

- preventing people from forming or joining an association;
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association;
- punishing people for their membership of a group; and
- protecting the right to strike and collectively bargain.

4.39 Limitations on the right are not permissible if they are inconsistent with the guarantees of freedom of association and the right to organise as contained in the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87).

Right to take part in public affairs

Article 25 of the ICCPR

4.40 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service. Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly.

4.41 The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government.

Right to equality and non-discrimination

*Articles 2, 3 and 26 of the ICCPR; articles 2 and 3 of the ICESCR; International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**); Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); CRPD; and article 2 of the Convention on the Rights of the Child (**CRC**)*

4.42 The right to equality and non-discrimination is a fundamental human right that is essential to the protection and respect of all human rights. The human rights treaties provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled to the equal and non-discriminatory protection of the law.

4.43 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a

discriminatory effect on the enjoyment of rights (indirect discrimination).[3] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.[4]

4.44 The right to equality and non-discrimination requires that the state:

- ensure all laws are non-discriminatory and are enforced in a non-discriminatory way;
- ensure all laws are applied in a non-discriminatory and non-arbitrary manner (equality before the law);
- have laws and measures in place to ensure that people are not subjected to discrimination by others (for example, in areas such as employment, education and the provision of goods and services); and
- take non-legal measures to tackle discrimination, including through education.

Rights of the child

CRC

4.45 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the CRC. All children under the age of 18 years are guaranteed these rights, which include:

- the right to develop to the fullest;
- the right to protection from harmful influences, abuse and exploitation;
- family rights; and
- the right to access health care, education and services that meet their needs.

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

4.46 Under the CRC, states are required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires active measures to protect children's rights and promote their survival, growth and wellbeing, as well as measures to support and assist parents and others who have

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

4 Althammer v Austria HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [4.29]).

Right of the child to be heard in judicial and administrative proceedings

Article 12 of the CRC

4.48 The right of the child to be heard in judicial and administrative proceedings provides that states assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting them. The views of the child must be given due weight in accordance with their age and maturity.

4.49 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body.

Right to nationality

Articles 7 and 8 of the CRC; and article 24(3) of the ICCPR

4.50 The right to nationality provides that every child has the right to acquire a nationality. Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. The CRC also provides that children have the right to preserve their identity, including their nationality, without unlawful interference.

4.51 This is consistent with Australia's obligations under the Convention on the Reduction of Statelessness 1961, which requires Australia to grant its nationality to a person born in its territory who would otherwise be stateless, and not to deprive a person of their nationality if it would render the person stateless.

Right to self-determination

Article 1 of the ICESCR; and article 1 of the ICCPR

4.52 The right to self-determination includes the entitlement of peoples to have control over their destiny and to be treated respectfully. The right is generally understood as accruing to 'peoples', and includes peoples being free to pursue their economic, social and cultural development. There are two aspects of the meaning of self-determination under international law:

- that the people of a country have the right not to be subjected to external domination and exploitation and have the right to determine their own political status (most commonly seen in relation to colonised states); and

- that groups within a country, such as those with a common racial or cultural identity, particularly Indigenous people, have the right to a level of internal self-determination.

4.53 Accordingly, it is important that individuals and groups, particularly Aboriginal and Torres Strait Islander peoples, should be consulted about decisions likely to affect them. This includes ensuring that they have the opportunity to participate in the making of such decisions through the processes of democratic government, and are able to exercise meaningful control over their affairs.

Rights to and at work

Articles 6(1), 7 and 8 of the ICESCR

Right to work

4.54 The right to work is the right of all people to have the opportunity to gain their living through decent work they freely choose, allowing them to live in dignity. It provides:

- that everyone must be able to freely accept or choose their work, including that a person must not be forced in any way to engage in employment;
- a right not to be unfairly deprived of work, including minimum due process rights if employment is to be terminated; and
- that there is a system of protection guaranteeing access to employment.

Right to just and favourable conditions of work

4.55 The right to just and favourable conditions of work provides that all workers have the right to just and favourable conditions of work, particularly adequate and fair remuneration, safe working conditions, and the right to join trade unions.

Right to social security

Article 9 of the ICESCR

4.56 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living and the right to health.

4.57 Access to social security is required when a person lacks access to other income and is left with insufficient means to access health care and support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;

- accessible (providing universal coverage without discrimination; and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

Right to an adequate standard of living

Article 11 of the ICESCR

4.58 The right to an adequate standard of living requires that the state take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

Right to health

Article 12 of the ICESCR

4.59 The right to health is the right to enjoy the highest attainable standard of physical and mental health. It is a right to have access to adequate health care (including reproductive and sexual healthcare) as well as to live in conditions that promote a healthy life (such as access to safe drinking water, housing, food and a healthy environment).

Right to education

Articles 13 and 14 of the ICESCR; and article 28 of the CRC

4.60 This right recognises the right of everyone to education. It recognises that education must be directed to the full development of the human personality and sense of dignity, and to strengthening respect for human rights and fundamental freedoms. It requires that primary education shall be compulsorily and freely available to all; and the progressive introduction of free secondary and higher education.

Right to culture

Article 15 of the ICESCR; and article 27 of the ICCPR

4.61 The right to culture provides that all people have the right to benefit from and take part in cultural life. The right also includes the right of everyone to benefit from scientific progress; and protection of the moral and material interests of the authors of scientific, literary or artistic productions.

4.62 Individuals belonging to minority groups have additional protections to enjoy their own culture, religion and language. The right applies to people who belong to minority groups in a state sharing a common culture, religion and/or language.

Right to an effective remedy

Article 2 of the ICCPR

4.63 The right to an effective remedy requires states to ensure access to an effective remedy for violations of human rights. States are required to establish

appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, states may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

4.64 States are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations. Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of persons including, and particularly, children.

Appendix 3

Correspondence

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MS17-002503

Mr Ian Goodenough
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough Ian

I thank the Parliamentary Joint Committee on Human Rights for its consideration of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the Bill).

The Bill introduces important measures to further protect the community from the dangers of child sex offenders by targeting all aspects of the child sex offender cycle—from commission of the offence through to bail, sentencing and post –release options.

I am pleased to offer the response at **Attachment A** to the questions raised by the Committee in its *Report 11 of 2017*.

The relevant adviser for this matter in my office is Talitha Try who can be contacted on 02 6277 7290.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Response to a request from the Parliamentary Joint Committee on Human Rights for information in relation to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017

Mandatory minimum sentencing

How mandatory minimum sentencing is effective to achieve its stated objective

The introduction of mandatory minimum sentencing for the most serious Commonwealth child sex offences and for repeat child sex offenders is central to achieving the Bill's objectives of protecting the community, adequately reflecting the harm inflicted on victims and ensuring that sexual predators receive a sentence that is commensurate to the severity of their offences. Addressing the current disparity between the seriousness of child sex offending and the lenient sentences handed down by courts is at the core of the Bill. The measures, including mandatory minimum sentences, advance the principles underpinning the Convention on the Rights of the Child and implement obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography to criminalise child sexual abuse and apply appropriate penalties that reflect the grave nature of those crimes. These measures are designed to protect the rights of children, in particular the right of children to be protected from sexual abuse.

The Government considers that mandatory minimum sentences should be used only rarely and reserved for the most serious offences. Mandatory minimums are already in place for terrorist offenders and people smugglers, and the Government is firmly of the view that—with the safeguards set out in the Bill—the application of mandatory minimum sentences to offenders who commit serious or repeated sexual crimes against innocent children is reasonable, necessary and proportionate.

Ensuring that perpetrators are adequately punished not only acknowledges the significant trauma caused by the offending behaviour, but also recognises the impact on the community if the individual reoffends. The Bill mitigates this risk by ensuring that serious child sex offenders serve a meaningful period of time in custody. This means offenders will be punished appropriately, reflecting the seriousness of their crimes. This also means that offenders will have access to targeted rehabilitation and treatment programs in prison, ultimately reducing the risks those offenders pose to the community. Importantly, time that a sex offender spends in prison is time they cannot offend in the community.

Whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:

why the exercise of judicial discretion is inappropriate or ineffective

Despite current Commonwealth child sex offences carrying significant maximum penalties, the courts are not handing down sentences that reflect the gravity of the offending, or the harm suffered by victims. Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning the majority of convicted offenders

are released into the community. Of the 652 Commonwealth child sex offences committed since 2012, only 58.7% of charges resulted in a custodial sentence. The most common length of imprisonment for an offence was 18 months and the most common period of actual imprisonment was just 6 months.

Current sentencing practice is inadequate and out of step with community expectations. These statistics demonstrate the clear need for legislation to stand as a yardstick for the courts in applying more appropriate penalties for Commonwealth child sex offences. The appropriateness of Parliament setting minimum sentences in addition to maximum penalties has been upheld by the High Court.

whether less rights restrictive alternatives are reasonably available
The mandatory minimum sentencing scheme provides the courts with enough discretion to enable individual circumstances to be taken into account while still ensuring that sentences for child sex offenders reflect the serious and heinous nature of the crimes.

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 safety and protection of children is the Government's paramount concern. Individuals convicted of serious child sex offences or who are repeat offenders deserve to spend time in jail for their offences. This protects the community by ensuring that these offenders receive significant penalties and that they are removed from the streets.

The Government understands that sentencing decisions involve the careful analysis of numerous factors and circumstances. That is why the mandatory minimum sentencing scheme includes mechanisms for courts to retain appropriate discretion in determining the most suitable sentence in each individual case.

Additionally, under Commonwealth law, courts have the discretion to determine the appropriate treatment of people with cognitive disability or mental impairment in the criminal justice system. Mental impairment is defined in the Criminal Code Act 1995 (Criminal Code) as including senility, intellectual disability, mental illness, brain damage and severe personality disorder. These protections have not been limited by the Bill.

the scope of judicial discretion maintained by the measures
The mandatory minimum sentencing scheme introduced by the Bill limits judicial discretion, but does not remove it. A court is able to take into account a guilty plea or an offender's cooperation with law enforcement agencies and to discount the minimum penalty by up to 25% respectively. Courts will also retain the ability to impose a sentence of a severity appropriate in all the circumstances of the offence through exercising judicial discretion over the length of the non-parole period. This means that courts will be able to take into account individual circumstances and any mitigating factors in considering the most suitable non-parole period.

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

The introduction of the mandatory minimum sentencing scheme provides direction to the courts in relation to sentences for serious child sex offences. Importantly, the mandatory minimums are not intended to be seen as a suggested penalty but rather as a floor for penalties. The courts should exercise their discretion with regard to the both the minimum and maximum penalty for an offence and determine a sentence of a severity appropriate in all the circumstances of the case.

With the exception of a limited number of offences (such as terrorism, treason and espionage), the Crimes Act 1914 does not prescribe how a non-parole period should be determined. Furthermore, there is no common law principle requiring a judicially determined norm or starting point, expressed as a percentage of the head sentence or otherwise, for setting the non-parole period.[1] As such, there is no need to amend the Bill in the manner suggested.

Whether mandatory minimum sentencing is compatible with the right to have a sentence reviewed by a higher court under Article 14(5) of the ICCPR

The mandatory minimum sentencing regime set out in the Bill does not impact on the right to have a sentence reviewed by a higher court. All avenues of appeal remain available. Nor do the reforms impact the current requirement for the courts to consider all the circumstances, including the sentencing factors listed in section 16A of the Crimes Act 1914, when fixing a non-parole period. Additionally, although the Bill introduces mandatory minimums for certain child sex offences in respect of the head sentence, the courts will exercise discretion over the non-parole period. It is therefore not the case that appellate courts would have nothing to review.

Conditional release of offenders after conviction

Whether the presumption in favour of a term of actual imprisonment is effective to achieve its stated objective

Yes, as the intention is to increase imprisonment of child sex offenders. Additionally, the presumption in favour of Commonwealth child sex offenders serving an actual term of imprisonment is in line with community expectations that offenders serve a period of imprisonment for abusing children. The presumption ensures community protection and reduces risk of reoffending through imprisonment and will also allow greater time for rehabilitation programs to be undertaken while in custody.

The presumption will provide clear guidance to courts for custodial sentences to be applied to predators who abuse children.

[1] Hili v The Queen; Jones v The Queen [2010] HCA 45

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
As discussed above, the issuing of wholly suspended sentences for child sex offenders has resulted in sentences that do not adequately reflect the gravity of child sex offending. Introducing a presumption in favour of imprisonment allows courts to consider all the circumstances when setting the pre-release period under a recognizance release order.

whether less rights restrictive alternatives are reasonably available
This measure provides the courts with enough discretion in setting the pre-release period under a recognizance order to enable individual circumstances to be taken into account while still ensuring that sentencing of child sex offenders is of a level that reflects the serious and heinous nature of the crimes.

whether there are 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
Please refer to the response above which equally applies in this instance.

what is anticipated to constitute 'exceptional circumstances' for the purpose of making a recognizance order and what is the scope of judicial discretion maintained by the measure
'Exceptional circumstances' was deliberately not defined in the Bill. Given the variable circumstances which may mitigate against or support a sentence of imprisonment, it would impose practical constraints if 'exceptional circumstances' was defined. Firstly, the phrase is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute 'exceptional circumstances', even if stated in broad terms, will have the tendency to restrict, rather than expand, the factors which might satisfy the requirements for 'exceptional circumstances'.

Presumption against bail

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 and how the measure is effective to achieve its stated objectives

Not all child sex offences are subject to the presumption against bail. The measure only applies to offences that attract a mandatory minimum penalty, namely the most serious child sex offences and repeat offenders. The presumption against bail for this cohort of the most serious child sex offenders is a necessary and effective crime prevention measure for a crime that targets our children.

Whether the limitation on the right to release pending trial under Article 9(3) of the ICCPR 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

The measure does not remove the current balancing exercise undertaken by bail authorities and the courts. Rather, the measure puts the responsibility on a person charged with a child sex offence to demonstrate to the court that circumstances exist to grant bail. It is appropriate that child sex offenders take responsibility for explaining to the court why they do not pose a risk if released on bail. This is particularly the case for Commonwealth child sex offences, which often concern emerging technologies that are often difficult to detect.

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 Bill includes matters that a bail authority must have regard to in determining whether circumstances exist to grant bail to a person charged with a serious child sex offence or who is a repeat child sex offender, including considerations relating to rehabilitation. However, this on its own has not proven to be sufficient to protect the community.

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 presumption against bail is rebuttable and provides judicial discretion determining whether a person's risk on bail can be mitigated through appropriate conditions which make the granting of bail appropriate in the circumstances. Flexibility is provided by the open nature of the presumption, which is not limited to specific criteria.

advice as to the threshold for rebuttal of the presumption against bail including what is likely to constitute 'exceptional circumstances' to justify bail

The Bill does not require there to be 'exceptional circumstances' to justify bail. Rather, the person charged or convicted of the child sex offence will need to satisfy the court that circumstances exist to grant bail. The presumption was deliberately not defined by reference to specific criteria to ensure that appropriate discretion is retained and that the courts can take individual circumstances into account.

Power to restrict information provided to offenders with respect to national security grounds

How the measure is effective to achieve its stated objective

The Bill introduces a provision to protect the security of reports, documents and information obtained for the purposes of informing parole decisions and ensures that information that could prejudice national security is not disclosed as a result of the operation of Part 1B of the Crimes Act.

It is in the public interest to restrict certain information used as part of the decision to release an offender from custody. For example, information may be provided to the Attorney-General's Department which relates to ongoing intelligence matters or investigations. The release of that information to the offender could jeopardise not only ongoing law enforcement matters but put the

community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.

A person sentenced to imprisonment does not have a right to be granted parole. Parole decisions are made giving consideration to the protection of the community, the rehabilitation of the offender and their reintegration into the community. In practice, the measures are likely to only apply to offenders with terrorist links. It would be a perverse outcome if one of the fundamental pillars of parole considerations—the protection of the community—could be undermined because national security information that informed a parole refusal had to be disclosed to the offender in the notice of refusal.

Whether the limitation on the right to a fair hearing under Article 14 of the ICCPR is 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 reforms do not prevent the Attorney-General from providing a person with an overview of the information considered as part of making a parole decision. Such an overview could be given providing the information set out did not prejudice national security. All Commonwealth parole decisions, including those which are refused on national security grounds, are subject to judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

the absence of any standard against which the need for confidentiality of information is independently assessed or reviewed and whether a decision to withhold information on the basis that it prejudices national security could be based on objective criteria

The agency that has provided the information–such as the AFP or ASIO –will advise the Attorney-General or a delegate as to whether information is likely to prejudice national security. The Attorney-General would make his assessment based on this advice and the circumstances of the case.

whether there are less rights restrictive approaches which are reasonably available

A parole decision is an administrative decision that is made having regard to a range of matters that are listed in section 19ALA of the *Crimes Act 1914*. The decision of the Attorney-General is appealable and subject to review in the Federal Court. Once before a court, the ordinary rules of evidence in relation to a civil proceeding will apply. Proposed section 22B in the Bill is restricted to parole decisions made under Part IB of the *Crimes Act 1914* and will not bind a court reviewing the decision of the Attorney-General.

Reverse burden offence

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.

Items 5 and 27 of Schedule 4 of the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 introduce new offences into the Criminal Code to

criminalise the grooming of a third party. The offences require the prosecution to prove, beyond reasonable doubt:

- the defendant intended to use a carriage service or postal service to transmit a communication or article to a recipient
- the sender did so with the intention of making it easier to procure a child under 16 years of age to engage in sexual activity with:
    - the sender, or
    - a participant who is, or who the sender believes to be, at least 18 years of age; or
    - another person who is, or who the sender believes to be, under 18 years of age, in the presence of the sender or participant who is, or who the sender believes to be, over 18 years of age; and
- the child was under 16, or the sender believed the child was under 16.

Items 7, 8, 28 and 29 of Schedule 4 apply absolute liability to the elements of the offence relating to the age of the child and/or the participant (where relevant). This means that the prosecution will not be required to prove that the defendant knew these elements. Rather, the prosecution will have to demonstrate that the child and/or the participant were in fact under 16 years of age and over 18 years of age respectively when the communication or article was sent.

Items 9 and 30 provide that evidence of representations made to the defendant that a person was under or over a particular age will serve as proof, in absence of evidence to the contrary, that the defendant believed the person to be under or over that age (as the case requires). These provisions offer a potential safeguard for the defendant in leading contradictory evidence as to his or her belief of the age of the child or participant.

The effect of applying absolute liability to these elements is ameliorated by the introduction of specific defences based on the defendant's belief about the child and/or participant's age (items 16, 18, 37 and 39). Section 13.4 and 13.5 of the Criminal Code provide that in the case of a legal burden of proof placed on the defendant, a defendant must discharge the burden on the balance of probabilities. If the defendant does this, it will then be for the prosecution to refute the matter beyond reasonable doubt.

The application of absolute liability, together with the belief about age defences, is consistent with the other grooming offences in the Criminal Code and is appropriate given the intended deterrent effect of these offences. Placing a legal burden of proof on the defendant in relation to belief about age defences is appropriate for these new offences as the defendant is best placed to adduce evidence about his or her belief that the child and/or participant was over the age of 16 and under the age of 18 respectively. The defendant's belief as to these circumstances at the relevant time is a matter peculiarly within his or her knowledge and not readily available to the prosecution.

It is important to note that an offence will still be committed where the defendant believes the child is under the age of 16 years, regardless of the actual circumstances of the offending. This is necessary to accommodate a standard investigatory technique where a law enforcement officer assumes the identity of a fictitious child, interacting with a potential predatory adult and arresting the adult before they have the opportunity to sexually abuse a real child. A person who engages in

conduct to procure a child to engage in sexual activity is not able to escape liability for an offence even if their conduct was not ultimately directed towards an actual child.

The application of absolute liability, together with the belief about age defences, is appropriate as the defendant is best placed to adduce evidence about his or her belief. The defences in the Bill are a reasonable and proportionate way to achieve the intended deterrent effect of these offences.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-003838

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Mr~~ Ian Goodenough

Thank you for your letter of 18 October 2017 in which further information was requested on the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017.

My response to your request is attached.

I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 02/11/17

Parliamentary Joint Committee on Human Rights
Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017

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

Compatibility of the measure with the right to privacy

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).

Response

There are seven key immigration detention values that guide and drive immigration detention policy and procedures. Two of these values articulate that people in detention will be treated fairly and reasonably within the law, and the conditions of detention will ensure the inherent dignity of the human person.

Removing things such as mobile phones from the Immigration Detention Network (IDN) altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees, staff and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics from other detainees. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff.

The proposed amendments provide a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees.

Detainees are afforded a variety of communication channels in private settings within immigration detention facilities. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with the strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are

delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

Safeguards

The Department of Immigration and Border Protection (the Department) uses an intelligence led, risk based approach to focus on mitigating the risks, including security risks, posed by the complex composition of the detention network. The Department has implemented a broad suite of program management initiatives aimed at defining its objectives and associated program requirements, in order to sufficiently identify emerging issues before they impact negatively on the IDN. These initiatives include the development and implementation of a risk management framework designed specifically to identify and counter associated risks. The Onshore Immigration Detention Network Risk Management Framework provides a range of tools, including a centrally administered national risk register that enables a standardised approach to both strategic and operational risk assessment and reporting.

As part of the process of identifying emerging issues, the Department monitors detention population and capacity, incident analysis trends, intelligence reports and other statistics to support assessment of risks and associated decisions, as part of due diligence business processes. Sitting under the national risk framework, tactical risk assessments are also conducted in relation to the implementation of new business policies or procedures.

Prior to making an item a 'prohibited thing' the Minister will need to be satisfied that possession of the thing is prohibited by law in a place or places in Australia; or 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. This satisfaction on the part of the Minister will be informed by intelligence-based briefings from the Department.

As the proposed amendments will enable the Minister to determine, by legislative instrument, prohibited things in relation to immigration detention facilities; the Minister will be able to respond quickly if operational requirements change or as emerging risks are identified. However, as the prohibition is by way of legislative instrument, any decisions by the Minister to prohibit an item will be open to scrutiny by Parliament thus providing an appropriate balance of transparency.

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

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.

Response

As outlined in the previous response, removing things such as mobile phones from the IDN altogether, rather than providing only certain detainees with access, is operationally achievable and the most effective way to mitigate risk. This approach is essential to maintain the safety of all detainees and the order of facilities. It is the least restrictive way to manage the threat that things such as mobile phones pose to the IDN, as any case-by-case or individual-risk-based access results in individuals seeking to obtain these things via trades or being susceptible to standover tactics. The use of mobile phones as a commodity, and to facilitate illegal and antisocial behaviour, has been occurring across the IDN for a number of years, and has increased since Illegal Maritime Arrival detainees have not been permitted mobile phones in detention. This presents serious risks to both detainees and staff. As such, it is view of the Government that prohibiting certain items to all detainees is the only way to implement such a measure without risking the health, safety or security of all persons in the facility. The proposed amendments provide a consistent single-tier policy that mitigates the risks associated with the current two-tier approach to the possession of mobile phones by detainees.

Detainees are able to access a variety of communication avenues to maintain contact with family. These include landline phones, internet, fax, post services and visits from community members. Landline phones, fax and post facilities are available 24 hours a day, seven days a week with no limits on access. Internet is available to detainees through a booking system, generally between the hours of 6 am to 11.59 pm. Each facility has different visiting hours, which are available on the Department's website.

Detainees are not required to lodge a request to use the landline phones, fax or post facilities. The booking system to access the internet is straightforward and there are no delays in this process. The application process for personal visits has a processing time of up to five business days. The application process for visits by legal representatives, agents or consular officials has a processing time of one business day. Visit applications are available via the Facilities and Detainee Services Provider (FDSP) and departmental websites.

Landline to landline calls are free of charge. An Individual Allowance Program is in place within detention facilities, allowing detainees to earn up to 60 points per week (one point equals one dollar). Detainees can use these points to 'purchase' phone cards for international and mobile calls, and postage stamps, all of which are charged at standard rates. Use of internet and fax facilities are all free of charge.

Detainees are able to access these communication channels in private settings. Landline phones are typically in private booths and in accommodation areas. Private rooms with phones can also be accessed by detainees. Private rooms for computer and internet use can also be accessed, under appropriate supervision as required. Any faxes received for detainees are treated with strictest confidence, are sealed in an envelope and provided to the detainee on the same day during business hours, or the next day if received after business hours. Any urgent faxes are delivered within four hours of receipt. Private interview rooms can also be used for detainees to meet with legal representatives, agents or any other meeting of a professional nature.

As a result of the extensive nature of the facilities provided to detainees and the availability and manner in which they are provided as detailed above, the Government is of the view that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation and does not amount to arbitrary or unlawful interference with family.

Compatibility of the measure with the right to freedom of expression

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.

Response

As noted in respect to the previous response regarding arbitrary or unlawful interference with family, the Government is of the view that the extensive nature of the facilities provided to detainees, their open availability and the manner in which they are provided ensures that the prohibition of certain items, such as mobile phones in immigration detention facilities is a proportionate limitation on the freedom of expression. The measure is sufficiently circumscribed and the least rights restrictive way to achieve the stated objective.

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

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

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.

Response

What protection provisions exist in the Migration Act?
In relation to the conduct of the searches of persons authorised by section 252, 252AA, 252A and 252G of the *Migration Act 1958* (the Migration Act), there are current provisions and a number of additional protections set out in the amendments that are designed to protect detainees (including those who are victims of torture and trauma) and their property.

It should be noted that the occurrence of strip searches under section 252A are extremely rare. It is also clearly stated in departmental operating procedures that strip searches are a

measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures - such as walk-through devices, hand-held scanners or x-rays
- searching - such as a pat down search.

Current provisions

Current safeguards and protections under the Migration Act will continue in effect. Section 252A of the Migration Act requires authorisation for strip searches for people at least 18 years old to be obtained from the Secretary of the Department or the Australian Border Force Commissioner (or a Senior Executive Service Band 3 level delegate) prior to a strip search being undertaken. For people between 10 and 18 years old, magistrate orders are required. Strip searches under section 252A will also remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that 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 be conducted by an authorised officer of the same sex as the detainee
- must not be conducted on a detainee who is under 10
- must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- 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 Bill seeks to introduce a number of provisions to protect detainees and their property. Section 252BA will provide additional protections in relation to detainees and their property to ensure that searches of immigration detention facilities under section 252BA do not subject the person to disproportionate force or indignity.

The use of detector dogs will also be subject to a number of additional protections. For example, section 252AA(3A) of the Bill provides that if an authorised officer uses a dog in conducting a screening procedure under this section, 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.

These amendments will give authorised officers the ability, under the Migration Act, to use highly trained detector dogs to search detainees in immigration detention facilities when conducting a screening procedure, while also ensuring these officers comply with strict conditions to control the dogs and prevent them from touching people.

Detector dogs are specifically trained to find concealed things such as narcotics, and are routinely used at Australian international airports and seaports and mail centres. The dogs are trained to give a passive or "sit" response where they detect something or a pawing or scratching response to areas (but not persons) where things may be hidden. Departmental officers involved in using a dog to conduct a screening procedure will be specifically authorised for the purpose of handling a dog and will have undergone extensive training in handling detector dogs.

Use of Force

In some cases the use of force and/or restraint while in held immigration detention may be necessary in order to achieve lawful and operational outcomes in the IDN.

The Department has developed a set of principles that guide the application of use of force and/or restraint in the immigration detention environment. These principles ensure that any application of use of force or restraint used in immigration detention will not meet the threshold levels of severity of harm so as to be torture or cruel, inhuman or degrading treatment or punishment and are only used as a last resort. The principles set out that:

- conflict resolution through negotiation and de-escalation is, where practicable, to be considered before the use of force and/or restraint is used
- reasonable force and/or restraint should only be used as a measure of last resort
- reasonable force and/or restraint may be used to prevent the detainee inflicting self-injury, injury to others, escaping immigration detention or destruction of property
- reasonable force and/or restraint may only be used for the shortest amount of time possible to the extent that is both lawfully and reasonably necessary. If the management of a detainee can be achieved by other means, force must not be used
- the use of force and/or restraint must not include cruel, inhumane or degrading treatments
- the use of force and/or restraint must not be used for the purposes of punishment
- the excessive use of force and/or restraint is unlawful and must not occur in any circumstances
- the use of excessive force on a detainee may constitute an assault.

It is important to note that all instances where use of force and/or restraint are applied (including any follow-up action), must be reported in accordance with the relevant reporting protocols.

Training

Officers authorised to carry out searches under sections 252AA and 252A will be subject to strict training and qualification requirements whether they are departmental officers, contracted staff, or any other person appointed as an authorised officer.

The Department currently expects and has stipulated in the FDSP contract that all service provider personnel are trained and instructed according to the specified contractual obligations. In addition, officers who manage security at an immigration detention facility, are required to hold at least a Certificate Level IV in Security Operations or Technical Security or equivalent and will have acquired at least five years of experience in managing security.

For authorised officers responsible for the general safety of detainees the Department requires that they must hold at least a Certificate Level II in Security Operations or equivalent or obtain a Certificate Level II in Security Operations within six months of commencement. The Department requires:

- the successful completion of the FDSP's mandatory induction training, which leads to staff being awarded the Certificate II in Security Operations
- that no officer will be placed in an immigration detention facility without this essential qualification.

The Certificate II in Security Operations includes the competency based unit 'CPPSEC2004B – Respond to security risks situations', the curriculum of which covers the knowledge and skills required for an authorised officer to use reasonable force. Security accreditation must be provided by a Registered Training Organisation and be delivered by a Level IV accredited trainer. The current FDSP is a Registered Training Organisation. Tier 1 and Tier 2 FDSP officers are also trained in 'CPPSEC2017A – Protect Self and Others using Basic Defensive Techniques', which is included as part of the required refresher training. Competency requires demonstration of ability to:

- apply basic defensive techniques in a security risk situation
- use basic lawful defensive techniques to protect the safety of the individual and others.

This training forms part of the licensing requirements for persons engaged in security operations in those States and Territories where these are regulated activities. This training, while not formally equivalent to police training, is similar to police and corrections training in so far as it includes control holds and other defensive measures, but training in strikes or use of impact tools is not required nor provided.

The FDSP contract requires a biennial rolling program of refresher training to ensure staff maintain their qualifications in the use of reasonable force. In addition, all authorised officers will attend regular refresher training on the use of reasonable force in immigration detention facilities, the curriculum of which includes:

- legal responsibilities
- duty of care and human rights
- cultural awareness
- occupational health and safety
- mental health awareness
- managing conflict through negotiation
- de-escalation techniques.

In addition to these training requirement, any individual who is appointed as an authorised officer for the purposes of conducting a strip search under section 252A must satisfy the minimum training and qualification requirements, which include training in the following areas:

- cultural awareness
- the grounds for conducting a strip search
- the pre-conditions for a strip search
- the role of officers involved in conducting a strip search
- the procedures for conducting a strip search
- the procedures relating to items retained during a strip search
- record keeping
- reporting.

As outlined in the Explanatory Memorandum to the Bill, officers authorised to use dogs for searches under section 252AA and 252A will also be required to undergo specific training in relation to handling dogs to ensure they keep the dog is prevented from touching any person and is kept under control for the duration of the search.

Oversight and assurance processes
There are laws, policies, rules and practices that govern the treatment of people in the IDN, and the length and conditions of immigration detention are subject to regular internal and external review.

Internal
Internal oversight processes help to care for and protect people in immigration detention and to maintain the health, safety and wellbeing of all detainees.

The Department has a number of internal assurance processes, including the Detention Assurance team and Internal Audit.

The Detention Assurance team is part of the Department's corporate Integrity, Security and Assurance function, and operates independently of immigration detention management. Detention Assurance works with stakeholders to ensure continual improvement in our immigration detention processes. It strengthens assurance and integrity in the management of detention services, including the operations delivered by Australian Border Force.

The work of Detention Assurance forms part of the Department's broader assurance activities, and provides confidence that the Department is able to achieve its strategic, operational and tactical objectives fairly and effectively. The Detention Assurance function reviews allegations or incidents within the IDN.

In addition to the work of Detention Assurance, internal audits are undertaken to determine the effectiveness of the detention control framework and decision-making processes and reported to the Department's audit committee.

External
The Department, including the Australian Border Force, works with independent external bodies, the Minister's Council on Asylum Seekers and Detention (MCASD), the Commonwealth Ombudsman and the Australian Human Rights Commission, to provide regular access to immigration detention facilities to allow for review of the management of these facilities.

The members of MCASD are drawn from the community and appointed by the Minister for Immigration and Border Protection, for their expertise. The Council gives independent advice to the Minister about policies, processes, services and programmes relating to asylum seekers and immigration detention. MCASD conducts regular meetings at immigration detention facilities with detainees and members of the community and reports back to the Minister and the Department.

The Commonwealth Ombudsman undertakes regular oversight inspections of immigration detention facilities and provides feedback to the Department about any areas of concern they identify as well as providing suggested improvements.

The Australian Human Rights Commission investigates and resolves complaints about alleged breaches of human rights in immigration detention. If a complaint is not resolved, the President of the Australian Human Rights Commission may decide to hold a public hearing to ascertain whether a breach of human rights has occurred. Should the President be satisfied that a breach of human rights has occurred, it will be reported to the Federal Attorney-General. In this report, the President can make recommendations about how to resolve the issues raised. This report is tabled in Parliament.

Immigration detainees are advised about these agencies during their induction program when they arrive at an immigration detention facility and advised about how to contact them.

The Australian Red Cross also visits immigration detention facilities. They monitor the conditions of detention and the treatment of people within the network, and offer services to restore family links.

Complaints management processes
Complaints and feedback are integral to the continuous improvement process for the Department and its contractors. Complaints might come from a number of sources, including detainees, visitors, departmental staff and contractors.

Detainees have a right to lodge a complaint or provide feedback on any aspect of their immigration detention without hindrance or fear of reprisal. To that end, the FDSP is required to have in place a complaints management system to manage complaints or feedback from detainees as well as members from the community and other stakeholders.

Detainees are also able to make complaints directly to the Commonwealth Ombudsman, the Australian Human Rights Commission, the police and state / territory child welfare authorities.

All complaints are investigated and a written response provided to the complainant.

The Government is committed to ensuring that all people in administrative immigration detention are not subjected to harsh conditions, are treated fairly and reasonably within the law, and are provided with a safe and secure environment.

The Government is of view that this balance of internal and external oversight and complaint mechanisms ensures the measure is compatible with the prohibition on torture, or cruel, inhuman and degrading treatment or punishment

Compatibility of the measures with the right to bodily integrity

Committee comment
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.

Response

For the same reasons noted in the response to the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the Government is of the view that the limitation on the right to bodily integrity is proportionate. The power to conduct a strip search currently exists under section 252A of the Migration Act and importantly, strip searches conducted under section 252A will remain subject to rules currently set out at section 252B of the Migration Act, which include (but are not limited to) that 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 be conducted by an authorised officer of the same sex as the detainee
- must not be conducted on a detainee who is under 10

- must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs
- 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.

Compatibility of the measures with the rights of children

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

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.

Response

The Government has made significant efforts to ensure children are no longer in immigration detention. The Government is of the view that the amended search and seizure powers, with their associated internal and external oversight mechanisms are compatible with the rights of the child, in particular articles 16 and 37 of the Convention on the Rights of the Child. The amended search and seizure powers seek to reduce the risk to the health, safety and security of persons in the facility, or the order of the facility and complements the strip search powers currently in the Act.

While the power to strip search a person between 10 and 18 years of age remains, the search can only occur by power of a Magistrate. It is clearly stated in departmental operating procedures that strip searches are a measure of last resort, should be applied only when other less intrusive measures have proven inconclusive or insufficient and detainees must always be treated with the utmost respect and dignity when being strip searched. Other less intrusive measures include:

- screening procedures - such as walk-through devices, hand-held scanners or x-rays
- searching - such as a pat down search.

Strip searches under section 252A will also remain subject to rules currently set out at section 252B, which include (but are not limited to) that 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 be conducted by an authorised officer of the same sex as the detainee
- **Must not be conducted on a detainee who is under 10**
- **Must be conducted in the presence of an adult or person representing the detainee's interests, if the detainee is between the ages of 10 and 18 or is incapable of managing his or her affairs**
- 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.

The Department has also developed 'The Child Safeguarding Framework' (the framework) which provides the blueprint for how the Department will continue to build and strengthen its policies, processes and systems to protect children in the delivery of all relevant departmental programmes, and asserts the pre-eminence of 'the best interests of the child' as a key consideration in decision-making processes that affect minors.

The framework clearly establishes the Department's expectations of staff and contracted service providers, who engage, interact and work with children. It outlines high-level actions and strategies that the Department and our contracted service providers will take to provide a safe environment for children and their families within the existing legislative and policy parameters. The policy requires that a departmental officer or contracted service provider must immediately report a child-related incident to their supervisor and the Department's Child Wellbeing Branch, in accordance with local operating procedures and within the relevant departmental system.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

This note sets out the committee's approach to human rights assessments and its requirements for statements of compatibility. It is designed to assist legislation proponents in the preparation of statements of compatibility.

Background

Australia's human rights obligations

Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* as the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. These treaties are:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia has voluntarily accepted obligations under these seven core UN human rights treaties. Under international law it is the state that has an obligation to ensure that all persons enjoy human rights. Australia's obligations under international human rights law are threefold:

- **to respect** – requiring government not to interfere with or limit human rights;
- **to protect** – requiring government to take measures to prevent others (for example individuals or corporations) from interfering with human rights;
- **to fulfil** – requiring government to take positive measures to fully realise human rights.

Where a person's rights have been breached, there is an obligation to ensure accessible and effective remedies are available to that person.

Australia's human rights obligations apply to all people subject to Australia's jurisdiction, regardless of whether they are Australian citizens. This means Australia owes human rights obligations to everyone in Australia, as well as to persons outside Australia where Australia is exercising effective control over them, or they are otherwise under Australia’s jurisdiction.

The treaties confer rights on individuals and groups of individuals and not companies or other incorporated bodies.

Civil and political rights

Australia is under an obligation to respect, protect and fulfil its obligations in relation to all civil and political rights. It is generally accepted that most civil and political rights are capable of immediate realisation.

Economic, social and cultural rights

Australia is also under an obligation to respect, protect and fulfil economic, social and cultural rights. However, there is some flexibility allowed in the implementation of these rights. This is the obligation of progressive realisation, which recognises that the full realisation of economic, social and cultural rights may be achieved progressively. Nevertheless, there are some obligations in relation to economic, social and cultural rights which have immediate effect. These include the obligation to ensure that people enjoy economic, social and cultural rights without discrimination.

Limiting a human right

It is a general principle of international human rights law that the rights protected by the human rights treaties are to be interpreted generously and limitations narrowly. Nevertheless, international human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.[1] For all other rights, rights may be limited as long as the limitation meets certain standards. In general, any measure that limits a human right has to comply with the following criteria (*The limitation criteria*) in order for the limitation to be considered justifiable.

Prescribed by law

Any limitation on a right must have a clear legal basis. This requires not only that the measure limiting the right be set out in legislation (or be permitted under an established rule of the common law); it must also be accessible and precise enough so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.

Legitimate objective

Any limitation on a right must be shown to be necessary in pursuit of a legitimate objective. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of the legitimate objective being pursued. To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient. In addition, there are a number of rights that may only be limited for a number of prescribed purposes.[2]

Rational connection

It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective being sought.

Proportionality

To demonstrate that a limitation is permissible, the limitation must be proportionate to the objective being sought. In considering whether a limitation on a right might be proportionate, key factors include:

- whether there are other less restrictive ways to achieve the same aim;
- whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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1 Absolute rights are: the right not to be subjected to torture, cruel, inhuman or degrading treatment; the right not to be subjected to slavery; the right not to be imprisoned for inability to fulfil a contract; the right not to be subject to retrospective criminal laws; the right to recognition as a person before the law.

2 For example, the right to association. For more detailed information on individual rights see Parliamentary Joint Committee on Human Rights, Guide to Human Rights (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

- the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.

Retrogressive measures

In respect of economic, social and cultural rights, as there is a duty to realise rights progressively there is also a corresponding duty to refrain from taking retrogressive measures. This means that the state cannot unjustifiably take deliberate steps backwards which negatively affect the enjoyment of economic, social and cultural rights. In assessing whether a retrogressive measure is justified the limitation criteria are a useful starting point.

The committee's approach to human rights scrutiny

The committee's mandate to examine all existing and proposed Commonwealth legislation for compatibility with Australia's human rights obligations, seeks to ensure that human rights are taken into account in the legislative process.

The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.

The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights referred to in the Human Rights (Parliamentary Scrutiny) Act 2011. Similarly, there are a number of other treaties and instruments to which Australia is a party, such as the International Labour Organization (ILO) Conventions and the Refugee Convention which, although not listed in the *Human Rights (Parliamentary Scrutiny) Act 2011,* may nonetheless be relevant to the interpretation of the human rights protected by the seven core human rights treaties. The committee has also referred to other non-treaty instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, where it considers that these are relevant to the interpretation of the human rights in the seven treaties that fall within its mandate. When the committee relies on regional or comparative jurisprudence to support its analysis of the rights in the treaties, it will acknowledge this where necessary.

The committee's expectations for statements of compatibility

The committee considers statements of compatibility as essential to the examination of human rights in the legislative process. The committee expects statements to read as stand-alone documents. The committee relies on the statement as the primary document that sets out the legislation proponent's analysis of the compatibility of the bill or instrument with Australia's international human rights obligations.

While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee strongly recommends legislation proponents use the current templates provided by the Attorney-General's Department. [3]

The statement of compatibility should identify the rights engaged by the legislation. Not every possible right engaged needs to be identified in the statement of compatibility, only those that are substantially engaged. The committee does not expect analysis of rights consequentially or tangentially engaged in a minor way.

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[3] The Attorney-General's Department guidance may be found at https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/Statements-of-Compatibility.aspx.

Consistent with the approach set out in the guidance materials developed by the Attorney-General's department, where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against the limitation criteria set out in this note. Statements of compatibility should provide analysis of the impact of the bill or instrument on vulnerable groups.

Where the committee's analysis suggests that a bill limits a right and the statement of compatibility does not include a reasoned and evidence-based assessment, the committee may seek additional/further information from the proponent of the legislation. Where further information is not provided and/or is inadequate, the committee will conclude its assessment based on its original analysis. This may include a conclusion that the bill or instrument (or specific measures within a bill or instrument) are incompatible with Australia's international human rights obligations.

This approach is consistent with international human rights law which requires that any limitation on a human right be justified as reasonable, necessary and proportionate in pursuit of a legitimate objective.

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 2: Offence provisions, civil penalties and human rights

December 2014

This guidance note sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties. It is not intended to be exhaustive but to provide guidance on the committee's approach and expectations in relation to assessing the human rights compatibility of such provisions.

Introduction

The right to a fair trial and fair hearing are protected by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial and fair hearing applies to both criminal and civil proceedings.

A range of protections are afforded to persons accused and convicted of criminal offences under article 14. These include the presumption of innocence (article 14(2)), the right to not incriminate oneself (article 14(3)(g)), the right to have a sentence reviewed by a higher tribunal (article 14(5)), the right not to be tried or punished twice for the same offence (article 14(7)), a guarantee against retrospective criminal laws (article 15(1)) and the right not to be arbitrarily detained (article 9(1)).[1]

Offence provisions need to be considered and assessed in the context of these standards. Where a criminal offence provision is introduced or amended, the statement of compatibility for the legislation will usually need to provide an assessment of whether human rights are engaged and limited.[2]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides a range of guidance in relation to the framing of offence provisions.[3] However, legislation proponents should note that this government guide is neither binding nor conclusive of issues of human rights compatibility. The discussion below is intended to assist legislation proponents to identify matters that are likely to be relevant to the framing of offence provisions and the assessment of their human rights compatibility.

Reverse burden offences

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

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1 For a more comprehensive description of these rights see Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014), available at http://www.aph.gov.au/~/media/Committees/Joint/PJCHR/Guide%20to%20Human%20Rights.pdf.

2 The requirements for assessing limitations on human rights are set out in *Guidance Note 1: Drafting statements of compatibility* (December 2014).

3 See *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011 edition, available at http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf.

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

Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.

It is the committee's usual expectation that, where a reverse burden offence is introduced, legislation proponents provide a human rights assessment in the statement of compatibility, in accordance with Guidance Note 1.

Strict liability and absolute liability offences

Strict liability and absolute liability offences engage and limit the presumption of innocence. This is because they allow for the imposition of criminal liability without the need to prove fault.

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

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

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

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

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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