

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 9 May and 1 June 2017 (consideration of 2 bills from this period has been deferred);¹
 - legislative instruments received between 7 April and 11 May 2017 (consideration of 3 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.
- 1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

Instruments not raising human rights concerns

- 1.3 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.³ Instruments raising human rights concerns are identified in this chapter.
- 1.4 The committee has concluded that the remaining instruments do not raise human rights concerns, either because they do not engage human rights, they contain only justifiable (or marginal) limitations on human rights or because they promote human rights and do not require additional comment.

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

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

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

Response required

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

Code for the Tendering and Performance of Building Work 2016 [F2016L01859] and Code for the Tendering and Performance of Building Work Amendment Instrument 2017 [F2017L00132]

Purpose	Sets up a code of practice that is to be complied with by persons in respect of building work as permitted under section 34 of the <i>Building and Construction (Improving Productivity) Act 2016</i> (ABCC Act)
Portfolio	Employment
Authorising legislation	<i>Building and Construction (Improving Productivity) Act 2016</i>
Last day to disallow	15 sitting days after tabling (F2016L01859 tabled in the Senate 7 February 2017; F2017L00132 tabled in the Senate 20 March 2017)
Rights	Freedom of expression; freedom of association; collectively bargain; form and join trade unions; just and favourable conditions of work (see Appendix 2)
Status	Seeking additional information

Background

1.6 The committee previously examined the *Building and Construction (Improving Productivity) Act 2016* (ABCC Act) which is the authorising legislation for this instrument in its *Second Report of the 44th Parliament, Tenth Report of the 44th*

*Parliament, Fourteenth Report of the 44th Parliament and Thirty-fourth Report of the 44th Parliament and Report 7 of 2016.*¹

Code for tendering and performance of building work

1.7 Under section 34 of the ABCC Act the Minister for Employment is empowered to issue a code of practice that is required to be followed by persons in respect of building work. The instrument sets up a code of practice for all building industry participants that seek to be, or are, involved in Commonwealth funded building work (a code covered entity). The code of practice contains a number of requirements which engage and limit human rights and are discussed further below.

Content of agreements and prohibited conduct

1.8 Section 11(1) of the code of conduct provides that a code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

- impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
- discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or
- are inconsistent with freedom of association requirements set out in section 13 of the code of practice;

1.9 Section 11 (3) further provides that clauses are not permitted to be included in the enterprise agreement in relation to a range of matters including the number of employees, consultation on particular matters, the engagement of particular classes of staff, contractors and subcontractors, casualisation and the type of contracts to be offered, redundancy, demobilisation and redeployment, loaded pay, allocation of work to particular employees, external monitoring of the agreement, encouraging, discouraging or supporting people being union members, when and where work can

1 The committee originally considered the Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 43-77; and *Fourteenth Report of the 44th Parliament* (28 October 2014) 106-113. These bills were then reintroduced as the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]; see *Thirty-fourth Report of the 44th Parliament* (23 February 2016) 2. The bills were reintroduced to the Senate on 31 August 2016, following the commencement of the 45th Parliament; see *Report 7 of 2016* (11 October 2016) 62-63. See also, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Direct Request, adopted 2016, published 106th ILC session (2017) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Australia.

be performed, union access to the workplace beyond what is provided for in legislation, granting of facilities to be used by union members, officers or delegates.

1.10 Section 11A additionally provides that code covered entities must not be covered by enterprise agreements that purport to remedy or render ineffective other clauses that are inconsistent with section 11.

1.11 The effect of a failure to meet the requirements of section 11 by a code covered entity is to render the entity ineligible to tender for, or be awarded, Commonwealth funded work.

Compatibility of the measure with the right to collectively bargain and the right to just and favourable conditions of work

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

1.13 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98), which protects the right of employees to collectively bargain for terms and conditions of employment.³ The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.⁴

1.14 Providing that certain code covered entity employers cannot be awarded Commonwealth funded work if they are subject to an enterprise agreement containing a range of terms is likely to act as a disincentive for the inclusion of such terms in enterprise agreements. The measure is likely to have a corresponding restrictive effect on the scope of negotiations on a broad range of matters including those that relate to terms and conditions of employment and how work is

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

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

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

performed. As such, the measure interferes with the outcome of the bargaining process and the inclusion of particular terms in enterprise agreements. Accordingly, the measure engages and limits the right to just and favourable conditions of work and the right to collectively bargain.

1.15 Measures limiting the right to freedom of association including the right to collectively bargain may be permissible providing certain criteria are satisfied. The right to collectively bargain may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),⁵ or public health or morals. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.⁶ Further, Article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in the ILO Convention No. 87.

1.16 The ILO's Committee on Freedom of Association (CFA Committee), which is a supervisory mechanism that examines complaints about violations of the right to freedom of association and the right to collectively bargain, has stated that 'measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98'.⁷ The CFA Committee has noted that there are some circumstances in which it might be legitimate for a government to limit the outcomes of a bargaining process, stating that 'any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.'⁸

1.17 In relation to the limitation that section 11 imposes on the right to collectively bargain, the statement of compatibility argues:

...the limitation is reasonable, necessary and proportionate in pursuit of the legitimate objective of seeking to ensure that enterprise agreements

5 'The expression "public order (*ordre public*)" ...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

6 See ICCPR article 22.

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

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

are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements in the building and construction industry more generally.⁹

1.18 Limited information is provided in the statement of compatibility as to whether the stated objective addresses a pressing and substantial concern such that it may be considered a legitimate objective for the purpose of international human rights law or whether the measure is rationally connected to (that is, effective to achieve) that stated objective.

1.19 Further, no information is provided about the proportionality of the measure. In this respect it is noted that section 11 imposes practical restrictions on the inclusion of a very broad range of matters relating to terms and conditions of employment in enterprise agreements. It is noted that section 11(1)(a) is particularly broad and provides a practical restriction on the inclusion of a clause in an enterprise agreement which imposes or purports to impose limits on the right of the code covered entity to manage its business or to improve productivity. This clause raises concerns for it may be understood to cover many matters that are usually the subject of enterprise agreements such as ordinary working hours, overtime, rates of pay and any types of work performed.

1.20 Additionally, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is another supervisory mechanism, has recently reported on Australia's compliance with the right to collectively bargain in respect of matters which will also be covered by section 11. In relation to restrictions on the scope of collective bargaining and bargaining outcomes, the committee noted that 'parties should not be penalized for deciding to include these issues in their negotiations' and requested that Australia review such matters 'with a view to removing these restrictions on collective bargaining matters'.¹⁰

1.21 The CFA Committee has also raised concerns in relation to similar measures previously enacted by Australia under the *Building and Construction Industry Improvement Act 2005* and stated that:

The Committee recalls that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and

9 Code for the Tendering and Performance of Building Work 2016, Explanatory Statement (ES), statement of compatibility (SOC) 6.

10 ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request - adopted 2016, published 106th ILC session (2017), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia
http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P1110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3299912,102544,Australia,2016 (last accessed 10 May 2017).

working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes... The Committee considers that the matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.¹¹

1.22 Concerns about restrictions Australia has imposed on the right to freedom of association and the right to collectively bargain have also been raised by the United Nations Committee on Economic, Social and Cultural Rights in its Concluding Observations on Australia.¹² Such comments from supervisory mechanisms were not addressed in the statement of compatibility. Addressing such matters in the statement of compatibility would generally be of assistance to the committee's task of assessing the human rights compatibility of legislation.

1.23 The committee has also previously commented on other measures which engage and limit these rights and raised concerns.¹³

Committee comment

1.24 The preceding analysis identifies that the measure engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility with these rights. The statement of compatibility has not sufficiently justified these

11 ILO's Committee on Freedom of Association (CFA Committee), Report in which the committee requests to be kept informed of development - Report No 338, November 2005 Case No 2326 (Australia) - Complaint date: 10 March 2004
http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2908523 (last accessed 10 May 2017).

12 UN Committee on Economic, Social and Cultural Rights, Concluding Observations, Australia, E/C.12/AUS/CO/4 (12 June 2009).

13 See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 1-30; *Tenth Report of the 44th Parliament* (26 August 2014) 55-56; *Report 7 of 2016* (11 October 2016) 21-24, 62-63; *Report 8 of 2016* (9 November 2016) 62 – 64.

limitations. Accordingly, the committee seeks the advice of the Minister for Employment 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;
- whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible);
- whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure; and
- the government's response to the previous comments and recommendations made by international supervisory mechanisms including whether the government agrees with these views.

Prohibiting the display of particular signs and union logos, mottos or indicia

1.25 Section 13(2)(b)-(c) provides that the code covered entity must ensure that 'no ticket, no start' signs, or similar are not displayed and signs that seek to 'vilify or harass employees who participate, or do not participate, in industrial activities are not displayed'.

1.26 Section 13(2)(j) provides that union logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made by, the employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee.

Compatibility of the measure with the right to freedom of expression

1.27 The right to freedom of opinion and expression is protected by article 19 of the ICCPR. The right to freedom of expression extends 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.¹⁴

1.28 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by

14 ICCPR, article 19(2).

law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.¹⁵

1.29 By providing certain signs cannot be displayed and providing that union logos, insignias and mottos are not to be applied to certain clothing or equipment, the measures engage and limit the right to freedom of expression.¹⁶ The statement of compatibility acknowledges that the right to freedom of expression is engaged and identifies the following as the objective of the measures:

The intimidation of employees to join or not join a building association is clearly an unacceptable infringement on their right to freedom of association...

The right to freedom of association can also be infringed by the presence of building association logos, mottos or indicia on clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity...

...pursuing the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensuring that this choice does not impact on an employee's ability to work on a particular site.¹⁷

1.30 The statement of compatibility provides limited information about the importance of these objectives. However, 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.¹⁸

1.31 Furthermore, the reasoning articulated in the statement of compatibility does not accurately reflect the scope of freedom of association under international law. The scope of the right to freedom of association in a workplace under international law focuses on a positive right to associate rather than a right not to

15 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

16 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [154]-[173].

17 ES, SOC 8.

18 See Attorney-General's Department, *Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues*, at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Documents/Template2.pdf>.

associate.¹⁹ ILO supervisory mechanisms have found that under Convention 87 it is a matter for each nation state to decide whether it is appropriate to guarantee the ability of workers *not* to join a union.²⁰ As a matter of international human rights law, the display of particular union signs, union logos, mottos or indicia on clothing does not appear to 'infringe' the right to freedom of association but rather constitutes an element of this right.²¹

1.32 Further, it is unclear whether the measure is rationally connected to (that is, effective to achieve) the stated objective of 'protecting...employees in the building and construction industry to choose to become, or not become, a member of a building association [union] and ensuring that this choice does not impact on an employee's ability to work on a particular site'.

1.33 The statement of compatibility provides the following information on whether the measure prohibiting certain signs (contained in section 13(2)(b)-(c)) is rationally connected to the stated objective:

...intimidation can take the form of signs implying that employees who are not members of a building association cannot work on the building site or, where such employees are present, seek to intimidate, harass or vilify such employees...

1.34 However, the statement of compatibility does not address how the display of specific signs rises to the level of intimidation, harassment or vilification. Without further information it is unclear that the removal of such signs would be effective in achieving the stated objective of protecting the choice to become, or not become, a member of a union.

1.35 The statement of compatibility further provides the following information on whether the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)) is rationally connected to the stated objective:

... [union] signage on clothing or equipment that is supplied by a code covered entity carries a strong implication that membership of the building association in question is being actively encouraged or endorsed by the relevant employer and is against the principle that employees should be

19 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].

20 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [365] – [367].

21 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].

free to choose whether to become or not become a member of a building association.²²

1.36 It is acknowledged that the explanatory statement outlines the findings of the final report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) including general issues of intimidation in the building and construction industry.²³ However, without further information, it is unclear how merely viewing, for example, a union logo on clothing or equipment would prevent an employee who did not wish to join the relevant union from their choice to do so or from working on a particular site. Further, it is unclear that such signs and logos would necessarily be seen as an employer endorsement of joining the union, and even if so, that this would affect an employee's freedom of choice or ability to decide not to join the union.

1.37 In relation to the proportionality of the measure prohibiting union logos, mottos or indicia on certain clothing, property or equipment (contained in section 13(2)(j)), the statement of compatibility provides that:

This prohibition only applies to clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. Section 13 would not prevent these items from being applied to clothing, property or equipment that was supplied by other individuals at the site or by the relevant building association.²⁴

1.38 No further information is provided in the statement of compatibility about proportionality of the measures including any relevant safeguards in relation to the right to freedom of expression.

Committee comment

1.39 The preceding analysis raises questions as to the compatibility of the measures with the right to freedom of expression. Accordingly, the committee seeks the advice of the Minister for Employment 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;**
- **whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible); and**

22 ES, SOC 8.

23 ES 3.

24 ES, SOC 8.

- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

Compatibility of the measure with the right to freedom of association and the right to form and join trade unions

1.40 Article 22 of the ICCPR guarantees the right to freedom of association generally, and also explicitly guarantees everyone 'the right to form trade unions for the protection of [their] interests.' Article 8 of the ICESCR also guarantees the right of everyone to form trade unions. As set out above, the right to freedom of association may only be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*), or public health or morals. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.²⁵ Further, no limitations on this right are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.²⁶

1.41 As noted above, the understanding of the right to freedom of association expressed in the statement of compatibility and the code of conduct does not fully reflect the conception of this right as a matter of international human rights law. The ILO supervisory mechanisms have noted, for example, that 'the prohibition of the placing of posters stating the point of view of a central trade union organization is an unacceptable restriction on trade union activities.'²⁷ As the measures restrict communication about union membership, including joining a union, the measures engage and may limit the right to freedom of association. This potential limitation was not addressed in the statement of compatibility.

Committee comment

1.42 The committee notes that the preceding analysis identifies that the measure engages and may limit the right to freedom of association. 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**

25 See ICCPR article 22.

26 See ICESCR article 8, ICCPR article 22.

27 See, ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth revised edition (2006) [161] – [163].

- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Electoral and Other Legislation Amendment Bill 2017

Purpose	Seeks to amend various Acts in relation to electoral, broadcasting and criminal matters to: amend authorisation requirements in relation to political, electoral and referendum communications; replace the current criminal non-compliance regime with a civil penalty regime to be administered by the Australian Electoral Commission; amend the <i>Criminal Code Act 1995</i> to criminalise conduct amounting to persons falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body; and create a new aggravated offence where a person engages in false representation
Portfolio	Special Minister of State
Introduced	House of Representatives, 30 March 2017
Rights	Freedom of expression; fair trial; criminal process; presumption of innocence (see Appendix 2)
Status	Seeking additional information

Requirement to authorise and notify particulars in respect of electoral matters and referendum matters

1.43 Proposed section 321D would amend the *Commonwealth Electoral Act 1918* (Electoral Act) to provide that communications about 'electoral matters' on behalf of particular entities (disclosure entities) are required to be authorised and would impose a requirement to notify particulars such as the entity's name, address and the person who has authorised the communication.¹ Under proposed section 321D, subject to exceptions, all types of communication fall within the authorisation and notification requirements including, for example, printed material, leaflets, text messages, voice messages, telephone calls and conversations in the course of door-knocking.²

1.44 'Electoral matter' is currently defined in sections 4(1) and 4(9) of the Electoral Act. Section 4(1) currently provides that 'electoral matter' means a 'matter which is intended or likely to affect voting in an election'. The proposed legislation would amend section 4(9) to provide that a matter is taken to be intended or likely to affect voting in an election if it contains an express or implicit comment on: the

1 Proposed section 321D includes a table specifying what authorisations are required for different forms of communications about an 'electoral matter'.

2 See proposed section 321D(b)-(c).

election; or a political party, candidate or group of candidates in the election; an issue submitted to, or otherwise before, the electors in connection with the election.

1.45 A 'disclosure entity' is defined under proposed section 321B as:

- a registered political party;
- current members of parliament and current and former candidates (for the previous 4 years for candidates for election to the House of Representatives or 7 years for candidates for election to the Senate);
- an associated entity (defined under Part XX of the Electoral Act to include unions that pay affiliation fees to political parties and organisations that are set up as fundraising vehicles by political parties);
- individuals or organisations who are required, or have been required in previous financial years, to submit returns to the Australian Electoral Commission because they have donated to a party or a candidate.

1.46 Proposed sections 321D(3)-(4) provide for exceptions to the authorisation requirements for certain types of communications (including, for example, clothing or anything that is designed to be worn; reporting of the news; communication for satire; academic or artistic purposes; and personal or internal communications).

1.47 A failure to comply with the new authorisation requirements is a civil penalty provision of 120 penalty units (currently \$21,600) for an individual.

1.48 Proposed Part IX, section 110C applies similar provisions in relation to referendum matters (defined as a matter intended or calculated to affect the result of a referendum).³

Compatibility of the measure with the right to freedom of expression

1.49 The right to freedom of opinion and expression is protected by article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to freedom of expression extends 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.⁴

1.50 By expanding authorisation and notification requirements in relation to communication about electoral and referendum matters, the measure imposes a practical limitation on the right to freedom of expression. By requiring the statement of certain particulars including, for example, the address of the entity, the relevant town or city of the entity and the name of the natural person responsible for giving

3 See proposed section 110A.

4 ICCPR, article 19(2).

effect to the authorisation, the measure imposes a restriction or burden on the form of communication.⁵

1.51 The statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that this limitation is permissible.⁶ In relation to the objectives of the measure, the statement of compatibility notes:

There is a strong public interest in ensuring that voters are aware of who is communicating to them without adversely impacting public debate. These authorisation requirements facilitate transparency and public confidence in Australia's electoral processes. They allow voters to assess the credibility of the information they rely on when forming their political judgment and selecting their representatives in the Parliament.

Ultimately, this Bill facilitates free and informed voting at elections, an object which is essential to Australia's system of representative democracy...the Bill's restrictions on anonymous electoral communications supports the right of participants in public debate to protection against unlawful attacks on reputation by providing key information necessary to commence appropriate civil action under Australia's defamation laws.⁷

1.52 These objectives are likely to constitute legitimate objectives for the purposes of international human rights law and the measure appears to be rationally connected to these objectives.

1.53 In relation to the proportionality of the measure, the statement of compatibility notes:

The Bill limits the restriction on anonymous speech to circumstances strictly necessary to protect the public interest by providing explicit exemptions for:

- the reporting of news, current affairs and editorial content in news media
- communication solely for genuine satirical, academic or artistic purposes
- personal or internal communications of disclosure entities
- opinion polls and research relating to voting intentions.

1.54 These exceptions provide important scope to freedom of expression in a range of circumstances.

5 Schedule 1, proposed section 321D (5).

6 Explanatory Memorandum (EM) 7.

7 EM 7.

1.55 However, there remain concerns the proportionality of the measure given the breadth of communications covered by the authorisation requirements and the burden that the notification requirement may impose depending on the type of communication being made. The measure applies not only to political parties but potentially to a range of advocacy groups, interest groups, unions and civil society organisations including those who may have a large number of volunteers. These volunteers may be actively involved in a range of campaign activities such as, for example, phone calls or door-knocking. Where communication activities occur in the context of telephone calls or door-knocking, it may be impractical to convey the required notification to each individual recipient while still attempting to communicate about electoral matters. In the voluntary context, it may also be potentially challenging for organisations to ensure that volunteers notify the required particulars. As noted above, failure to comply with section 321D(5) is a civil penalty provision of 120 penalty units. The explanatory memorandum notes in relation to the potential effect on individuals that:

Where a notifying entity that is not a legal entity, for example, a citizens' group, contravenes subsection (5), subsection 321D(6) provides that for the purposes of the Electoral Act and the Regulatory Powers Act, each member, agent or officer (however described) of the entity who contributed to the contravention through action or inaction in their role would be individually responsible for not meeting the authorisation obligation of the notifying entity as required by subsection 321D(5).⁸

1.56 This could act as a potential disincentive for some civil society or citizens organisations to use volunteers or convey information about electoral or referendum matters in light of the penalties to be applied. In other words, the measure could have a particular 'chilling effect' on freedom of expression for certain groups, individuals and volunteers. The statement of compatibility does not address whether there will be any additional safeguards in place to ensure that the measure is the least rights restrictive way of achieving its objectives.

Committee comment

1.57 The preceding analysis raises questions about the compatibility of the measure with the right to freedom of expression.

1.58 Accordingly, the committee requests the advice of the minister as to whether the limitation is a reasonable and proportionate measure to achieve its stated objective including (the existence of relevant safeguards and whether the measure is the least rights restrictive way of achieving its objective noting the potential impact on some groups and individuals including volunteers).

Compatibility of the measure with criminal process rights

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

1.60 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. It is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.⁹ Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) apply.¹⁰

1.61 In relation to whether the civil penalty provision may be regarded as criminal, the statement of compatibility states only that:

The Bill's civil penalty provisions do not constitute a criminal penalty for the purposes of human rights law as they are not classified as criminal under Australian law and are restricted to people in a specific regulatory context.¹¹

1.62 As set out in the committee's *Guidance Note 2*, as the civil penalty provisions are not classified as 'criminal' under domestic law they will not automatically be considered 'criminal' for the purposes of international human rights law.

1.63 The next step in assessing whether the civil penalties are 'criminal' under international human rights law is to look at the nature and purpose of the penalty. A penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context and proceedings are instituted by a public authority with statutory powers of enforcement. In this respect it is noted that while the proposed regime applies to regulate electoral and

9 *Guidance Note 2* – see Appendix 4.

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

11 EM 7.

referendum matters, the regime could apply quite broadly including to volunteers, such that it is unclear whether the regime can categorically be said not to apply to the public in general. Enforcement is to be undertaken by a public authority under the *Regulatory Powers (Standard Provisions) Act 2014*.

1.64 The third step in assessing whether the penalties are 'criminal' under international human rights law is to look at their severity. In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the maximum amount of the pecuniary penalty that may be imposed under the civil provision in context is relevant. In this respect, as noted above, a penalty of 120 penalty units (currently \$21,600) is substantial. It would apply for each breach including for each individual who contributed to the breach where the organisation is unincorporated. These issues were not addressed in the statement of compatibility.

Committee comment

1.65 The committee seeks the advice of the minister as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*), addressing in particular:

- **whether the nature and purpose of the penalties is such that the penalties may be considered 'criminal';**
- **whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be considered 'criminal';**
- **whether the application of the civil penalties could be limited so as to not apply as broadly to individuals; and**
- **if the penalties are considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).**

Reverse evidential burden of proof

1.66 Proposed section 150.1 of the Criminal Code would make it an offence for a person to falsely represent that the person is, or is acting on behalf of, or with the authority of, a Commonwealth body (and makes it a higher level offence to do so with the intention of obtaining a gain, causing a loss, or influencing the exercise of a public duty or function).¹²

12 Schedule 2, item 2, proposed section 150.1(4).

1.67 Subsection 150.1(4) provides that if the Commonwealth body is fictitious, these offence provisions do not apply unless a person would reasonably believe that the Commonwealth body exists. This would appear to provide an exception to the relevant offences.

1.68 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

Compatibility of the measure with the right to be presumed innocent

1.69 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. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, engage and limit this right.

1.70 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.

1.71 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).

1.72 In this case it appears that the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter). However, the reversal of the evidential burden of proof in proposed section 150.1(4) has not been addressed in the statement of compatibility. In this instance, the proposed offence appears to require the defendant to raise evidence that suggests a reasonable possibility that 'a person would reasonably believe that the Commonwealth body exists'. This seems to be an objective fact and not one that is peculiarly within the knowledge of the defendant. Accordingly, it appears that the limitation may not be proportionate.

Committee comment

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

1.74 The committee requests the advice of the minister as to:

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

- **how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017

Purpose	Seeks to introduce reforms to the funding, provision and administration of higher education in Australia
Portfolio	Education and Training
Introduced	House of representatives, 11 May 2017
Rights	Education; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Background

1.75 The committee has previously commented on proposed reforms to the funding of higher education in its *Twelfth Report of the 44th Parliament*, *Eighteenth Report of the 44th Parliament* and its *Twenty-second Report of the 44th Parliament*.¹

Decrease in funding for commonwealth supported students in higher education

1.76 Schedule 1 of the bill seeks to decrease the amount of commonwealth funding or subsidies for commonwealth supported students at universities and increase the amount of student contribution to higher education funding.² From 1 January 2018 a 2.5 percent efficiency dividend will be applied to Commonwealth contribution amounts in each of 2018 and 2019. Student contribution amounts for commonwealth supported students will increase by 1.8 percent from 2018 to 2021 (7.5 percent in total.)

Compatibility of the measure with the right to education

1.77 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education. It specifically requires, with a view to achieving the full realisation of the right to education, that:

1 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) 43-64; *Twenty-second Report of the 44th Parliament*

2 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution.

Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

1.78 Australia has obligations to progressively introduce free higher education by every appropriate means but also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation to the right to education.³

1.79 The statement of compatibility acknowledges that the decrease in commonwealth funding is counter to progressive introduction of the right to free higher education,⁴ that is, it constitutes a retrogressive measure.

1.80 Retrogressive measures may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the United Nations Committee on Economic, Social and Cultural Rights has noted that:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.⁵

1.81 The statement of compatibility argues that the reduction of funding is a permissible limitation on the right to education including the progressive introduction of free higher education:

Recalibration of Commonwealth contribution and student contribution amounts in Schedule 1 will result in decreased Government funding and an increase in student contributions. This measure is counter to the goal of progressive introduction of free education however the savings measure is proportionate to the policy objective of ensuring long-term financial sustainability necessary to support opportunities in higher education. It also sits within student loan arrangements that ensure no domestic student need pay upfront fees for access to higher education. The savings

3 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999).

4 SOC 3.

5 See, UN Committee on Economic, Social and Cultural Rights, General Comment 13: the Right to education (8 December 1999) [45].

as a result of this measure will be an important contribution towards Budget repair.⁶

1.82 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of the right to education. However, limited information has been provided to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. Evidence explaining why a proposed cut in funding of this size is a proportionate reduction in terms of the right to education was not provided in the statement of compatibility. Further, no information has been provided about the consideration of alternatives, in the context of Australia's use of its maximum available resources.

Committee comment

1.83 The preceding analysis raises questions as to the compatibility of the measure with the obligation to progressively introduce free higher education (right to education).

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;**
- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

Increase in student contributions for enabling courses

1.85 Currently, students undertaking enabling courses cannot be required to pay a student contribution amount.⁷

1.86 Schedule 2 of the bill seeks to introduce a student contribution amount fixed at a rate of \$3,271 for a full time study load in 2018. Students will be able to borrow their contribution amount through the Higher Education Loan Program (HELP).

6 SOC 8.

7 An enabling course is a course of instruction that enables a person to undertake a course leading to a higher education award (sometimes referred to as a bridging course).

Compatibility of the measure with the right to education

1.87 As set out above, article 13 of the ICESCR protects the right to education including the progressive introduction of free higher education by every appropriate means. By requiring students to make a financial contribution towards the costs of enabling courses, the measure engages and limits the right to education.

1.88 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible. The committee's usual expectation where a measure limits a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

Committee comment

1.89 Accordingly, the committee requests the further 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 a reasonable and proportionate measure to achieve the stated objective;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

Eligibility of Australian permanent residents and New Zealand citizens to a commonwealth supported university place

1.90 Schedule 3 of the bill seeks to provide that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places.⁸ Permanent humanitarian visa holders and New Zealand Special Category Visa holders who arrived in Australia as dependent children will remain eligible for commonwealth supported places.⁹

1.91 A commonwealth supported place is partly subsidised by the Australian government through the government paying part of the fees for the place directly to

8 Item 3, new section 36-10(2)(b); EM 45.

9 Item 3, new section 36-10(2)(b); EM 45.

the university. Students are also required to contribute towards their study and they pay the remainder of the fee called 'student contribution amount' for each unit they are enrolled in.

Compatibility of the measure with the right to education

1.92 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

1.93 By providing that Australian permanent residents and New Zealand citizens will no longer be eligible for commonwealth supported higher education places, the measure engages and limits the right to education and specifically the progressive introduction of free higher education. Australia's obligations with respect to the right to education apply regardless of citizenship status to persons within Australia.

1.94 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

Committee comment

1.95 Accordingly, the committee requests the further 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;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**
- **whether alternatives to reducing higher education funding have been fully considered; and**
- **how the measure complies with Australia's obligation to use the maximum of its available resources to progressively introduce free higher education.**

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

1.96 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. 'Discrimination' under the ICCPR encompasses a distinction based on a

personal attribute (for example, race, sex or on the basis of disability),¹⁰ which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.¹¹

1.97 The proposed measure, by providing that New Zealand citizens and Australian permanent residents are no longer eligible for commonwealth supported places, appears to directly discriminate against people on the basis of their nationality.

1.98 Differential treatment¹² will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.99 However, the statement of compatibility did not identify this measure as engaging the right to equality and non-discrimination and accordingly did not provide an assessment of whether the limitation is permissible or constitutes unlawful discrimination.

Committee comment

1.100 Accordingly, the committee requests the further 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 a reasonable and proportionate measure to achieve the stated objective.**

Lowering repayment threshold for HELP debts

1.101 Schedule 3 of the bill lowers the current minimum repayment threshold for HELP loans to \$41,999 per annum (currently, the repayment threshold is \$55,000). It also introduces additional repayment thresholds and rates (1 percent at \$42,000 and increasing to 10 percent on salaries over 119,882 per annum).¹³

10 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation: UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).

11 UN Human Rights Committee, *General Comment 18, Non-discrimination* (1989).

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

13 EM 45.

1.102 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index rather than Average Weekly Earnings.¹⁴

Compatibility of the measures with the right to education

1.103 As set out above, article 13 of the ICESCR protects the right to education including ensuring it is equally accessible and through the progressive introduction of free higher education by every appropriate means.

1.104 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This would be contrary to the requirement under article 13 to ensure that higher education is equally accessible and progressively free. Similarly, the proposed change to indexation also engages and may limit the right to education as it may increase the amount to be paid, relative to earnings, in the event that growth in the Consumer Price Index exceeds growth in Average Weekly Earnings.

1.105 The statement of compatibility did not identify this measure as engaging and limiting the right to education and accordingly did not provide an assessment of whether the limitation is permissible.

Committee comment

1.106 Accordingly, the committee requests the further 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 a reasonable and proportionate measure to achieve the stated objective.**

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

1.107 As set out above, the right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR, and includes indirect discrimination.

1.108 The change in indexation may have a disproportionate negative effect on women. On average, women earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be

14 EM 45.

engaged in part-time employment.¹⁵ Where a person takes longer to repay HELP debt, the change to indexation may result in increased levels of debt to be repaid relative to earnings. The longer period that women, on average, take to pay their HELP debt¹⁶ leads, consequently, to higher education costs than their male counterparts.

1.109 Reducing the minimum repayment income threshold for HELP debts to \$41,999 may also have a disproportionate impact on women, given that they are more likely to earn less than men, and therefore more likely to be affected by the reduction in the repayment threshold to cover those earning between \$41,999 and \$55,000.

1.110 Where a measure impacts on particular groups disproportionately it establishes *prima facie* that there may be indirect discrimination.¹⁷ Differential treatment (including the differential effect of a measure that is neutral on its face)¹⁸ will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.

1.111 The statement of compatibility acknowledges that the measures engage the right to equality and non-discrimination due to their disproportionate impacts on women:

introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.

The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work or individuals in low paid professions. As a result, many of these individuals, including many women, will be making repayments for the first time as a result of the introduction

-
- 15 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?OpenDocument>; ABS, Gender indicators, Australia (August 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151>; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (last accessed 24 May 2017).
- 16 See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) 52.
- 17 See, *D.H. and Others v the Czech Republic* ECHR Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v. the Netherlands* ECHR, Application no. 58641/00 (6 January 2005).
- 18 See, for example, *Althammer v Austria* HRC 998/01 [10.2].

of the new, lower thresholds. Addressing this income inequality, however, is not the role of the higher education loans system.¹⁹

1.112 In this respect, the statement of compatibility does not provide a substantive assessment of whether the measure amounts to indirect discrimination. To state that a negative impact on women results from income inequality is not a justification of the measure – which has the potential to exacerbate inequality – as a proportionate limitation on the right to equality and non-discrimination.

Committee comment

1.113 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) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective.**

Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210]

Purpose	Amends the Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 and Social Security (Administration) (Trial Area - East Kimberley) Determination 2016 to extend trials of cashless welfare arrangements
Portfolio	Social Services
Authorising legislation	<i>Social Security (Administration) Act 1999</i>
Disallowance	15 sitting days after tabling (tabled Senate and House of Representatives 20 March 2017)
Rights	Social security; private life; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Extending a trial of cashless welfare arrangements

1.114 The Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210] (the determination) extends trials of cashless welfare arrangements in Ceduna and its surrounding region, and East Kimberley for six months. This extension will bring the total period of the trials to 18 months in each location.¹

Compatibility of the measure with human rights

1.115 The committee has considered these measures in previous reports in relation to the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card bill),² and the Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (declinable transactions determination).³ The Debit Card bill amended the *Social Security (Administration) Act*

1 The trials were initially extended to a period of twelve months in two instruments: Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Amendment Determination (No. 2) 2016 [F2016L01424] and Social Security (Administration) (Trial Area – East Kimberley) Amendment Determination 2016 [F2016L01599]. See Parliamentary Joint Committee on Human Rights, *Report 8 of 2016* (9 November 2016) 53.

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

3 See Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) 58-61.

1999 to provide for a trial of cashless welfare arrangements in prescribed locations. Persons on working age welfare payments in the prescribed locations would have 80 percent of their income support restricted, so that the restricted portion could not be used to purchase alcoholic beverages or to conduct gambling. The trial arrangements are currently operating in two trial locations of Ceduna and East Kimberley. Explanatory material for the Debit Card bill and declinable transactions determination noted that the policy intention was for the trial to take place for only 12 months in each location.⁴

1.116 The explanatory statement to the determination does not provide detail as to why the extension is required, but states:

While the early indications of the Trial's impact are positive, the Trial's extension will allow the Government to make fully informed decisions about the future of welfare conditionality in Australia.

1.117 The previous human rights assessments of the cashless welfare trial measures raised concerns in relation to the compulsory quarantining of a person's welfare payments and the restriction of a person's agency and ability to spend their welfare payments at businesses including supermarkets. These concerns related to the right to social security, the right to a private life and the right to equality and non-discrimination.⁵

1.118 By extending the trials in each location for a further six months, this instrument engages and limits the abovementioned human rights. As outlined in the committee's *Guidance Note 1*, where a limitation on a right is proposed, the committee expects the statement of compatibility to provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate. While the committee previously accepted that the cashless welfare trial measures may pursue a legitimate objective,⁶ it has raised concerns as to whether the measures are rationally connected to and proportionate to their objective.⁷ In this instance, the statement of compatibility has not provided enough information to establish why extending the

4 See Social Security Legislation Amendment (Debit Card Trial) Bill 2015, explanatory memorandum 4; Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248], explanatory statement 6.

5 See Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 58-61.

6 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 27.

7 Parliamentary Joint Committee on Human Rights, *Thirty-first report of the 44th Parliament* (24 November 2015) 21-36; *2016 Review of Stronger Futures measures* (16 March 2016) 61; and *Report 7 of 2016* (11 October 2016) 42.

trials is necessary and will be effective to achieve the objectives of the trials, and is a proportionate limitation on the above human rights.

Committee comment

1.119 The effect of the determination is to extend the trials of cashless welfare arrangements in Ceduna and its surrounding region and East Kimberley for six months, bringing the total period of the trials to 18 months. The statement of compatibility does not provide information as to why it is considered necessary to extend the trials beyond 12 months, as originally envisaged in the Debit Card Bill.

1.120 Noting the human rights concerns raised by the previous human rights assessments of the trials, and related concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee seeks the advice of the Minister for Social Services as to:

- why it is necessary to extend the trials for a further six months;
- how the extension is effective to achieve (that is, rationally connected to) the stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the objective of the trials.

Further response required

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

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

Purpose	Seeks to make a range of amendments to the <i>Australian Federal Police Act 1979</i> , <i>Crimes Act 1914</i> , and the <i>Criminal Code Act 1995</i> including clarifying the functions of the Australian Federal Police to enable cooperation with international organisations, and non-government organisations; clarifying the custody notification obligations of investigating officials when they intend to question an Aboriginal person or Torres Strait Islander; creating separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to controlled operations in the <i>Crimes Act 1914</i>
Portfolio	Justice
Introduced	House of Representatives, 30 March 2017
Rights	Privacy; life; freedom from torture, cruel, inhuman or degrading treatment or punishment (see Appendix 2)
Previous report	4 of 2017
Status	Seeking further additional information

Background

1.122 The committee first reported on the bill in its *Report 4 of 2017*, and requested a response from the Minister for Justice by 26 May 2017.¹

1.123 The minister's response to the committee's inquiries was received on 29 May 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Functions of the Australian Federal Police – assistance and sharing information

1.124 Schedule 1 of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) seeks to make amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the Australian Federal Police (AFP) to provide assistance and cooperation to international organisations and non-

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 3-6.

government organisations in relation to the provision of police services or police support services.

1.125 Under section 4 of the AFP Act, 'police services' is defined as services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise. 'Police support services' means services related to: (a) the provision of police services by an Australian or foreign law enforcement agency; or (b) the provision of services by an Australian or foreign intelligence or security agency; or (c) the provision of services by an Australian or foreign regulatory agency.

Compatibility of the measure with human rights

1.126 The statement of compatibility states that this measure allows for information sharing with a range of bodies such as Interpol, United Nations organisations and non-government organisations (NGOs) and accordingly:

...may engage the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as the amendments to the AFP Act provide for information sharing with international organisations, including international judicial bodies.²

1.127 The right to privacy may be subject to permissible limitations which are provided by law and not considered arbitrary for the purpose of international human rights law. 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.

1.128 The statement of compatibility states that the objective of the measure is to ensure:

...the AFP can engage fully with international organisations, including judicial bodies, and NGOs, in relation to the provision of police services and police support services.³

1.129 This is likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, the committee's initial analysis raised questions about the adequacy of safeguards that are in place with respect to AFP assistance and cooperation with such bodies, including the sharing of information. First, it is not readily apparent from the statement of compatibility the extent to which the minister considers that the existing safeguards in the Privacy Act will apply with respect to AFP sharing of information with international organisations and NGOs. Second, the initial analysis noted that the sharing of information overseas in the context of law enforcement raises concerns in respect of the right to life, which

2 Explanatory memorandum (EM) 8.

3 EM 8.

were not addressed in the statement of compatibility. Third, the initial analysis noted the possibility that the sharing of information, or cooperation in investigation, may result in torture, or cruel, inhuman and degrading treatment or punishment. This issue was not addressed in the statement of compatibility, including any relevant safeguards.

1.130 Accordingly, in relation to the right to privacy, the committee sought the advice of the Minister for Justice as to the proportionality of the measure, including the availability of effective and adequate safeguards, and the extent to which the provisions of the Privacy Act will act as a safeguard against the use and disclosure of personal information for a secondary purpose.

1.131 In relation to the right to life, the committee sought the advice of the minister about the compatibility of the measure with this right (including the existence of relevant safeguards).

1.132 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 any relevant safeguards).

Minister's response

1.133 The minister's response further explains the scope of the measure, how it is anticipated that it will operate in practice and addresses whether it imposes a proportionate limit on human rights:

The Bill would insert a new function in section 8 of the AFP Act to allow the AFP to assist or cooperate with an international organisation, or with a non-government organisation in relation only to acts, omissions, matters or things outside Australia, in relation to the provision of police services or police support services. The Bill also inserts a definition of an 'international organisation' to include public international organisations as defined in the Criminal Code and bodies established by an international agreement or arrangement.

Under its existing functions, the AFP already engages with a range of international bodies. The AFP's engagement with international bodies, both currently and under the new AFP function, may be for the purposes of sharing information and intelligence, policy development, or otherwise facilitating the provision of police services. In many cases, the provision of information will not involve personal information or information relating to any particular investigation. This might include, for example, the provision of information relating to law enforcement methodologies or trends of criminal activity. In such cases, as the circumstances of specific individuals are not at issue, the right to privacy, the right to life, and the prohibition on torture, cruel, inhuman and degrading treatment will not be enlivened. In all cases, the AFP has a robust set of governance and

procedures in place to ensure such engagement is compatible with human rights.

In summary, the measure to insert a new function in the AFP Act is compatible with the right to privacy, the right to life and the prohibition on torture, cruel, inhuman and degrading treatment. In particular, with respect to any relevant disclosure of information pursuant to the new function:

- the Privacy Act 1988 will apply
- the AFP National Guideline on international police-to-police assistance in death penalty situations (the National Guideline on Death Penalty) will be applied, and
- the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (the National Guideline on TCIDTP) will be applied.

Although the National Guideline on Death Penalty and the National Guideline on TCIDTP do not specifically reference international organisations, the AFP already applies the Guidelines to relevant information disclosures it makes to international organisations under its existing functions. Should the amendment pass, the AFP will review internal AFP governance and procedures, including both Guidelines, to ensure they reflect legislative and operational requirements.

1.134 The response clarifies that much of the assistance and information provided will not relate to individual investigative cases so, as a practical matter, the proposed new function may not impact upon human rights in these instances. While this may be the case, as acknowledged in the minister's response, the proposed new function still engages a range of human rights by permitting the sharing of information overseas.

1.135 The AFP's commitment to review both the National Guideline on Death Penalty and the National Guideline on TCIDTP (the guidelines) in light of the measure is welcome. However, as set out below, in relation to the right to life and the prohibition on torture, cruel, inhuman and degrading treatment, the committee would be assisted by additional information regarding these guidelines, to assess whether they provide an adequate and effective safeguard in relation to these rights.

Compatibility of the measure with the right to privacy

1.136 In relation to the right to privacy, the minister's response clarifies how the Privacy Act and the Australian Privacy Principles (APPs) will apply and operate as a safeguard in relation to disclosure of personal information for the proposed measure:

The proposed new function in section 8 of the AFP Act does not override the Privacy Act. To the extent that the new function will enable the disclosure of personal information with international organisations and non-government organisations, the Privacy Act, the AFP Act and AFP policy

provide effective and adequate safeguards to protect the right to privacy. Furthermore and as noted above, only a small proportion of the cooperation undertaken pursuant to the new function is likely to relate to specific individuals or cases where personal information would be relevant.

As an Australian Privacy Principle entity, the AFP is bound by the Australian Privacy Principles (APPs) which are contained in Schedule 1 of the Privacy Act. The APPs govern the way the AFP collects, uses, discloses and stores personal information. The APPs apply irrespective of whether the AFP is cooperating with a domestic or international body.

The APPs contain some exceptions allowing the use and disclosure of personal information for a purpose other than the primary purpose for which it was collected. As noted by the Committee, one such exception is where use or disclosure of information is required or authorised by law. The government does not consider that the new AFP function inserted by the Bill operates as a 'requirement or authorisation by law' for the purpose of this exception.

1.137 The minister's advice notes that the measure is not considered to create a broad authorisation for the disclosure of personal information for secondary purpose under the Privacy Act. It follows that the Privacy Act and the APPs appear capable of operating as a safeguard in relation to the disclosure of personal information in a range of circumstances.

1.138 However, the minister's response acknowledges that other exceptions to the prohibition on disclosure of information for a secondary purpose under the APPs may be applicable:

As also noted by the Committee, another of these exceptions includes where the use or disclosure is reasonably necessary for enforcement related activity conducted by, or on behalf of, an enforcement body. 'Enforcement related activity' is defined broadly and includes prevention, detection, investigation, prosecution or punishment of criminal offences. 'Enforcement body' includes the AFP together with a number of other domestic agencies.

The use or disclosure of personal information pursuant to the new AFP function inserted by the Bill may, in some circumstances, qualify under this exception. That is, where the use or disclosure of personal information with respect to the international organisation or non-government organisation is reasonably necessary for enforcement related activity conducted by, or on behalf of, an enforcement body as defined by the Privacy Act. As noted above, in many cases, the provision of information will not involve personal information or relate to any particular investigation.

In all cases involving the use or disclosure of personal information, AFP appointees must consider whether the Privacy Act permits use or disclosure of the personal information. In relation to information

disclosure, AFP appointees are also bound by the secrecy provision in section 60A of the AFP Act and must consider whether the release of information is consistent with AFP functions. Each disclosure must be considered on a case-by-case basis.

The AFP's National Guideline on Privacy also outlines AFP appointees' obligations under the Privacy Act and all AFP appointees are required to be familiar and comply with the Guideline.

1.139 While noting that an exception to the prohibition on disclosure may be available in particular cases, the general prohibition on disclosure of personal information under the APPs for a secondary purpose appears to provide a significant safeguard in relation to the right to privacy. On this basis, the measure would appear to provide a proportionate limitation on the right to privacy.

Compatibility of the measure with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment

1.140 In relation to whether the measure is compatible with the right to life and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the minister provided the following information:

Information and intelligence sharing with international organisations and non-government organisations for the purposes of the proposed new function will often not relate to any particular individual under investigation, and therefore will not raise death penalty, or torture, cruel, inhuman or degrading treatment or punishment (TCIDTP), implications.

Where information provided to an international organisation or a non-government organisation has potential death penalty or TCIDTP implications, the AFP will apply the National Guideline on Death Penalty or the National Guideline on TCIDTP. For example, this might arise when providing information via Interpol to a law enforcement agency in a country that has not abolished the death penalty or where TCIDTP concerns exist.

As noted above, the National Guideline on Death Penalty and the National Guideline on TCIDTP do not specifically refer to the proposed new function of cooperating with international organisations. Should the amendment pass Parliament, the AFP will review both National Guidelines to ensure they reflect legislative and operational requirements.

The AFP already applies the National Guideline on Death Penalty and the National Guideline on TCIDTP to relevant information disclosures it makes to international organisations under its existing functions. The AFP will continue to treat any disclosures of information that may involve the death penalty or TCIDTP implications with the same process as it would for the exchange of information between law enforcement agencies.

National Guideline on Death Penalty

All AFP appointees are required to comply with the National Guideline on Death Penalty. Inappropriate departures from the National Guideline may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

Under the National Guideline on Death Penalty, the AFP is required to consider relevant factors before providing information to foreign law enforcement agencies if it is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty. Ministerial approval is required for any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.

The Government has committed to make improvements to the National Guideline on Death Penalty. On 1 March 2017, the Government tabled its response to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*. In its response, the Government agreed to implement a number of recommendations, including:

- the National Guideline be amended by 'explicitly applying the Guideline to all persons, not just Australian citizens';
- the National Guideline be amended by 'including a provision that, in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases be directed to the Minister for decision' (the Government accepts this recommendation in principle, however re-affirms that the decision-making in the pre-arrest phase is best made within the AFP)
- The National Guideline be amended by 'articulating the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk'. These amendments will enhance the existing safeguards against the provision of information in death penalty cases.

National Guideline on TCIDTP

The National Guideline on TCIDTP outlines the obligations for AFP appointees where a person is in danger of being subjected to TCIDTP. All AFP appointees are required to comply with the National Guideline on TCIDTP. Inappropriate departures may constitute a breach of AFP professional standards and be dealt with under Part V of the AFP Act.

The National Guideline on TCIDTP provides a list of mandatory considerations before information can be disclosed to foreign authorities in situations where there are substantial grounds for believing a person that is detained would be in danger of being subjected to TCIDTP. It also sets out a formal approval process for the release of such information. The information, if provided, must include a caveat to protect against unintended use of the information, and on-disclosure to third parties.

1.141 The guidelines relied upon by the minister are significant in relation to whether the measure is compatible with the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment. However, without knowing what the guidelines state it is not possible to conclude that they would provide adequate and effective protection of these rights. While some copies have been made publically available through the *Freedom of Information Act 1982*, they are undated and it is unclear whether these versions are current. Accordingly, in order to complete the human rights assessment of the measure against the right to life and the prohibition on torture, cruel, inhuman and degrading treatment or punishment, the committee would be assisted by a current copy of these guidelines.

Committee response

1.142 The committee thanks the minister for his response.

1.143 As set out in the preceding analysis, the minister has provided a range of information that indicates that the measure is likely to be compatible with the right to privacy.

1.144 In order to complete its examination of the compatibility of the measure with the right to life and the right not to be subject to torture, cruel, inhuman and degrading treatment, the committee requests a copy of the following guidelines:

- **AFP National Guideline on international police-to-police assistance in death penalty situations; and**
- **AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment.**

Advice only

1.145 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.

Appropriation Bill (No. 1) 2017-2018

Appropriation Bill (No. 2) 2017-2018

Purpose	Appropriation Bill (No. 1) 2017-2018 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government; and Appropriation Bill (No. 2) 2017-2018 seeks to do so for services that are not ordinary annual services of the government
Portfolio	Finance
Introduced	House of Representatives, 9 May 2017
Rights	Multiple rights (see Appendix 2)
Status	Advice only

Background

1.146 The committee has previously considered the human rights implications of appropriations bills in a number of reports,¹ and they have been the subject of correspondence with the Department of Finance.²

1.147 The committee previously reported on Appropriation Bill (No. 1) 2016-2017 and Appropriation Bill (No. 2) 2016-2017 (the earlier 2016-2017 bills) in its *Report 9 of 2016*.³

-
- 1 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013) 65; *Seventh report of 2013* (5 June 2013) 21; *Third report of the 44th Parliament* (4 March 2014) 3; *Eighth report of the 44th Parliament* (24 June 2014) 5, 31; *Twentieth report of the 44th Parliament* (18 March 2015) 5; *Twenty-third report of the 44th Parliament* (18 June 2015) 13; and *Thirty-fourth report of the 44th Parliament* (23 February 2016) *Report 2 of 2017* (21 March 2017) 44-46.
 - 2 Parliamentary Joint Committee on Human Rights, *Seventh report of 2013* (5 June 2013) 21; and *Eighth report of the 44th Parliament* (18 June 2014) 32.
 - 3 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

Potential engagement and limitation of human rights by appropriations Acts

1.148 As previously stated in respect of the 2016-2017 bills, proposed government expenditure to give effect to particular policies may engage and limit and/or promote a range of human rights. This includes rights under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

1.149 The committee has previously noted that:

...the allocation of funds via appropriations bills is susceptible to a human rights assessment that is directed at broader questions of compatibility—namely, their impact on progressive realisation obligations and on vulnerable minorities or specific groups. In particular, the committee considers there may be specific appropriations bills or specific appropriations where there is an evident and substantial link to the carrying out of a policy or program under legislation that gives rise to human rights concerns.⁵

Compatibility of the bills with multiple rights

1.150 Like the earlier 2016-2017 bills, and previous appropriations bills, the current bills are accompanied by a brief statement of compatibility, which notes that the High Court has stated that, beyond authorising the withdrawal of money for broadly identified purposes, appropriations Acts 'do not create rights and nor do they, importantly, impose any duties'.⁶ The statements of compatibility conclude that, as their legal effect is limited in this way, the bills do not engage, or otherwise affect, human rights.⁷ They also state that '[d]etailed information on the relevant appropriations...is contained in the portfolio [Budget] statements'.⁸ No further assessment of the human rights compatibility of the bills is provided.

1.151 The full human rights analysis in respect of such statements of compatibility can be found in the committee's *Report 9 of 2016*.⁹

4 See Parliamentary Joint Committee on Human Rights, *Third report of 2013* (13 March 2013); *Seventh report of 2013* (5 June 2013); *Third report of the 44th Parliament* (4 March 2014); and *Eighth Report of the 44th Parliament* (24 June 2014).

5 Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) 17.

6 Appropriation Bill (No. 1) 2017-2018: explanatory memorandum (EM), statement of compatibility (SOC) 3. Appropriation Bill (No. 2) 2017-2018: EM, SOC 4.

7 Bill No. 3, EM, SOC 3; Bill No. 4, EM, SOC 4.

8 Bill No. 3, EM, SOC 3; Bill No. 4, EM, SOC 4.

9 Parliamentary Joint Committee on Human Rights, *Report 9 of 2016* (22 November 2016) 30-33.

1.152 As previously stated, while such bills present particular difficulties for human rights assessment because they generally include high-level appropriations for a wide range of outcomes and activities across many portfolios, the allocation of funds via appropriations bills is susceptible to a human rights assessment directed at broader questions of compatibility.

Committee comment

1.153 The committee notes that the statements of compatibility for the bills provide no assessment of their compatibility with human rights on the basis that they do not engage or otherwise create or impact on human rights. However, while the committee acknowledges that appropriations bills present particular challenges in terms of human rights assessments, the appropriation of funds may engage and potentially limit or promote a range of human rights that fall under the committee's mandate.

1.154 Given the difficulty of conducting measure-level assessments of appropriations bills, the committee recommends that consideration be given to developing alternative templates for assessing their human rights compatibility, drawing upon existing domestic and international precedents. Relevant factors in such an approach could include consideration of:

- **whether the bills are compatible with Australia's obligations of progressive realisation with respect to economic, social and cultural rights; and**
- **whether any reductions in the allocation of funding are compatible with Australia's obligations not to unjustifiably take retrogressive or backward steps in the realisation of economic, social and cultural rights.**

Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017

Purpose	This bill seeks to amend the <i>Social Security (Administration) Act 1999</i> to allow the Income Management element of Cape York Welfare Reform to continue for two additional years until 30 June 2019
Portfolio	Social Services
Introduced	House of Representatives, 24 May 2017
Rights	Equality and non-discrimination; social security; privacy and family (see Appendix 2)
Status	Advice only

Background

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

1.156 A person on welfare benefits can voluntarily sign up for income management, or be made subject to compulsory income management.

1.157 The committee examined the income management regime, focusing on its operation in the Northern Territory, in its *2013* and *2016 Reviews of the Stronger*

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

2 See, further, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures* (16 March 2016) 39, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2.

Futures measures.³ In its 2016 review, the committee noted that the income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.⁴

Extending Cape York income management

1.158 The Social Services Legislation Amendment (Queensland Commission Income Management Regime) Bill 2017 (the bill) proposes to amend the *Social Security (Administration) Act 1999* to continue income management under the Cape York welfare reform package for a further two years.⁵ The Cape York welfare reforms were introduced in 2008, jointly funded by the Commonwealth and Queensland state government. As part of the reforms, the Family Responsibilities Commission (Queensland Commission) was created as an independent statutory authority to:

...support the restoration of socially responsible standards of behaviour and local authority in welfare reform community areas; and...to help people in welfare reform community areas to resume primary responsibility for the wellbeing of their community and the individuals and families of the community.⁶

1.159 The Queensland Commission may, in certain circumstances, direct Centrelink to place a person under compulsory income management.⁷ Individuals who may be placed on income management under the Cape York measures must be referred to the Queensland Commission by a relevant Queensland department, after having failed to meet certain pre-determined obligations.⁸

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

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

5 The Cape York Welfare Reform package applies to the communities of Aurukun, Coen, Hope Vale, and Mossman Gorge. In 2016, income management under these measures was also extended to the community of Doomadgee.

6 See *Family Responsibilities Commission Act 2008* (Qld), section 4.

7 See *Social Security (Administration) Act 1999*, section 123UF.

8 See, Family Responsibilities Commission, *FRC Processes* at: <http://www.frcq.org.au/?q=content/frc-processes>. Referrals are made by agency notice from the relevant departments. Agency notices are received by the Queensland Commission in the following circumstances:

- The Department of Education and Training (DET) must submit a School Attendance Notice to the Commission if a child is absent for three full, or part days of a school term without reasonable excuse, or submit a School Enrolment Notice where a child of compulsory school age is not enrolled to attend school.
- The Department of Communities, Child Safety and Disability Services must submit a Child Safety and Welfare Notice where the Chief Executive becomes aware of an allegation of harm or risk to a child.

1.160 On receipt of the notice, a local commissioner will then hold a conference with the person, and, as an alternative to placing a person on income management, the commission can refer the person to support services.⁹

Compatibility of the measure with human rights

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

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

1.162 Each of these rights is discussed in detail in the context of the income management regime in the committee's *2016 Review of Stronger Futures measures* (2016 Review).¹⁰

1.163 In the 2016 Review, the committee accepted that the income management regime pursues a legitimate objective for the purposes of international human rights law, but questioned whether the measures were rationally connected to achieving the stated objective and were proportionate.¹¹ The committee's report noted:

While the income management regime may be of some benefit to those who voluntarily enter the program, it has limited effectiveness for the vast majority of people who are compelled to be part of it.¹²

1.164 As noted above, the income management regime as applied by the Cape York welfare reform measures appears targeted at a more limited range of welfare recipients, and allows for individual assessments of the particular circumstances of the affected individuals and the management of their welfare payments. This regime, as facilitated through the Queensland Commission, may accordingly be less rights restrictive than the blanket location-based scheme as applied in the Northern Territory, and other place-based income management sites. However, while an

-
- The Department of Justice and Attorney-General must submit a Court Offence Notice if a person is convicted of an offence.
 - The Department of Housing and Public Works or the provider of social housing must submit a Tenancy Breach Notice if the tenant has breached their social housing tenancy agreement.

9 Explanatory memorandum (EM) 3.

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

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

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

individual assessment is required, the application of income management may be compulsory rather than voluntary. The concerns raised in 2016 Review regarding compulsory income management therefore remain.

Committee comment

1.165 The effect of the bill is to extend the income management element of the Cape York welfare reform measures in the communities of Aurukun, Coen, Hope Vale, Mossman Gorge and Doomadgee for two years.

1.166 Noting the human rights concerns regarding income management identified in the committee's *2016 Review of Stronger Futures measures*, the committee draws the human rights implications of the bill to the attention of the Parliament.

Bills not raising human rights concerns

1.167 Of the bills introduced into the Parliament between 9 May and 1 June 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):

- Appropriation (Parliamentary Departments) Bill (No. 1) 2017-2018;
- Australian Education Amendment Bill 2017;
- Clean Energy Finance Corporation Amendment (Carbon Capture and Storage) Bill 2017;
- Comcare and Seacare Legislation Amendment (Pension Age and Catastrophic Injury) Bill 2017;
- Customs Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017;
- Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017;
- Excise Tariff Amendment (Tobacco Duty Harmonisation) Bill 2017;
- Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining and Other Measures) Bill 2017;
- Government Procurement (Judicial Review) Bill 2017;
- Industrial Chemicals Bill 2017;
- Industrial Chemicals Charges (Customs) Bill 2017;
- Industrial Chemicals Charges (Excise) Bill 2017;
- International Monetary Agreements Amendment Bill 2017;
- Major Bank Levy Bill 2017;
- Medicare Guarantee (Consequential Amendments) Bill 2017;
- Medicare Guarantee Bill 2017;
- Public Service Amendment (Supporting a Regional Workforce) Bill 2017;
- Safe Work Australia Amendment (Role and Functions) Bill 2017;
- Social Services Legislation Amendment (Ending Carbon Tax Compensation) Bill 2017;
- Social Services Legislation Amendment (Energy Assistance Payment and Pensioner Concession Card) Bill 2017;
- Social Services Legislation Amendment (Relieving Domestic Violence Victims of Debt) Bill 2017;
- Statute Update (Winter 2017) Bill 2017;
- Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017;

- Treasury Laws Amendment (2017 Measures No. 2) Bill 2017;
- Treasury Laws Amendment (Accelerated Depreciation For Small Business Entities) Bill 2017;
- Treasury Laws Amendment (Enterprise Tax Plan No. 2) Bill 2017;
- Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017;
- Treasury Laws Amendment (GST Integrity) Bill 2017;
- Treasury Laws Amendment (Major Bank Levy) Bill 2017;
- Treasury Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2017;
- Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2017.