

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 20 and 23 February 2017 (consideration of five bills from this period has been deferred);¹
 - legislative instruments received between 17 February and 9 March 2017 (consideration of two legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.

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

1.3 The committee has also concluded its examination of the previously deferred Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017 and makes no further comment on the bill.³

Instruments not raising human rights concerns

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

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

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

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

3 See Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) 117.

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

Response required

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

Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 [F2016L01934]

Purpose	Specifies the amounts to be paid to the states and territories to support service delivery in the areas of schools, skills and workforce development, disability and housing
Portfolio	Treasury
Authorising legislation	<i>Federal Financial Relations Act 2009</i>
Last day to disallow	Exempt
Rights	Equality and non-discrimination; health; social security; adequate standard of living; children; education; work (see Appendix 2)
Status	Seeking additional information

Background

1.7 The committee has previously examined a number of related Federal Financial Relations (National Specific Purpose Payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.¹

1.8 Based on this additional information provided by the Treasurer, the committee was able to conclude that these determinations were compatible with human rights.²

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

1.9 The Intergovernmental Agreement on Federal Financial Relations (the IGA) is an agreement providing for a range of payments from the Commonwealth government to the states and territories. These include National Specific Purpose

1 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) 115-119.

2 See Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th Parliament* (23 February 2016) 119.

Payments (NSPPs), which are financial contributions to support state and territory service delivery in the areas of schools, skills and workforce development, disability and housing.

1.10 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each NSPP, the manner in which these total amounts are indexed, and the manner in which these amounts are divided between the states and territories.

1.11 Payments under the determinations assist in the delivery of services by the states and territories in the areas of health, education, employment, disability and housing. Accordingly, the determinations engage a number of human rights.

Compatibility of the measure with multiple rights

1.12 As noted above, the committee has considered similar NSPP determinations in a number of previous reports.

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

1.14 As such, where the Commonwealth seeks to reduce the amount of funding pursuant to NSPPs, such reductions in expenditure may amount to retrogression or limitations on rights. Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.15 The statement of compatibility for the Federal Financial Relations (National Specific Purpose Payments) Determination 2015-16 (the determination) simply states that the determination 'is compatible with relevant human rights'.³ This mirrors information provided in the statements of compatibility for NSPP determinations previously considered by the committee.

1.16 In the committee's previous assessment of similar NSPP determinations, in response to the committee's request, the Treasurer provided additional information which included a comparison of funding amounts for the various NSPPs over recent years. This additional information allowed the committee to conclude that there had been no reduction in funding allocation to the NSPPs in these determinations, and as such, that these payments would not have a retrogressive impact on human rights.

1.17 It is relevant to the committee's consideration of the determination whether there has been any reduction in funding allocation to the NSPPs since the committee's last assessment at the beginning of 2016. This information has not been provided in the statement of compatibility.

3 Explanatory statement, statement of compatibility 2.

Committee comment

1.18 The preceding analysis raises questions as to whether the determination is compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights. Accordingly, the committee requests the Treasurer's advice as to whether:

- there has been any reduction in the allocation of funding towards NSPPs since its last assessment of related determinations;
- the determination does or does not support the progressive realisation of economic, social and cultural rights (such as the rights to health and education); and
- if there has been a reduction in the allocation of funding towards NSPPs, whether this is compatible with Australia's obligations not to unjustifiably take backward steps (a retrogressive measure) in the realisation of economic, social and cultural rights.

Reverse burden offences and strict liability offences - various

Legislation	<ul style="list-style-type: none"> • Biosecurity Amendment (Ballast Water and Other Measures) Bill 2017;¹ • Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017;² • Protection of the Sea (Prevention of Pollution from Ships) Amendment (Polar Code) Bill 2017.³
Rights	Fair trial; presumption of innocence (see Appendix 2)
Status	Seeking additional information

Legislation containing reverse burden offences and strict liability offences

1.19 These bills contain reverse burden offences and strict liability offences. Given the similar issues that they raise, these bills are dealt with collectively in this report entry.

Compatibility of strict liability offences with the right to be presumed innocent

1.20 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. The right to be presumed innocent usually requires that the prosecution prove each element of the offence (including fault elements and physical elements). Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. The defence of honest and reasonable mistake of fact is available to the defendant. Strict liability may apply to whole offences or to elements of offences.

1.21 Strict liability offences will not necessarily be inconsistent with the presumption of innocence where they pursue a legitimate objective, are rationally

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- 1 Government bill. See, reverse burden in proposed section 270 (item 30) (this particular reverse burden offence is not addressed in the statement of compatibility); and strict liability offence in proposed section 299A (item 126) (the statement of compatibility correctly identifies this issue in relation to strict liability offences).
 - 2 Private member's bill. See, strict liability offence in proposed section 168A(3) (item 4); and reverse burden offence in proposed section 168A(1)-(2) (the statement of compatibility does not provide an assessment of this reverse burden and strict liability offence).
 - 3 Government bill. See, strict liability offences in proposed sections 26BCC(3)-(4) (item 14), reverse burden offence at sections 26BCC(5)-(9) (statement of compatibility does not provide an assessment of reverse burden offences or strict liability offences and does not identify that any rights are engaged and limited).

connected to that objective and are 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 provisions that create offences including that:

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 1.⁴

1.22 Each of the bills identified above either has not addressed, or has not sufficiently addressed, whether the strict liability offence is a permissible limit on human rights.

1.23 It is noted that the Senate Standing Committee on the Scrutiny of Bills also has a mandate in relation to strict liability offences and will generally write to legislation proponents asking whether such strict liability provisions are justifiable where the issue has been insufficiently addressed in the explanatory materials accompanying the bill. Further analysis in relation to specific strict liability offences is provided in that committee's *Alert Digest*. The Attorney-General's Department has also issued relevant guidance material in relation to strict liability offences.⁵

Committee comment

1.24 Noting that strict liability offences engage and limit the right to be presumed innocent, the preceding legal analysis raises questions about whether each strict liability offence is a permissible limitation on this right. The statement of compatibility for each of the bills identified above has either not addressed, or has not sufficiently addressed, whether the relevant strict liability offence is a permissible limitation on human rights.

1.25 The committee draws to the attention of legislation proponents its *Guidance Note 2* which sets out information specific to strict liability and absolute liability offences.

1.26 The committee requests the legislation proponent in each case to provide further information as to:

- **whether the strict liability offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**

4 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

5 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at: <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

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- **how the strict liability 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.**

Compatibility of reverse burden offences with the right to be presumed innocent

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

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

1.29 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.

1.30 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences in order to assist legislation proponents (including reverse burden offences). *Guidance Note 2* provides in relation to reverse burden offences that:

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 1.⁶

1.31 Each of the bills identified above has not addressed whether the relevant reverse burden is a permissible limitation on human rights.

1.32 It is noted that the Senate Standing Committee on the Scrutiny of Bills also has a mandate in relation to reverse burden offences and will generally write to

6 *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

legislation proponents asking whether such reverse burden offences are justifiable where the issue has been insufficiently addressed in the explanatory materials. Further analysis in relation to the specific reverse burden offences is provided in that committee's *Alert Digest*. The Attorney-General's Department has also issued relevant guidance material in relation to reverse burden offences.⁷

Committee comment

1.33 Noting that reverse burden offences engage and limit the right to be presumed innocent, the preceding legal analysis raises questions about whether each reverse burden offence is a permissible limitation on this right. The statement of compatibility for each of the bills identified above has not addressed whether the relevant reverse burden is a permissible limitation on human rights.

1.34 The committee draws to the attention of legislation proponents its *Guidance Note 2* which sets out information specific to reverse burden offences.

1.35 The committee requests the legislation proponent in each case to provide further information 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.**

⁷ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) at: <https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>.

Further response required

1.36 The committee seeks a further response from the relevant with respect to the following instrument.

Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696]

Purpose	Amends the Migration Regulations 1994 to make various changes to the immigration citizenship policy, including changing the definition of 'member of the family unit' for most visas (except protection, refugee and humanitarian visas)
Portfolio	Immigration and Border Protection
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	13 February 2017
Right	Protection of the family (see Appendix 2)
Previous report	1 of 2017
Status	Seeking further additional information

Background

1.37 The committee first reported on the Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 [F2016L01696] (the regulation) in its *Report 1 of 2017*, and requested a response from the Minister for Immigration and Border Protection by 3 March 2017.¹

1.38 The minister's response to the committee's inquiries was received on 10 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Narrowing the definition of the member of a family unit

1.39 Schedule 4 of the regulation changes the general definition of 'member of the family unit' such that extended family members are no longer included in this definition. A member of a family unit will therefore only include the spouse or de facto partner of a primary applicant, and the dependent children, under the age of 23 or who are over this age but incapacitated, of the primary applicant or their partner (previously there was no age limit for the children of an applicant).² A child over 23 who is not incapacitated will therefore be considered an extended family

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 2-4.

2 Schedule 4, subregulation 1.12(2).

member, and would not fall within the definition of a 'member of the family unit' (and therefore not entitled to family reunion).

1.40 In respect of protection, refugee and humanitarian visas,³ a person will continue to be a member of the family unit of another person (the family head) if the person meets the criteria for the general definition of a member of a family unit, as well as if the person is a dependent child of any age or a single dependent relative of any age who is usually resident in the household of the family head.⁴

1.41 The initial human rights analysis noted that the right to protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. The definition of what constitutes 'family' under international human rights law is broad; it refers not only to spouses, parents and children, but also to unmarried and same-sex couples and extended family members.⁵

1.42 The initial human rights analysis noted that the measure engages and limits the right to protection of the family for visa holders, other than holders of protection, refugee and humanitarian visas,⁶ as it could operate to separate parents and their adult children and extended members of the same family by excluding those family members from being considered a 'member of the family unit'. This would apply regardless of the circumstances of an individual family.

1.43 The statement of compatibility identifies that the right to protection of the family unit is engaged by the measure, however, it also states that:

...protection of the family unit under articles 17 and 23 [of the ICCPR] does not amount to a right to enter and remain in Australia where there is no other right to do so. Nor do they give rise to an obligation on a State to take positive steps to facilitate family reunification.⁷

1.44 Although Australia's obligations under international human rights law do not extend to non-citizens over whom Australia has no jurisdiction, where a person is under Australia's jurisdiction for the purposes of international human rights law, human rights obligations will apply. As such, Australia is required not to arbitrarily or unlawfully (for the purposes of international human rights law) interfere in the family

3 As defined at schedule 4, subregulation 1.12(3).

4 Schedule 4, subregulation 1.12(4).

5 See, for example, UN Human Rights Committee, General Comment 16: Article 17 (Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation) 1988 at [5] which stated that the term 'family' should 'be given a broad interpretation to include all those comprising the family as understood in the society of the State Party concerned'. See also UN Human Rights Committee, General Comment 19: Article 23 (The Family), 1990 at [2].

6 The previous definition of member of the same family unit will continue to apply to these visa classes – see: explanatory statement (ES), statement of compatibility (SOC) 11.

7 ES, SOC 12.

life of visa holders. For example, if a visa holder is residing in Australia, the government must respect, protect and fulfil this person's right to protection of their family. This includes ensuring family members are not involuntarily separated from one another.

1.45 The initial human rights analysis noted that the statement of compatibility does not explicitly identify the legitimate objective of the measure; however, it does note that the new provisions are intended to better align 'migration pathways for relatives of new migrants with those for Australian citizens and existing permanent residents'.⁸ This analysis noted that it was unclear whether this constituted a legitimate objective for the purposes of international human rights law.

1.46 The initial analysis further stated that it was unclear whether the measure was rationally connected to, and a proportionate means of achieving, a legitimate objective. The committee therefore sought the advice of the minister as to:

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

Minister's response

1.47 The minister's response notes that the adult children of a primary applicant or of the primary applicant's spouse (or de facto partner) continue to be eligible to be included where they are aged under 23 years and are financially dependent. Adult children of any age also continue to be eligible where they are financially dependent due to incapacity to work.

1.48 The minister's response further notes that Australia has a right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. While it is well-established under international law that nation states generally have the right to control such immigration matters, this is subject to particular human rights obligations such as the right to protection of the family.

1.49 The minister's response states that the right to protection of the family unit under articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights (ICCPR) does not amount to a right to enter and reside in Australia where there is no other right to do so. The minister further states that while the ICCPR requires the protection of the family, there is no positive obligation to take steps to facilitate family reunification.

8 ES, SOC 12.

1.50 While there is no positive obligation on Australia to facilitate family reunion, Australia does have international obligations in relation to actions that interfere with the family life of those within its jurisdiction.

1.51 A measure which limits the ability of certain family members to join others in a country, or prevents certain family members from staying in a country, is a limitation on the right to protection of the family, and therefore must be proportionate to the pursuit of a legitimate objective in order to be compatible with human rights.⁹

1.52 The minister's response provides insufficient information to evaluate whether the measure pursues a legitimate objective, is effective to achieve that objective, and is proportionate to it. Accordingly, it is difficult to conclude, in the absence of further information, that the measure is a permissible limitation on the right to protection of the family.

Committee response

1.53 The preceding analysis indicates that narrowing the definition of 'member of the family unit' engages and limits the right to protection of the family. The minister's response does not sufficiently address whether this limitation is permissible as a matter of international human rights law.

1.54 Accordingly, the committee requests the further advice of the minister as to:

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

9 See, for example, *Sen v the Netherlands* (Application no. 31465/96) (2001) ECHR; *Tuquabo-Tekle And Others v The Netherlands* (Application no. 60665/00) (2006) ECHR [41]; *Maslov v Austria* (Application no. 1638/03) (2008) ECHR [61]-[67].

Advice only

1.55 The committee draws the following instruments to the attention of the relevant minister on an advice only basis. The committee does not require a response to these comments.

Federal Financial Relations (National Partnership payments) Determination No. 112-115 (October 2016)-(January 2017)

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

Background

1.56 In 2015 the committee previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the Treasurer as to whether they were compatible with Australia's human rights obligations.¹

1.57 In 2016 the committee then reported on a number of new Federal Financial Relations (National Partnership payments) Determinations in its *Report 7 of 2016*, and sought further information from the Treasurer as to the compatibility of these determinations.²

1.58 The committee concluded its consideration of these determinations in its *Report 8 of 2016*. Based on additional information provided by the Treasurer, the committee was able to conclude that the determinations were unlikely to constitute a retrogressive measure for the purposes of international human rights law, and that

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

2 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 40-43.

they were likely to assist and provide a mechanism for the progressive realisation of a number of economic, social and cultural (ESC) rights.³

1.59 The committee recommended at that time that the type of information provided by the Treasurer be included in future statements of compatibility for related National Partnership payments determinations to assist the committee to assess the continued compatibility of NPPs with human rights.⁴

1.60 This report considers a number of new Federal Financial Relations (National Partnership payments) Determinations (the determinations).⁵

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

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

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

Compatibility of the measure with multiple rights

1.63 As noted above, the committee has considered similar NPP determinations in a number of previous reports.

1.64 In its previous analysis, the committee noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights,

3 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 84-87.

4 See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 87.

5 Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724]; Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937]; Federal Financial Relations (National Partnership payments) Determination No. 114 (December 2016) [F2017L00049]; and Federal Financial Relations (National Partnership payments) Determination No. 115 (January 2017) [F2017L00050].

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

1.65 Under international human rights law, Australia has obligations to progressively realise ESC rights using the maximum of resources available, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.

1.66 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.⁶ Any backward step in the level of attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.67 The statement of compatibility for each of the determinations contains a standard paragraph, similar to the information provided in relation to determinations previously considered by the committee, which states:

...neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.⁷

1.68 Accordingly, the statements of compatibility to the new and previous determinations do not provide any particular or general assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

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

1.70 The provision of that additional information by the Treasurer allowed the committee to conclude that the determinations were likely to be compatible with Australia's international obligations. While the committee recommended this type of

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

7 Explanatory statement, statement of compatibility 2.

information be included in future statements of compatibility, this has not occurred to date.

1.71 Without this additional information included in the statement of compatibility it is difficult for the committee to complete its assessment of the compatibility of NPPs going forward.

Committee comment

1.72 **The committee reiterates its previous recommendation that the type of information previously provided by the Treasurer to the committee be included in future statements of compatibility for related National Partnership Payment determinations to assist the committee to fully assess the compatibility of these determinations with human rights.**

Bills not raising human rights concerns

1.73 Of the bills introduced into the Parliament between 20 and 23 February 2017, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Immunisation Register and Other Legislation Amendment Bill 2017;
- Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017;
- Communications Legislation Amendment (Executive Remuneration) Bill 2017;
- Communications Legislation Amendment (SBS Advertising Flexibility) Bill 2017;
- Copyright Amendment (Disability Access and Other Measures) Bill 2017;
- Fair Work Amendment (Protecting Take Home Pay) Bill 2017;¹
- Fair Work Amendment (Protecting Take-Home Pay) Bill 2017;
- Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill 2017;
- Live Animal Export Prohibition (Ending Cruelty) Bill 2017;
- National Land Transport Amendment (Best Practice Rail Investment) Bill 2017; and
- Social Services Legislation Amendment (Seasonal Worker Incentives for Jobseekers) Bill 2017.

1 Two bills by the same name were introduced during this period.

