

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 19 and 22 June (consideration of 3 bills from this period has been deferred);¹
 - legislative instruments received between 26 May and 22 June (consideration of 5 legislative instruments from this period has been deferred);² and
 - bills and legislative instruments previously deferred.
- 1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.
- 1.3 The committee has concluded its consideration of 8 bills and instruments that were previously deferred.³

Instruments not raising human rights concerns

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

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

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

3 These are: the Law Enforcement Integrity Commissioner Regulations 2017 [F2017L00304] and the Telecommunications Integrated Public Number Database Scheme 2017 [F2017L00298] (first deferred in *Report 4 of 2017*); the Aviation Transport Security Amendment (Persons in Custody) Regulations 2017 [F2017L00440], the Imported Food Control Amendment Bill 2017, and the Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450] (first deferred in *Report 5 of 2017*); the Long Service Leave (Commonwealth Employees) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00568], the Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017 [F2017L00549], and the Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 [F2017L00581] (deferred in *Report 6 of 2017*).

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

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

Response required

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

Federal Financial Relations (National Partnership payments) Determination No. 116-119 (February 2017)-(May 2017)⁵

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

Background

1.7 The committee has previously examined a number of related Federal Financial Relations (National Partnership payments) Determinations made under the *Federal Financial Relations Act 2009* and requested and received further information from the treasurer as to whether they were compatible with Australia's human rights obligations.⁶

5 Federal Financial Relations (National Partnership payments) Determination No. 116 (February 2017) [F2017L00198]; Federal Financial Relations (National Partnership payments) Determination No. 117 (March 2017) [F2017L00413]; Federal Financial Relations (National Partnership payments) Determination No. 118 (April 2017) [F2017L00540]; Federal Financial Relations (National Partnership Payments) Determination No. 119 (May 2017) [F2017L00707].

6 See Parliamentary Joint Committee on Human Rights, *Twenty-eighth report of the 44th Parliament* (17 September 2015) 10-14; *Thirtieth report of the 44th Parliament* (10 November 2015) 102-109; *Report 7 of 2016* (11 October 2016) 40-43; *Report 8 of 2016* (9 November 2016) 84-87; and *Report 3 of 2017* (28 March 2017) 13-16.

1.8 In its *Report 7 of 2016*, the committee sought further information from the treasurer as to the compatibility of a number of related Federal Financial Relations (National Partnership payments) Determinations with Australia's obligation to progressively realise economic, social and cultural (ESC) rights and to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights.⁷ Based on additional information provided by the Treasurer, the committee was able to conclude in its *Report 8 of 2016* that the determinations were unlikely to constitute a retrogressive measure for the purposes of international human rights law.⁸ The committee also recommended at the time that the kind of additional information provided by the Treasurer be included in future statements of compatibility.

1.9 In its *Report 3 of 2017*, the committee also examined four related Federal Financial Relations (National Partnership payments) Determinations.⁹ The committee reiterated its previous recommendation that the type of information previously provided by the treasurer to the committee be included in future statements of compatibility for such measures in order to assist the committee to fully assess the compatibility of these determinations with human rights.

1.10 This report considers four new Federal Financial Relations (National Partnership payments) Determinations (the determinations) for the periods February, March, April and May 2017.

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

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

1.12 The *Federal Financial Relations Act 2009* provides for the minister, by legislative instrument, to determine the total amounts payable in respect of each

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

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

9 Federal Financial Relations (National Partnership payments) Determination No. 112 (October 2016) [F2016L01724]; Federal Financial Relations (National Partnership Payments) Determination No. 113 (November 2016) [F2016L01937]; Federal Financial Relations (National Partnership payments) Determination No. 114 (December 2016) [F2017L00049]; and Federal Financial Relations (National Partnership payments) Determination No. 115 (January 2017) [F2017L00050] 13-16.

NPP in line with the parameters established by the relevant National Partnership agreements. Schedule 1 to each of the determinations sets out the amounts payable under the NPPs to states and territories, contingent upon the attainment of specified benchmarks or outcomes, in areas including health, employment, education, community services and affordable housing.

Compatibility of the measure with multiple rights

1.13 In its previous analysis, the committee has noted that setting benchmarks for achieving certain standards, which may consequently result in fluctuations in funding allocations, has the capacity to both promote rights and, in some cases, limit rights, including the right to health; the right to social security; the right to an adequate standard of living, including housing; the right to education; and the rights of children.

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

1.15 Because realisation of these rights is reliant on government allocation of expenditure, a reduction in funding for services such as health and education may be considered a retrogressive measure in the attainment of ESC rights.¹⁰ Any backward step regarding the progressive attainment of such rights therefore needs to be justified for the purposes of international human rights law.

1.16 The statement of compatibility for each of the determinations contains a standard paragraph, similar to information provided for past related determinations considered by the committee, which states:

neither this determination nor the making of National Partnership payments more generally could be said to have a detrimental impact on any human right.¹¹

1.17 The statements of compatibility for the determinations therefore do not provide an assessment of the extent to which fluctuations in funding, with reference to the achievement or failure to achieve specific benchmarks or outcomes, may promote human rights (where funding is increased) or may be regarded as retrogressive (where funding is reduced).

10 The committee has previously considered similar issues in relation to the human rights compatibility of funding allocation measures through appropriation bills: See, Parliamentary Joint Committee on Human Rights, *Twenty-third report of the 44th Parliament* (18 June 2015) Appropriation Bill (No. 3) 2014-2015 and Appropriation Bill (No. 4) 2014-2015, 13-17; *Report 2 of 2017* (21 March 2017) Appropriation Bill (No. 3) 2016-2017 and Appropriation Bill (No. 4) 2016-2017, 44-46; *Report 5 of 2017* (14 June 2017) Appropriation Bill (No. 1) 2017-2018 and Appropriation Bill (No. 2) 2017-2018, 42-44.

11 Explanatory statement, statement of compatibility 2.

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

1.19 The response previously provided by the Treasurer in relation to similar measures provided a very useful assessment of the human rights compatibility of the NPPs in the context of ESC rights. The provision of such additional information by the treasurer allowed the committee to conclude that past determinations were likely to be compatible with Australia's international obligations.¹² While the committee has now recommended this type of information be included in future statements of compatibility going forward, this has not occurred to date.

1.20 Without this additional information included in the statements of compatibility, it is difficult for the committee to complete its assessment of the compatibility of NPPs. If such information were included in the statement of compatibility at the outset then the committee may not need to request further information from the Treasurer in relation to NPPs.

Committee comment

1.21 In relation to the determinations examined in this report, the committee therefore seeks the advice of the treasurer as to:

- **whether the setting of benchmarks for the provision of funds under the National Partnership payments is compatible with human rights (for example, how the benchmarks may or may not support the progressive realisation of human rights such as the rights to health and education);**
- **whether there are any retrogressive trends over time indicating reductions in payments which may impact on human rights (such as health, education or housing); and**
- **whether any retrogressive measures or trends pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.**

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

1.22 Additionally, the committee seeks the advice of the treasurer as to whether this type of information, previously provided by the treasurer to the committee, could be included in future statements of compatibility for related National Partnership payment determinations to assist the committee to fully assess the compatibility of the measure with human rights in future.

Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017

Purpose	Amends the <i>Australian Passports Act 2005</i> and <i>Foreign Passports (Law Enforcement and Security) Act 2005</i> to require the minister to deny a passport or demand the surrender of a foreign travel document when an Australian citizen is on a state or territory child sex offender register with reporting obligations; and the <i>Criminal Code Act 1995</i> to create an offence for a registered child sex offender with reporting obligations to travel, or attempt to travel, overseas without permission from a relevant authority
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives, 14 July 2017
Rights	Freedom of movement (see Appendix 2)
Status	Seeking additional information

Background

1.23 The Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (the bill) finally passed both houses of parliament on 20 July 2017 and received royal assent on 26 July 2017.

1.24 As a result of the rapid passage of the bill, this is the first opportunity that the committee has had to report on this legislation.

Denial or cancellation of passport and criminal offence to travel overseas

1.25 Section 22AA of the bill provides that a passport must not be issued and must be cancelled where a 'competent authority' makes a refusal or cancellation request.

1.26 Such a request may be made in relation to a 'reportable offender', which means an Australian citizen whose name is entered on a child protection register of a state or territory and who has reporting obligations in connection with that entry on the register.

1.27 A 'competent authority' is defined in the *Australian Passports Act 2005* as a person with responsibility for, or powers, functions or duties in relation to, reportable offenders or a person specified in a minister's determination as a competent authority.¹

1 *Australian Passports Act 2005* section 12(3).

1.28 Section 271A.1(1) further makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia.

1.29 Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. The offence carries a maximum penalty of five years imprisonment.

Compatibility of the measures with the right to freedom of movement

1.30 The right to freedom of movement includes the right to leave and return to Australia. As international travel requires the use of passports, the right to freedom of movement encompasses the right to obtain necessary travel documents, such as a passport.

1.31 By providing for the denial or cancelation of a reportable offender's passport and creating a criminal offence for a reportable offender to leave Australia, the measure engages and limits freedom of movement. The statement of compatibility acknowledges the limitation on the right but argues that this limitation is permissible.²

1.32 The right to freedom of movement may be permissibly limited where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.33 The explanatory memorandum states that the purpose of the measures are to ensure reportable offenders are prevented from travelling overseas 'to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored'.³ The statement of compatibility identifies the objective of the measures as protecting the rights and freedoms of others and particularly the rights of children to be protected from all forms of sexual exploitation and abuse.⁴ The explanatory memorandum also provides evidence of the importance of this objective.⁵ Preventing the abuse of children is clearly a legitimate objective for the purpose of international human rights law.

1.34 However, the statement of compatibility does not provide any specific information, or any evidence, about how the measure will be effective to achieve this objective (that is, rationally connected to the legitimate objective).

2 Statement of Compatibility (SOC) 4, 5.

3 Explanatory Memorandum (EM) 2.

4 SOC 3.

5 EM 2.

1.35 In relation to the proportionality of the measures, the statement of compatibility argues that:

The measure is proportionate and reasonable because it only captures those who have been convicted in a court of law for child sex offences and/or who have been placed by a court on a register with reporting obligations due to the seriousness of their offences and/or risk of reoffending. The passport measures will be legislated, are not arbitrary and will cease to take effect once the person's reporting obligations end.⁶

1.36 The statement of compatibility identifies one relevant safeguard in relation to the measures, stating:

if there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis.⁷

1.37 The statement of compatibility provides no further information on the operation of safeguards. It is therefore not evident that the measures are sufficiently circumscribed so as to ensure they are the least rights restrictive way of achieving their objective.

1.38 It appears from the explanatory materials that it is not intended that a competent authority will make a case-by-case assessment of each reportable offender before requesting that their passport be cancelled or not issued. The explanatory memorandum notes that Commonwealth legislation already provides that a child sex offender's passport may be refused, cancelled or surrendered on the basis of a competent authority's assessment of the offender's likelihood to cause harm.⁸ However, the explanatory memorandum states that:

This process is resource intensive, being done on a case-by-case basis, and is subject to review by the Administrative Appeals Tribunal. As a result, States and Territories do not use these provisions at all. The measures in the Bill address these constraints to protect vulnerable overseas children.⁹

1.39 While the current process may be more resource intensive than the absence of a risk-based assessment, the statement of compatibility does not explain why better resourcing the current process would be insufficient to address the legitimate objective of protecting children. This would appear to be a more tailored approach, allowing for restriction of movement in those cases where an offender is likely to cause harm. The statement of compatibility does not identify any problems with the

6 SOC 5.

7 SOC 5.

8 This would appear to be provided for in existing section 14 of the *Australian Passports Act 2005*.

9 EM 2.

current legal test for the refusal, cancellation or surrender of a passport in terms of targeting appropriate offenders.

1.40 It should be noted that reducing the administrative inconvenience of undertaking case-by-case assessments of offenders before depriving them of their freedom of movement after they have served their criminal sentence is not a legitimate objective for limiting a fundamental human right. Nor is reducing the administrative inconvenience of the availability of rights of review before the Administrative Appeals Tribunal (AAT).

1.41 The explanatory memorandum further states that following the changes introduced by the bill the number of competent authority requests 'will rise substantially to capture the existing 20,000 registered child sex offenders and additional 2,500 offenders added to the registers each year'.¹⁰ Based on this information, it appears that the bill would permit competent authorities to make requests in relation to all reportable offenders without any consideration of the risk each individual poses or their individual circumstances or whether it is necessary to restrict travel entirely rather than to specific countries 'where the law enforcement framework is weaker'.¹¹ Further, the criminal offence of leaving Australia under section 271A.1(1) would apply to all those on a child protection offender register who have reporting obligations unless an exception applies.

1.42 The existence of effective safeguards and exemption is relevant to whether the measures are a proportionate limitation on human rights. A competent authority will be able to permit a reportable offender to travel overseas on a case by case basis where there are 'good reasons' (such as visiting a dying family member).¹² However, no information is provided as to the processes by which a person could apply to the competent authority to seek permission to be able to travel overseas or whether there is any process for merits review of any decision that the competent authority makes. It appears that the criminal offence of leaving Australia could apply unless a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Permitting travel in particular circumstances also does not address the concern about the potential blanket application of the measures to all reportable offenders regardless of individually assessed risk.

1.43 In this respect, it is also unclear from the bill, the statement of compatibility and the explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. The explanatory memorandum provides no detail of which offenders are put on a state or territory child protection

10 EM 12.

11 EM 2.

12 EM 9-10.

register, other than to say that the bill applies to 'registered child sex offenders'.¹³ However, the bill provides that a reportable offender is one whose name is entered on a state or territory 'child protection offender register', however described. It appears that this may include those who have been convicted of harmful, but not sexual, offences against children and offences not involving children. For example, it appears that in the Northern Territory, Queensland, Tasmania and Victoria, a person convicted of incest (which could apply in relation to adults) could be included on a child protection register.¹⁴ It therefore appears that the range of offences for which a person could be included on a child protection offender register may be broader than child sex offences. As such, the measures appear to be overly broad with respect to achieving the objective of preventing the abuse of children overseas. It is noted in this respect that the obligation to ensure that legislation operates in compatibility with Australia's international obligations rests with the commonwealth, irrespective of whether the relevant legislation or processes operate at the federal, state or territory level.¹⁵

Committee comment

1.44 The measures are stated to pursue the legitimate objective of preventing the exploitation and abuse of children overseas. However, the preceding analysis raises questions as to whether the limitation placed on the right to freedom of movement is proportionate and permissible.

1.45 The statement of compatibility has provided insufficient information to justify this limitation. The committee accordingly seeks the advice of the minister as to:

- how the measures, in altering the existing system for the refusal of a travel document, are effective to achieve (that is, rationally connected to) its legitimate objective; and
- whether the limitation is reasonable and proportionate to achieve its stated objective, including:
 - why existing section 14 of the *Australian Passports Act 2005*, which provides that a travel document may be refused if a competent

13 EM 2.

14 See *Child Protection (Offender Reporting and Registration) Act 2004* (Northern Territory); *Child Protection (Offender Reporting) Act 2004* (Queensland); *Community Protection (Offender Reporting) Act 2005* (Tasmania); *Sex Offenders Registration Act 2004* (Victoria). For a summary of offender registration legislation in each Australian state or territory, see also: <https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory> (accessed 15 June 2017).

15 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 – 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

authority reasonably suspects a person would engage in harmful conduct, is not sufficient to address the legitimate objective of the measures;

- whether other less rights restrictive approaches are reasonably available, including approaches which are tailored to the risk posed by an individual;
- how the measures are sufficiently circumscribed (including whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so; whether the competent authority will be required to consider individual risk factors before making a request); and
- whether there are adequate and effective safeguards (including the extent to which a reportable offender could seek review of a refusal/cancellation request or a decision to refuse a reportable offender's case-by-case request to travel 'for good reasons').

Compatibility of the measure with the right to a fair hearing

1.46 The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR) and applies to both criminal and civil proceedings, including where rights and obligations are determined. The measures may engage and limit this right due to the restricted scope that is provided for review of the denial or cancellation of an individual's passport and other decisions in this process. The decision to deny or cancel an Australian passport will not be subject to merits review. The statement of compatibility argues that:

The decision to cancel an Australian passport following a competent authority request on the grounds that a person is a reportable offender should not be subject to administrative review as the Minister's decision will be a mandatory decision. The Minister is required to deny a passport following a request by a competent authority, which has appropriate expertise and full understanding of the circumstances of the offender.¹⁶

1.47 It is acknowledged that, given the mandatory nature of the minister's decision to cancel or deny a passport, merits review of the exercise of this power would potentially provide substantively no further grounds of review than judicial review. It is noted in this respect that an individual would continue to have access to judicial review.

1.48 However, it is not addressed in the statement of compatibility whether the decision by the competent authority to make a refusal or cancellation request would

be subject to merits review. Nor does the statement of compatibility address whether a decision by a competent authority in relation to whether a registrable offender is to be granted permission to travel overseas would be subject to merits review.

Committee comment

1.49 The preceding analysis raises questions about the compatibility of the measure with the right to a fair hearing.

1.50 Accordingly, the committee requests the advice of the minister as to whether decisions of the competent authority will be subject to merits review.

1.51 If not, the committee requests the advice of the minister as to whether the measure is compatible with the right to a fair hearing.

Compatibility of the measure with criminal process rights

1.52 Article 14(7) of the ICCPR protects the right not to be tried and punished twice (the prohibition against double jeopardy). Article 15 of the ICCPR provides that a heavier penalty shall not be imposed than the one which was applicable at the time a particular criminal offence was committed. These rights apply in relation to criminal offences. As set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil under domestic law it may nevertheless be considered 'criminal' under international human rights law.¹⁷

1.53 The statement of compatibility acknowledges that the measures may engage these rights as they impose a new restriction on reportable offenders following their conviction.¹⁸ However, the statement of compatibility argues that the measures are compatible with these rights as 'they are not penal in nature and support the existing requirements for reportable offenders to report their intention to travel' and 'attach a civil consequence...to individuals who have been proven to engage in particular criminal conduct.'¹⁹

1.54 Nonetheless, questions remain as to whether the measure operates as a form of additional or retroactive harsher penalty in relation to the criminal offence giving rise to a person's status as a 'reportable offender'.

Committee comment

1.55 The committee seeks the advice of the minister as to the compatibility of the measures with the right not to be tried and punished twice and the right not to be subject to retroactive harsher penalties (having regard to the committee's *Guidance Note 2*), addressing in particular:

17 See, also, *Fardon v Australia*, UN Human Rights Committee (1629/2007) (18 March 2010).

18 SOC 7.

19 SOC 7.

- **whether the prohibition on travel may be considered a 'penalty';**
- **whether the nature and purpose of the measures is such that the prohibition on travel may be considered 'criminal';**
- **whether the severity of the prohibition on travel that may be imposed on individuals is such that the penalties may be considered 'criminal'; and**
- **if the prohibition on travel is considered 'criminal' for the purposes of international human rights law, whether the measure accords with criminal process rights (including right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retroactive application of harsher penalties (article 15).**

Compatibility of the measure with the right to be presumed innocent

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

1.57 An offence provision which requires the defendant to carry an evidential or legal burden of proof (commonly referred to as 'a reverse burden') with regard to the existence of some fact engages and limits the presumption of innocence. Where a statutory exception, defence or excuse to an offence is provided in legislation, these defences or exceptions may also effectively reverse the burden of proof.

1.58 As set out above, section 271A.1(1) makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia. Section 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. Section 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.

1.59 Reverse burdens 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.

1.60 The statement of compatibility states that any limitation on the right to be presumed innocent is justified on the basis that it is reasonable that the burden of proving relevant circumstances falls to the defendant as these 'will be particularly within the knowledge of the person concerned and easily evidenced by a reportable

offender'.²⁰ The statement of compatibility further states that 'it is clearly more practical for the defendant to prove that they satisfy the requirements of the defence'.²¹

1.61 However, in this case, it is unclear matters such as whether a competent authority has given permission for the person to leave Australia or the reporting obligations being suspended at the time the person leaves Australia, are matters particularly within the defendant's knowledge. Further, it is unclear why it is 'clearly more practical for the defendant to prove that they satisfy the requirements of the defence' or whether this provides a necessary justification for the reverse burden.

Committee comment

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

1.63 The committee requests the minister to provide further information as to:

- **whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and**
- **whether the offence provision may be modified such that the fact that a competent authority has not given permission for the person to leave Australia, or the reporting obligations of the person are not suspended at the time the person leaves Australia, is one of the elements of the offence, to be proved by the prosecution in the ordinary way.**

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

1.64 The right to the protection of the family includes ensuring that family members are not involuntarily and unreasonably separated from one another. If the reportable offender has family members residing overseas the measures may engage and limit this right. The statement of compatibility acknowledges that this right is engaged but notes that a competent authority will be able to approve travel to visit family members.²² As set out above, there are a number of questions about whether the measures are rationally connected to and a proportionate means of achieving their legitimate objective.

20 SOC 6.

21 SOC 6.

22 SOC 7.

Committee comment

1.65 The measures pursue the legitimate objective of preventing the exploitation and abuse of children overseas.

1.66 The preceding analysis raises questions as to whether the measures permissibly limit the right to protection of the family.

1.67 The statement of compatibility provided insufficient information to justify this limitation.

1.68 The committee accordingly seeks the advice of the minister as to:

- how the measures are effective to achieve (that is, rationally connected to) the legitimate objective; and
- whether the limitation is reasonable and proportionate to achieve the stated objective (including the existence of relevant safeguards in relation to the right to the protection of the family).

Social Services Legislation Amendment (Payment Integrity) Bill 2017

Purpose	Seeks to amend the <i>Social Security Act 1991</i> to change the residency requirements for the age pension and the disability support pension by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients; increase the maximum liquid assets waiting period for Youth Allowance, Austudy, Newstart Allowance and Sickness Allowance from 13 weeks to 26 weeks; amend the <i>Social Security Act 1991</i> and the <i>Veterans' Entitlements Act 1986</i> to cease payment of the pension supplement after six weeks temporary absence overseas and immediately for permanent departures; and amend <i>A New Tax System (Family Assistance) Act 1999</i> to align the income test taper rates so that all income above the higher income free area is treated equally when calculating an individual's rate of family tax benefit Part A
Portfolio	Social Services
Introduced	House of Representatives, 21 June 2017
Rights	Social security; adequate standard of living; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Residency requirement for disability support pension and age pensions

1.69 The age pension and the disability support pension have a 10-year qualifying residence requirement before a person can access these social security payments. Currently, under the residency requirements a person must either have been an Australian resident for a continuous period of at least 10 years or, alternatively, for an aggregate period (comprising separate periods of residency) in excess of 10 years but including a continuous period of at least 5 years within that aggregate.¹

1.70 Schedule 1 of the bill proposes to amend the *Social Security Act 1991* to tighten the residency requirements in order to qualify for the age pension or the disability pension and will introduce a 'self-sufficiency' test. It is proposed that in order to meet residency requirements, at least 5 years of the 10 years of continuous Australian residency period must be during a person's working life.²

1 Explanatory memorandum (EM) 5.

2 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

1.71 Alternatively, where that 5 years working life test is not met, a person must demonstrate 'self-sufficiency' by having 10 years continuous Australian residency with greater than 5 years (in aggregate) relating to periods in which a person has not been in receipt of an activity tested income support payment (currently Austudy, Newstart, Youth Allowance and Special Benefit).³

1.72 If a person does not meet the 10 years continuous Australian residency period, with 5 years during that person's working life, or has not demonstrated 'self-sufficiency', then at least 15 years of continuous Australian residency will be required to satisfy residency requirements.⁴

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

1.73 The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other rights. The right to an adequate standard of living requires state parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing. Australia has obligations in relation to these rights for *all* people in Australia.

1.74 The proposed tightening of the residency waiting requirements in order to qualify for the age pension or disability support pension engages the right to social security and an adequate standing of living because it reduces access to social security and may impact on a person's ability to afford the necessities to maintain an adequate standard of living.

1.75 Under international human rights law, Australia has obligations to progressively realise the right to social security and the right to an adequate standard of living using the maximum of resources available. Australia has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. The tightening of the residency waiting requirements would appear to be a backwards step in the realisation of these rights and accordingly this limitation on the level of attainment needs to be justified. Such limitations may be permissible providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

1.76 While acknowledging that the measure engages the right to social security, the statement of compatibility states that 'the schedule does not place limitations on human rights.'⁵ As such, the short statement of compatibility provides no substantive assessment of whether the measure constitutes a justifiable limitation on the right to

3 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

4 See proposed sections 43A, 95A; Schedule 1, items 4, 10.

5 Statement of compatibility, schedule 1.

social security and the right to an adequate standard of living for the purposes of international human rights law.

Committee comment

1.77 The preceding analysis explains why the measure constitutes a limitation on the right to social security and the right to an adequate standard of living. These limitations were not addressed in the statement of compatibility.

1.78 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;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- whether there are safeguards available (such as access to Special Benefit or exemptions);
- whether alternatives to reducing access to social security have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to progressively realise the right to social security and the right to an adequate standard of living.

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

1.79 'Discrimination' under the International Covenant on Civil and Political Rights (ICCPR) encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).⁶ The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute (for example race, national or social origin, age or disability).⁷

1.80 As the measure relates to social security payments for older people and people with a disability, the restrictions on access to such payments may have a

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

7 See, e.g., *Althammer v Austria*, Human Rights Committee (HRC) 998/01, 8 August 2003, [10.2].

disproportionate negative effect on some members of these groups on the basis of protected attributes (such as age, disability, national origin or race). In this case, it appears that the measure may have a disproportionate impact on, for example, persons with disabilities and older people from non-Australian national origins.

1.81 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.⁸ Differential treatment (including the differential effect of a measure that is neutral on its face)⁹ 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.

1.82 However, this right was not addressed in the statement of compatibility so no assessment was provided as to the compatibility of the measure with the right to equality and non-discrimination.

Committee comment

1.83 The preceding analysis raises questions about the compatibility of the measure with the right to equality and non-discrimination, noting that it appears the measure may have a disproportionate negative effect on particular groups. This right was not addressed in the statement of compatibility.

1.84 Accordingly, the committee seeks the advice of the minister as to whether the measure is compatible with the right to equality and non-discrimination.

8 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).

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

Advice only

1.85 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.

Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) (Documents) Instrument 2017 [F2017L00539]

Purpose	Lists documents specified by the Minister for Foreign Affairs that list goods prohibited for export to, or importation from, the Democratic People's Republic of Korea under the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008
Portfolio	Foreign Affairs and Trade
Authorising legislation	Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Regulations 2008
Last day to disallow	15 sitting days after tabling (tabled in the Senate 13 June 2017)
Rights	Fair trial; quality of law; liberty (see Appendix 2)
Status	Advice only

Background

1.86 The committee considered the Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016 [F2016L00116] (Iran list) in its *Thirty-sixth report of the 44th Parliament*.¹ The human rights assessment of the Iran list set out that a proposed criminal offence arising from the breach of certain regulations on the supply of 'export sanctioned goods' and the importation of 'import sanctioned goods' raised concerns in relation to the right to a fair trial. Specifically, the measure did not appear to meet the quality of law test, which provides that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified. This was based on an assessment that the definition of 'export sanctioned goods' lacked a clear legal basis.

1.87 The committee sought the minister's advice as to whether the offences were drafted in a sufficiently precise manner to ensure a fair trial for the purposes of

1 See Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) 11; and *Report 9 of 2016* (22 November 2016) 56.

international human rights law, as well as advice as to the proportionality of the measures with the right to a fair trial.

1.88 The minister's response did not provide sufficient information to address these concerns, and the committee's concluding remarks noted that persons potentially subject to the relevant offence provisions may be unable to determine, with sufficient precision, particular items that are export sanctioned goods for the purposes of the relevant regulations.² Therefore the right to a fair trial was engaged, and there did not appear to be sufficient justification for the limitation imposed on this right.

1.89 The current Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017 [F2017L00539] (the instrument) raises similar human rights concerns.

Offences of dealing with export and import sanctioned goods

1.90 The instrument lists documents specified by the Minister for Foreign Affairs determining goods to be prohibited for export to, or importation from, the Democratic People's Republic of Korea (DPRK). Goods mentioned in the listed documents are incorporated into the definition of export and import sanctioned goods for the purposes of the Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008 [F2016C01044] (DPRK sanctions regulations).³

1.91 The DPRK sanctions regulations define 'export sanctioned goods' as including goods that are mentioned in a document specified by the minister by legislative instrument.⁴ The documents that are specified by the minister through this instrument take various forms, including letters and information circulars.

1.92 Sections 9 and 10 of the DPRK sanctions regulations, respectively, prohibit supply of export sanctioned goods to the DPRK, and importation of import sanctioned goods. The Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2017C00214] (the declaration), provides that contravention of regulations 9 and 10 of the DPRK Sanctions Regulations are contraventions of a 'UN sanction enforcement law'. The effect of this is to make breach of those provisions a criminal offence under the *Charter of the United Nations Act 1945* (the Act). Therefore, a person commits an offence under the Act by engaging in conduct (including doing an act or omitting to do an act) that contravenes the provisions in the DPRK Sanctions Regulations. This is then punishable by up to 10 years' imprisonment and/or a fine of up to 2,500 penalty units (or \$525,000).

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

3 See DPRK sanctions regulations section 5.

4 See DPRK sanctions regulations section 5(1)(c).

Compatibility of the measure with human rights

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

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

1.95 As noted above, the instrument incorporates documents, including letters and information circulars, into the definition of export and import sanctioned goods for the purposes of offences in the DPRK sanctions regulations. As the definition of 'export sanctioned goods', which is an important element of the offences in the regulations, is determined by reference to goods 'mentioned' in the listed documents, it appears to lack a clear legal basis as the definition is vaguely drafted and imprecise. As such, the measure engages and may limit the right to a fair trial and the right to liberty.

1.96 In order to be sufficiently precise to satisfy the requirement that a measure limiting rights is prescribed by law, as set out in the human rights analysis of the Iran List in the *Thirty-sixth Report of the 44th Parliament*, measures limiting rights must be precise enough that persons potentially subject to the offence provisions are aware of the consequences of their actions.⁵ In relation to the right to liberty, the UN Human Rights Committee has also noted that any substantive grounds for detention 'must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.⁶

1.97 It is unclear whether the documents listed in the instrument contain sufficiently precise descriptions of goods, such as would meet appropriate drafting standards for the framing of an offence. For example, the first and second documents, INFCIRC/254/Rev.12/Part 1 and INFCIRC/254/Rev.9/Part 2, appear to provide guidelines for nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, as opposed to specific descriptions of particular goods that are prohibited. These documents were also

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

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

included in the Iran list, and raise the same concerns that persons potentially subject to the offence provisions in the DPRK sanctions regulations may not be able to determine with sufficient precision particular items that are export and import sanctioned goods for the purposes of those regulations.

1.98 As set out above, the instrument operates in a substantially similar way to the previously considered Iran list. The committee's usual expectation is that, where a human right is engaged, the statement of compatibility will provide a reasoned explanation of why the measure is compatible with that right.⁷ The statement of compatibility to the instrument provides a brief description of the operation of the instrument, and states that the instrument is compatible with human rights. It does not provide any assessment on how the instrument engages the right to a fair trial, or the right to liberty, and does not acknowledge the committee's previous concerns in relation to the Iran list, which raised substantially similar issues. The statement of compatibility therefore does not meet the standards outlined in the committee's *Guidance Note 1*.

Committee comment

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

1.100 Noting the human rights concerns identified in the preceding analysis in relation to the instrument, and the committee's previous assessment of the Charter of the United Nations (Sanctions—Iran) Document List Amendment 2016, the committee draws the human rights implications of the instrument to the attention of the Parliament.

7 See *Guidance Note 1*, Appendix 4. See also the Attorney-General's Department's guidance on the preparation of statements of compatibility: 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/Pages/Statements-of-Compatibility-Templates.aspx>.

Competition and Consumer Amendment (Safeguarding the Reputation of Australian Beef) Bill 2017

Purpose	To penalise cattle exporters for failing to take reasonable steps to ensure that Australian cattle that is slaughtered, or processed after slaughter, in a foreign country, is not marketed as Australian beef
Sponsor	Ms. Rebekha Sharkie MP
Introduced	House of Representatives, 19 June 2017
Right	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself (see Appendix 2)
Status	Advice only

Civil penalty provision

1.101 Proposed section 137A seeks to impose a pecuniary penalty on cattle exporters who fail to take reasonable steps to ensure that no product which results from the slaughter, or processing after slaughter, of Australian cattle in a foreign country, is marketed as Australian beef. The proposed penalty is \$220,000 for individuals, and \$1.1 million for a body corporate.

Compatibility of the measure with criminal process rights

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

1.103 It is settled that a penalty or sanction may be 'criminal' for the purposes of the ICCPR, even where it is classified as 'civil' under Australian domestic law. The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to civil penalties.¹ The classification of a penalty as 'criminal' under human rights law does not mean that the penalty is illegitimate, but rather that criminal process rights, such as the right to be presumed innocent and the right not to be tried and punished twice, apply.

1.104 The statement of compatibility does not identify that any rights are engaged by this measure and has not addressed whether the civil penalty provision may be classified as 'criminal' for the purposes of international human rights law.

1 See Appendix 4.

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

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

1.107 The third step is to consider the severity of the penalty. It is here that potential concerns arise. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. However, this must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. The severity of penalties imposed within the cattle export context is unclear, due to the lack of information in the statement of compatibility.

Committee comment

1.108 Noting concerns regarding the potential classification of the penalty as 'criminal' for the purposes of international human rights law, the committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

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

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

Purpose	Seeks to amend the <i>National Disability Insurance Scheme Act 2013</i> to establish the NDIS Quality and Safeguards Commission with national functions in relation to a range of quality assurance and oversight matters, including information sharing arrangements
Portfolio	Social Services
Introduced	House of Representatives, 31 May 2017
Right	Right to privacy (see Appendix 2)
Status	Advice only

Information sharing arrangements

1.110 The bill seeks to establish a National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission and Commissioner. Proposed subsection 67E(1)(a) provides that the NDIS Quality and Safeguards Commissioner may, if he or she considers it in the public interest to do so, disclose information acquired pursuant to the Act 'to such persons and for such purposes as the Commissioner determines'.

1.111 Proposed subsection 67E(2) provides that in disclosing such information, the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F. Proposed section 67F provides that the rules may make provision for and in relation to the exercise of the Commissioner's power to disclose such information.

Compatibility of the measure with the right to privacy

1.112 The right to privacy includes the respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.¹ Proposed subsection 67E(1) would appear to allow the disclosure of private information, including information relating to a person's disability. On this basis, as acknowledged by the statement of compatibility, the measure engages and limits the right to privacy. The right to privacy may be limited where the measure pursues a legitimate

1 See, article 17 of the International Covenant on Civil and Political Rights, article 22 of the Convention on the Rights of Persons with Disabilities (CRPD), and article 16 of the Convention on the Rights of the Child (CRC).

objective, and is effective to achieve (that is, rationally connected to) and proportionate to that objective.

1.113 The statement of compatibility states that the objective of the provision is: 'to ensure that the Commission can share information to enable the thorough investigation and co-ordinated response in relation to a reportable incident or allegation of abuse or neglect.'²

1.114 The statement of compatibility further explains the intended use of proposed subsection 67E(1) as follows:

The Commission will receive information from a variety of sources about the potential abuse, neglect or exploitation of people with disability [...] Recent inquiries into abuse have emphasised that system-level oversight is required to ensure reportable incidents are thoroughly investigated, responses are co-ordinated, and systemic issues are identified and addressed. The Commission will need to work with mainstream systems within States and Territories including child protection agencies and guardianship boards when it receives information about abuse, neglect or exploitation.³

1.115 It is accepted that this is a legitimate objective under human rights law and the measure is rationally connected to that objective.

1.116 Turning to the proportionality of the measure, in order to be a proportionate limitation on the right to privacy, powers of disclosure must be sufficiently circumscribed and be only as extensive as is strictly necessary to achieve the legitimate objective of the measure. The statement of compatibility indicates that the specific rules further constraining the disclosure of information under the measure will be contained in delegated legislation, rather than the bill itself, as '[t]he mainstream systems in the States and territories which are responsible for responding to allegations of neglect and abuse vary considerably and will further change with the establishment of the Commission'.⁴

1.117 The statement of compatibility reasons that the measure is also proportionate to that objective as i) the Commissioner must be 'satisfied on reasonable grounds' that disclosure is necessary in the public interest; ii) the rules to be made pursuant to section 67F will specify bodies and purposes for which the Commissioner may disclose information and limit the further use and disclosure of the information; and (iii) most providers in the NDIS are covered by the *Privacy Act*

2 Statement of compatibility (SOC) 13.

3 SOC 13.

4 SOC 13.

1988 (Cth) (Privacy Act) which constrains the collection, storage, disclosure and use of personal information.⁵

1.118 The prohibition of 'arbitrary interference with an individual's privacy' requires that any interference with privacy be reasonable in the particular circumstances. Despite the inclusion of the element of reasonableness in the measure, the breadth of discretion afforded to the Commissioner is, on the face of the legislation, extremely wide. While the statement of compatibility states that the Commissioner will not be able to disclose information without complying with rules issued under section 67F, the wording of section 67F does not seem to require that rules be made.⁶ Further, it is unclear whether those rules will contain constraints such as requiring the consent of the affected individual, or providing for the review of that disclosure by an independent body. Finally, while 'most' providers may be constrained by the Privacy Act, it is not clear that all those to whom information is disclosed are similarly constrained. As such, there are questions as to whether the measure is the least rights-restrictive way of achieving its legitimate objective, and therefore a proportionate limitation on the right to privacy.

Committee comment

1.119 The preceding analysis indicates that the proposed subsection 67E(1) pursues a legitimate objective and is rationally connected to that objective, but raises questions regarding its proportionality in relation to the right to privacy.

1.120 The committee draws these matters to the attention of the minister and the Parliament, and will revisit them when reviewing the rules to be issued pursuant to proposed section 67F.

5 SOC 13.

6 Proposed section 67F states '[t]he National Disability Insurance Scheme rules *may* make provision for and in relation to the exercise of the Commissioner's power to disclose information for the purposes of paragraph 67E(1)(a) or subparagraph 67E(1)(b)(i), (iii) or (iv)' (emphasis added).

Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533]

Purpose	Seeks to declare the Law Enforcement Conduct Commission of New South Wales an interception agency for the purposes of the <i>Telecommunications (Interception and Access) Act 1979</i>
Portfolio	Attorney-General
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Last day to disallow	5 September 2017
Right	Privacy (see Appendix 2)
Status	Advice only

Background

1.121 The committee examined the Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016 (the bill) in its *Report 9 of 2016* and *Report 1 of 2017*.¹

1.122 The bill (which passed both Houses of Parliament on 24 November 2016) amended the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to include the Law Enforcement Conduct Commission (LECC) of New South Wales in the definition of 'eligible authority', thereby permitting the Attorney-General to declare the LECC an 'interception agency' for the purposes of the Act.² Additionally, the LECC was included in the definition of 'criminal law-enforcement agency' in the TIA Act.

1.123 The effect of being declared an 'interception agency' and inclusion as a 'criminal law-enforcement agency' permits LECC officers to carry out a range of activities, including:

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- 1 Parliamentary Joint Committee on Human Rights, Law Enforcement Legislation Amendment (State Bodies and Other Measures) Bill 2016, *Report 9 of 2017* (22 November 2016) 2-8; *Report 1 of 2017* (16 February 2017) 35-44.
 - 2 Subject to the requirement that the respective state legislation meets the requirements in section 35 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

- apply for interception warrants to access the content of private communications;³
- issue preservation notices requiring a telecommunications carrier to preserve all stored communications that relate to a named person or telecommunications service;⁴
- apply for a warrant to access stored communications content;⁵ and
- seek access to telecommunications data (metadata).⁶

Declaration of the NSW Law Enforcement Conduct Commission as an 'interception agency'

1.124 The Telecommunications (Interception and Access - Law Enforcement Conduct Commission of New South Wales) Declaration 2017 [F2017L00533] (the declaration) declares the LECC to be an agency for the purposes of the TIA Act, under section 34 of the TIA Act, authorising the body to apply for warrants to intercept the content of communications.

Compatibility of the measure with the right to privacy

1.125 The previous human rights analysis noted that, as the TIA Act was legislated prior to the establishment of the committee, it has never been subject to a foundational human rights compatibility assessment in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. It was stated that the committee was therefore faced with the difficult task of assessing the human rights compatibility of permitting an agency to access powers under the TIA Act without the benefit of a foundational human rights assessment of the Act.

1.126 The TIA Act provides a legislative framework that criminalises the interception and accessing of telecommunications. However, the TIA Act sets out exceptions that enable prescribed agencies to apply for access to communications and telecommunications data. Chapters 2 and 3 of the TIA Act provide for warranted access by an agency to the content of communications, including both

3 'Communication' is defined in section 5 of the TIA Act as including: 'conversation and a message, and any part of a conversation or message, whether: (a) in the form of: (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether or not animated; or (v) signals; or (b) in any other form or in any combination of forms'. The declaration would enable the LECC to access the content of private communications via warrant under chapter 2 and chapter 3 of the TIA Act.

4 See section 107H of the TIA Act.

5 See section 109 of the TIA Act.

6 'Telecommunications data' refers to metadata rather than information that is the content or substance of a communication: see section 172 of the TIA Act.

communications passing across telecommunications services,⁷ and stored communications content.

1.127 As noted in the previous analysis, declaring LECC to be an 'interception agency', and thereby permitting it to access the content of private communications via warrant, engages and limits the right to privacy.

1.128 The right to privacy includes the right to respect for private and confidential information, particularly the storing, use and sharing of such information and the right to control the dissemination of information about one's private life. A limitation on the right to privacy will be permissible under international human rights law where it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.129 The statement of compatibility identifies that the measure limits the right to privacy but that it pursues the legitimate objective of 'the investigation and prosecution of serious crime and corruption' and is a reasonable and proportionate means of achieving that end.⁸

1.130 In relation to the proportionality of the measure and the operation of warrants as a relevant safeguard, the statement of compatibility notes:

Before an issuing authority [for example, an eligible judge or member of the Administrative Appeals Tribunal] may issue a warrant they must be satisfied that interception is appropriate in the circumstances. In coming to this conclusion the issuing authority must consider several factors, including the privacy impacts of the interception, the gravity of the offence, the likely usefulness of interception information to the relevant investigation and the extent to which other methods of investigating the offence have been used or are available [...]

Interception will only be available to the LECC in relation to the investigation of serious offences, which generally includes offences punishable by imprisonment for life or for a period or a maximum period of at least seven years.⁹

1.131 As noted in the previous human rights analysis, although access to private communications is via a warrant regime which itself may be sufficiently circumscribed, the use of warrants does not provide a complete answer as to whether chapters 2 and 3 of the TIA Act constitute a proportionate limit on the right to privacy. The committee's previous analysis noted that, as the committee had not previously considered chapters 2 and 3 of the TIA Act in detail, further information from the Attorney-General in relation to the human rights compatibility of the TIA

7 That is, the interception of live communications.

8 Explanatory memorandum (EM), statement of compatibility (SOC) 2.

9 SOC 2.

Act would assist a human rights assessment of proposed measures in the context of the Act.

Committee comment

1.132 Consistent with its previous report on the authorising legislation for this measure, the committee is unable to conclude that the measure, in extending access to the coercive powers in the *Telecommunications (Interception and Access) Act 1979* to an additional body, justifiably limits the right to privacy.

1.133 The committee considers that the *Telecommunications (Interception and Access) Act 1979* would benefit from a full review of its compatibility with the right to privacy, including the sufficiency of safeguards.

1.134 Noting the human rights concerns regarding the right to privacy identified in its *Report 9 of 2016* and *Report 1 of 2017*, the committee draws the human rights implications of the instrument to the attention of the parliament.

Vaporised Nicotine Products Bill 2017

Purpose	Seeks to amend the <i>Airports Act 1996</i> to provide that the regulation of smoking at airports does not apply to the use of e-cigarettes (vaping); <i>Therapeutic Goods Act 1989</i> to exclude e-cigarettes from regulation by the Therapeutic Goods Administration; and <i>Tobacco Advertising Prohibition Act 1992</i> to provide that the ban on the advertising of smoking does not apply to the advertising of vaping
Sponsors	Senators Leyonhjelm and Roberts
Introduced	Senate, 19 June 2017
Right	Health (see Appendix 2)
Status	Advice only

Removing barriers to sale of e-cigarettes, removing advertising bans and permitting the use of e-cigarettes at airports

1.135 The bill proposes to exclude nicotine electronic cigarettes (e-cigarettes) from regulation by the Therapeutic Goods Administration. This will have the effect of removing a commonwealth barrier to the sale of e-cigarettes in Australia.

1.136 The bill also proposes to provide that the regulation of smoking at airports does not affect the use of e-cigarettes and that the ban on the advertising of smoking does not apply to the advertising of e-cigarettes.

Compatibility of the measure with the right to health

1.137 The right to health is protected by article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Specific obligations with respect to the right to health include that parties to ICESCR such as Australia should discourage the production, marketing and consumption of tobacco, narcotics and other harmful substances.¹

1.138 E-cigarettes work by delivering nicotine and/or other chemicals to the user via an aerosol vapour. By removing barriers to the sale of nicotine e-cigarettes, removing advertising bans for these e-cigarettes and permitting their use at airports, the measure engages the right to health. In this respect, it is noted that it is unclear at this stage exactly what the health impacts of nicotine e-cigarettes are. However, it is well established that nicotine is a highly addictive drug, including one that may

1 UN Committee on Economic, Social and Cultural Rights, General Comment 14: the Right to the Highest Attainable Standard of Health, [51]

appeal to and be marketed to children.² As such there are questions about whether the right to health is limited by the measures.

1.139 However, the statement of compatibility does not acknowledge that the right to health is engaged and merely states that the bill 'does not engage any of the applicable rights or freedoms'.³ Accordingly, the statement of compatibility does not provide an assessment of the compatibility of the measures with the right to health.

Committee comment

1.140 Noting the human rights concerns raised by the bill, the committee draws the human rights implications of the bill to the attention of the legislation proponents and the Parliament.

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

2 See, for example, Quit Resource Centre, E-cigarettes, <http://www.quit.org.au/resource-centre/policy-advocacy/policy/e-cigarettes1>; Cancer Council NSW, Why we need to regulate e-cigarettes, <https://www.cancercouncil.com.au/109406/cancer-prevention/smoking-reduce-risks/why-we-need-to-regulate-electronic-cigarettes/>

3 Explanatory Memorandum, Statement of Compatibility 4.

Bills not raising human rights concerns

1.142 Of the bills introduced into the Parliament between 19 and 22 June, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Australian Nuclear Science and Technology Organisation Amendment Bill 2017;
- Competition and Consumer Amendment (Paper Bills and Statements) Bill 2017;
- Competition and Consumer Amendment (Truth in Labelling—Palm Oil) Bill 2017;
- Customs Tariff Amendment (Incorporation of Proposal and Other Measures) Bill 2017;
- Education and Training Legislation Repeal Bill 2017;
- Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill 2017;
- Live Animal Export (Slaughter) Prohibition Bill 2017;
- Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017;
- Migration Amendment (Regulation of Migration Agents) Bill 2017;
- Public Governance and Resources Legislation Amendment Bill (No. 1) 2017;
- Statute Update (Smaller Government) Bill 2017;
- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017;
- Telecommunications (Regional Broadband Scheme) Charge Bill 2017; and
- Treasury Laws Amendment (2017 Measures No. 4) Bill 2017.¹

1 The following three bills, introduced into the Parliament between 9 May and 1 June, should have been listed as not raising human rights concerns in the committee's *Report 5 of 2017*: the Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017; the Industrial Chemicals (Notification and Assessment) Amendment Bill 2017; and the Industrial Chemicals Charges (General) Bill 2017.