Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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Committee information

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

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

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

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

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

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

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

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

Table of contents

Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 8 and 10 August (consideration of 2 bills from this period has been deferred);[1]
- legislative instruments received between 23 June and 6 July (consideration of 10 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 the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 that was previously deferred.

Instruments not raising human rights concerns

1.4 The committee has examined the legislative instruments received in the relevant period, as listed in the *Journals of the Senate*.[3] Instruments raising human rights concerns are identified in this chapter.

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

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1 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

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

Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

Purpose	Seeks to make a range of amendments to the *Australian Citizenship Act 2007* and other legislation including eligibility requirements, good character requirements and review of decisions
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 15 June 2017
Rights	Obligation to consider the best interests of the child; children's right to nationality; children to be heard in judicial and administrative proceedings; quality of law; fair hearing; to take part in public affairs; freedom of movement (see **Appendix 2**)
Status	Seeking additional information

Background

1.7 The committee previously examined the Australian Citizenship and Other Legislation Amendment Bill 2014 (2014 bill) in its *Eighteenth Report of the 44th Parliament* and *Twenty-Fourth Report of the 44th Parliament*.[4]

1.8 The 2014 bill lapsed at the prorogation of the 44th parliament.

1.9 The Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (2017 bill) contains a number of reintroduced measures that were previously contained within the 2014 bill as well as a number of new measures.

1.10 The analysis below deals with both new and reintroduced measures.

Requirement to provide evidence of English language proficiency

1.11 The bill proposes to amend the general eligibility criteria under section 21(2) of the *Australian Citizenship Act 2007* (Citizenship Act), to require that applicants have 'competent English'. This is a new measure not previously introduced. The

4 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 4-30; *Twenty-fourth Report of the 44th Parliament* (23 June 2015) 25-73.

current provision requires applicants to possess 'basic English', demonstrated via the existing citizenship test.[5] Proposed section 23(9)(a) provides that the minister may, by legislative instrument, determine the circumstances in which a person has competent English.

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

1.12 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), article 2 of International Convention on Economic, Social and Cultural Rights (ICESCR), article 2 of the Convention on the Rights of the Child (CRC), article 5 of the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

1.13 'Discrimination' under the ICCPR encompasses both measures that have a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[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 origin, language, social origin or disability).[7]

1.14 Whilst states enjoy some discretion in differentiating between nationals and non-nationals, they still remain bound by non-discrimination obligations where

5 The current citizenship test is designed to assess whether an applicant has 'adequate knowledge of Australia and the responsibilities and privileges of Australian citizenship' and 'basic knowledge of the English language'. It consists of 20 questions derived from content in the resource book *Australian Citizenship*: *Our Common Bond*. There is no separate English language test, but applicants need basic knowledge of English to pass the test. A sample question from a practice test is: "Which arm of government has the power to interpret and apply laws? A) Legislative B) Executive C) Judicial". See, Department of Immigration and Border Protection, *Citizenship Test*, https://www.border.gov.au/Trav/Citi/pathways-processes/Citizenship-test.

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, 8 August 2003, [10.2].

differentiating between non-nationals in requests for naturalisation and citizenship.[8] The UN Committee on the Elimination of Racial Discrimination has stated that States are obliged to:

> Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;
>
> Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality…[9]

1.15 Differential treatment will not constitute unlawful discrimination if based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.[10]

1.16 The measure differentiates between non-nationals in requests for citizenship on the basis of their language competency. It therefore engages the right to equality and non-discrimination on the basis of language, and may also indirectly discriminate on the basis of national origin, in causing a disproportionate impact on individuals from countries where English is not the national language or widely spoken.[11] Raising the level of English required from basic to competent may also increase the

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8 See, e.g., UN Human Rights Committee, Concluding Observations on Estonia, UN Doc CCPR/C/79/Add.59 (1995), [12] ["The Committee expresses its concern that a significantly large segment of the population, particularly members of the Russian speaking minority, are unable to enjoy Estonian citizenship due to the plethora of criteria established by law, and the stringency of language criterion, and that no remedy is available against an administrative decision rejecting the request for naturalization under the Citizenship law."]; ICERD, art 1(3) ["Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."]

9 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens*, (2004), [13]-[15] [Paragraph 15 additionally provides: 'Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles'].

10 See, e.g., UN Human Rights Committee, *General Comment 18: Non-Discrimination*, (1989), [13]; *Althammer v Austria*, Human Rights Committee, 8 August 2003, [10.2].

11 See Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report*, 30 June 2015, 3 [although fail rates were all quite low amongst the top ten countries of birth listed, the highest were Vietnam (4%), China (1.84%), and Sri Lanka (1.84%)]; R Van Oers, *Deserving Citizenship*, 2014, 182-184 [analysis of UK test], 179 [analysis of Netherlands test].

disproportionate impact on those with disabilities that do not rise to 'mental incapacity', those who have not benefited from regular education, and/or those whose education was interrupted by war, trauma or other events.

1.17 The concern that the measure would have a disproportionately negative effect on particular groups finds some support in data on the current test, which indirectly tests basic English. The top ten countries of birth for the offshore humanitarian programme are all countries where English is not an official language.[12] Humanitarian migrants are also more likely to have experienced traumatic events and interrupted schooling prior to migration.[13] From 2014-2015, 98.6% of those who sat the current citizenship test passed, and 1,635 people failed. Humanitarian Programme applicants fail the current test at higher rates than other migration streams, with 8.8% failing the test compared to 0.03% of Skill Stream applicants, and 2% of the Family Stream.[14] Humanitarian Programme applicants also sat the test 2.4 times on average, compared to 1.1 for the Skill Stream. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[15]

1.18 The statement of compatibility acknowledges that the right to non-discrimination is engaged, stating:

> This measure also engages Articles 2(1) and 26 of the ICCPR, described above. These Articles are engaged on the basis that the measure may be seen to discriminate on the basis of national origin by treating those

12 Department of Immigration and Border Protection, *Fact sheet – Australia's Refugee and Humanitarian Programme*, https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee#c [listing 2015-2016 Offshore Visa Grants by Top Ten Countries of Birth]. For the onshore humanitarian programme see Department of Immigration and Border Protection, *Onshore Humanitarian Programme 2015-2016*, Table 4 – Grant and grant rates by last known country of citizenship, at https://www.border.gov.au/ReportsandPublications/Documents/statistics/ohp-april-16.pdf.

13 See R Jenkison et al., *Building a New Life in Australia: Settlement experiences of recently arrived humanitarian migrants*, Australian Institute of Family Studies at https://aifs.gov.au/sites/default/files/publication-documents/bnla-fs1-settlement-experiences.pdf, 1 & 3-5. [Longitudinal study of 1,500 individuals and their families who had been granted permanent humanitarian visas. 89% reported that they or their immediate family had experienced at least one type of traumatic event before arriving in Australia, including war and persecution. 15% of adult respondents reported having never attended school prior to arrival in Australia. Three quarters reported that they understood English "not well" or "not at all" prior to arrival].

14 Department of Immigration and Border Protection, *Australian Citizenship Test Snapshot Report*, 30 June 2015, https://www.border.gov.au/Citizenship/Documents/2014-15-snapshot-report.pdf, 2-3.

15 See, *D.H. and Others v the Czech Republic* European Court of Human Rights (ECHR) Application no. 57325/00 (13 November 2007) 49; *Hoogendijk v the Netherlands*, ECHR, Application no. 58641/00 (6 January 2005).

> applicants with lower levels of English language proficiency differently to applicants who are more proficient in the English language. However, this is not dissimilar to the current legislation which requires applicants to possess a basic knowledge of the English language; this is presently assessed through the existing citizenship test. Further, this measure emphasises the importance of having competent English language and ensures that aspiring citizens can integrate into and contribute to the Australian community, including by obtaining employment, and/or undertaking vocational/ tertiary education. Insofar as the measure may limit this right, any such limitation is thus a reasonable and proportionate response to the objective of promoting social participation and encouraging new citizens to fully participate in Australian life.
>
> The proposed amendments increase the level of English language required to be held by applicants for citizenship by conferral. This requirement ties in with the new four-year residence requirement to provide aspiring citizens sufficient time to reach a competent level of English. This is important because English language proficiency is essential for economic participation, social cohesion and integration into the Australian community. Those who are currently entitled to the Adult Migrant English Program will still be able to access this program to improve their English language skills.[16]

1.19 It is accepted that 'promoting social participation and encouraging new citizens to fully participate in Australian life' can be a legitimate objective for the purposes of human rights law. However, it must also be demonstrated that the limitation imposed is effective in achieving (that is, rationally connected to) that objective. It is unclear from the statement of compatibility as to whether the measure will be effective in achieving its stated objective. The statement of compatibility states that 'English language proficiency is essential for economic participation, social cohesion and integration into the Australian community', indicating that 'emphasis[ing] the importance of having competent English language' will promote full participation in Australian life.[17] However, the measure itself excludes permanent residents if the minister is not satisfied that they meet the new 'competent English' standard from participating in Australian life as citizens. This raises questions as to whether the measure undermines its apparent objective of promoting social participation.

1.20 Should a measure be rationally connected to a legitimate objective, it must be demonstrated that the measure is a proportionate means to achieve the stated objective. Under human rights law, this requires the measure to be the least rights restrictive means of achieving the stated objective.

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16 Statement of compatibility (SOC) 78-79.

17 SOC 78-79.

1.21 The statement of compatibility mentions a number of exemptions to the English language requirement.[18] These exemptions include: persons who have a permanent or enduring physical or mental incapacity that means that the person is not capable of understanding the application, demonstrating competent English, or demonstrating an adequate knowledge of Australia and citizenship; persons over 60 or below 16 years of age; persons suffering a permanent loss or substantial impairment of hearing, speech or sight at the time that the application is made; persons born outside Australia to former Australian citizens; and persons born in Australia who have never been a national or citizen of any country, and are not entitled to acquire the nationality or citizenship of any foreign country. These exemptions do not address all those who may be indirectly discriminated against by the measure, but do lessen the rights-restrictive nature of the measure.

1.22 The proposed legislation does not specify what is meant by the new standard of 'competent English' and how the standard will differ from 'basic English'. Rather, details regarding the definition of 'competent English', the means of testing, and any further exemptions have been left to delegated legislation. Some information regarding the intended delegated legislation was provided in the statement of compatibility:

> It is intended that the instrument will be similar, where relevant, to the *Language Tests, Score and Passports 2015 (IMMI 15/005)* prescribed in the *Migration Regulations 1994*. The instrument will specify the English language test providers, scores, and exemptions to meet the English language requirement prior to applying for citizenship by conferral. It will also determine the situations where people are not required to undertake English language testing, for example, if they are a passport holder of the United Kingdom, the Republic of Ireland, Canada, the United States of America or New Zealand or have undertaken specified English language studies at a recognised Australian education provider.[19]

1.23 The *Language Tests, Score and Passports 2015 (IMMI 15/005)* prescribe a range of potential tests and measures, with scores ranging from the International English Language Test System (IELTS) five to eight, using the General Training exam. Under the IELTS scale, band score six is the lowest level classified as a 'competent user', defined as 'the test taker has an effective command of language despite some inaccuracies, inappropriate usage and misunderstandings. They can use and understand fairly complex language, particularly in familiar situations.'[20] Band six of the IELTS, using the Academic test, is the requisite standard for tertiary study in

18 SOC 71.

19 SOC 71.

20 IELTS, *How IELTS is scored*, https://www.ielts.org/about-the-test/how-ielts-is-scored.

Australian universities.[21] The description of the level of English remains the same for both the Academic and General Training tests.

1.24 The prospect of the measure defining 'competent English' as level six IELTS raises serious concerns as to whether it is a rationally connected and proportionate method of achieving the objective of 'promoting social cohesion and encouraging new citizens to fully participate in Australian life.' First, it is difficult to accept that tertiary-level or 'fairly complex' English is required for social cohesion or full participation in Australian life such that citizenship is to be denied to those who do not meet this standard. Second, the achievement of that level of English may, when balanced with work and/or caring duties, be unachievable for many permanent residents[22] from countries where English is not widely spoken, who have a disability that does not rise to physical or mental incapacity, whose education was interrupted by war or trauma, or who are otherwise inexperienced in formal education settings. It raises questions as to whether a large group of permanent residents would be unable to vote, serve on a jury, access certain benefits and employment opportunities, or otherwise participate in the Australian community as citizens until they reach the age of 60. As non-citizens, they may also be more vulnerable to visa cancellation and deportation. Those who were not born in Australia, and do not hold citizenship or nationality of a foreign country, could be rendered stateless.

1.25 The statement of compatibility refers to the Adult Migrant English Program (AMEP) remaining available for certain migrants to improve their English skills. AMEP is funded by the Australian government and provides up to 510 hours of free English language lessons to eligible migrants and humanitarian entrants, who speak little to no English. On acquiring 'functional English', or approximately IELTS 4 to 5, clients must exit the program.[23] This indicates that this program is not in fact capable of bringing adult migrants to the standard of 'competent English' as it exists under the IELTS. In any event, a recent review found that only 7% of AMEP clients achieve

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21 See, for example, Flinders University, English language requirements, http://www.flinders.edu.au/international-students/study-at-flinders/entry--and-english-requirements/english-language-requirements.cfm; Australian National University, English language admission requirements for students, https://policies.anu.edu.au/ppl/document/ANUP_000408.

22 93% of those in Australia's current Adult Migrant English Program fail to reach functional English levels after 500 hours of tuition, a level lower than the proposed level 6 IELTS. See [1.25]. When Germany instituted an integration course and language test for candidates for permanent residence, 32.4%-46.2% of test-takers failed the language test: See, Sara Wallace Goodman, Immigration and Membership Politics in Western Europe, 136, citing BAMF, "9. Lagebericht Der Beauftragten Der Bundesregierung Für Migration, Flüchtlinge Und Integration über Die Lage Der Ausländerinnen Und Ausländer in Deutschland," (July, 2012), 677.

23 Questions taken on notice, Supplementary Budget Estimates Hearing, 30 October 2006, Q.236 [stating ISLPR 2=IELTS 4 to 5]; ACIL Allen Consulting, *Final Report to Department of Education and Training: AMEP Evaluation*, 22 May 2015, 6-7 & 68.

functional English after 500 hours of tuition.[24] It is therefore difficult to accept that migrants will be supported to acquire the requisite level of testable English on the information provided in the statement of compatibility, exacerbating the disproportionate impact on those who, due to the personal attributes outlined above, require support to reach that level.

1.26 Finally, the indication in the explanatory memorandum that a person will not be required to undertake language testing to the 'competent English' standard if they are a passport holder of the United Kingdom, Republic of Ireland, Canada, the United States of America or New Zealand, raises the prospect of further impermissible discrimination between non-nationals in requests for citizenship. It is not apparent that passport holders from these countries can be automatically assumed to have 'competent English', particularly if that standard is aligned to the standard currently required to study at a university level.

Committee comment

1.27 The right to equality and non-discrimination on the basis of language, national origin, social origin, and disability is engaged and limited by the measure. The above analysis raises questions as to whether the measure is a permissible limitation on those rights.

1.28 The committee therefore seeks further advice from the Minister for Immigration and Border Protection as to:

- **how the measure itself, rather than the goal of the measure, is effective to achieve (that is, rationally connected to) the objective of 'promoting social cohesion and encouraging new citizens to fully participate in Australian life'; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective, including:**
  - **further information as to the intended definition and means of demonstrating competent English;**
  - **any further exemptions to the means chosen;**
  - **any relevant safeguards in relation to the measure to protect against the exclusion of persons from citizenship;**

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24 ACIL Allen Consulting, *Final Report to Department of Education and Training: AMEP Evaluation*, 22 May 2015, 65 ['The AMEP defines 'functional English' as a score of 2 or higher on all four of the ISLPR macro skills. Around 7 per cent of AMEP clients achieve this level of English language skills after 500 hours. Consultations indicated that the vast majority of AMEP clients are committed and value the programme highly. Despite this commitment, in many cases a very low level of English language skill on programme entry means social proficiency is unlikely to be obtained through the current AMEP. This is recognised in the programme's design and objectives as discussed…'].

- **whether government funded English education will be provided to the proposed higher standard of competent English, and if so, how it is proposed to ensure that this education will be effective to ensure that permanent residents are not excluded from citizenship; and**
- **the compatibility of exemptions for passport holders of certain countries from English language testing with the right to non-discrimination on the grounds of nationality in requests for citizenship.**

Integration into the community requirement

1.29 Proposed section 21(2)(fa) requires the minister to be satisfied that a person 'has integrated into the Australian community' in order for that person to be eligible for citizenship by conferral. The matters which the minister may or must have regard to have been left to the minister to determine via legislative instrument. This is a new measure not previously introduced.

1.30 The explanatory memorandum provides examples of the type of matters the minister may determine that he or she may have regard to in deciding whether a person has integrated into the Australian community:

> a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.[25]

1.31 In relation to 'conduct inconsistent with the Australian values to which they have committed', the bill proposes that applicants for citizenship by conferral be tested on Australian values via the citizenship test, and be required to sign an Australian Values Statement. Proposed subsection 46(5) provides for the minister to determine, by legislative instrument, the content of an Australian Values Statement.

1.32 Additionally, as discussed below, proposed subsection 52(4) excludes merits review for decisions made personally by the minister in relation to citizenship by conferral, where the minister issues a notice under section 47 stating that he is satisfied that the decision was made in the public interest.

Compatibility of the measure with multiple rights

1.33 'Integration into the community' is a broad term that may raise different views as to its meaning. The intended consideration of 'conduct inconsistent with the Australian values to which they committed throughout their application process' is similarly imprecise, particularly where those values are yet to be determined by the minister in a legislative instrument.

25 Explanatory memorandum (EM) 27.

1.34 Such broad discretion under proposed section 21(2)(fa) potentially raises serious concerns of incompatibility with the right to non-discrimination and equality. Without safeguards, it is possible that the minister could exercise this power in such a way as to have a disproportionate effect on people on the basis of disability, nationality, religion, race or sex. There is nothing on the face of the legislation which appears to limit his or her discretion. The examples of matters the minister may take into account cited in the explanatory memorandum are concerning. Many Australians may experience unemployment, or may not complete study, or may face difficulties with their children's school participation. It is not evident why it is necessary to exclude permanent residents from Australian citizenship on these grounds.

1.35 Depending on what matters are considered relevant to assessing 'integration into the Australian community' the measure may also engage and limit a range of other human rights. For example, the measure may also limit the right to freedom of expression, should it be construed to include statements considered by the minister to contravene Australian values.

1.36 As discussed further below, the bill also provides for the minister to exclude merits review of his decision to refuse a citizenship application, where he issues a notice that the decision is in the public interest. This raises the prospect that a person may be denied citizenship, and the important rights and protection that citizenship entails, without being able to effectively challenge the minister's determination or test the information that it is based upon. While judicial review would remain available, it is likely to be an inadequate safeguard due to the breadth of the power conferred on the minister by the terms of the proposed bill.

1.37 The statement of compatibility did not acknowledge that the 'integration into the community' requirement engaged human rights.

Committee comment

1.38 The preceding analysis indicates that the measure engages and may limit the right to equality and non-discrimination and the right to freedom of expression and raises questions about the compatibility of the measure with these rights.

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

- **whether the measure is compatible with the right to equality and non-discrimination and other human rights;**
- **whether the basis on which a person will be considered to have integrated into the Australian community could be made clear and defined in the legislation;**
- **why it is not possible to allow merits review for all assessments made under proposed section 21(2)(fa).**

Power to revoke Australian citizenship due to fraud or misrepresentation – removal of court finding

1.40 Currently, under the Citizenship Act the power to revoke citizenship on the grounds of fraud requires a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.[26]

1.41 Proposed new section 34AA would give the minister a discretionary power to revoke a person's Australian citizenship, up to 10 years after citizenship was first granted, where the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation by themselves or a third party. There would be no requirement that the allegations of fraud or misrepresentation in relation to the citizenship application be proven in court or that a person be convicted.[27] The power to revoke citizenship is also available in relation to the citizenship of children.[28] This is a reintroduced measure.

1.42 Presently, section 34 of the Citizenship Act further provides that the minister may also revoke the citizenship of a child whose responsible parent's citizenship has been revoked. That is, where a responsible parent's citizenship is revoked under proposed section 34AA there is a consequential power to revoke their child's citizenship under section 34 of the Citizenship Act.

1.43 If a person's citizenship is revoked under the proposed measure then the person will be granted an ex-citizen visa.[29]

Compatibility of the measure with the obligation to consider the best interests of the child

1.44 Under the Convention on the Rights of the Child (CRC), state parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[30]

1.45 The human rights assessment of the measure in the committee's previous report on the 2014 bill noted that removing the requirement of a conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and limits the obligation to consider the best interests of the child. This is because the proposed discretionary power may be exercised regardless of whether or not it is in the child's best interests. The enjoyment of a range of rights is tied to

26 See Citizenship Act, section 34.

27 Proposed new section 34AA.

28 EM, SOC 79.

29 EM, SOC 80; See also *Migration Act 1958* section 35.

30 Article 3(1).

citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests.

1.46 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child. However, it argues that the measure is 'not inconsistent' with that obligation as the minister's discretion 'allows for the child's best interests to be considered as a primary consideration, although it is noted that the best interests of the child may be outweighed by other, competing primary considerations'.[31]

1.47 Yet, as noted in the previous human rights assessment, while the minister may choose to consider the best interests of the child as a matter of discretion, the proposed power to revoke a child's citizenship will be able to be exercised regardless of whether or not the minister has, in fact, considered the best interests of the child. It is for this reason that the measure limits the obligation to consider the best interests of the child. Further, international human rights law generally requires that states have sufficient safeguards in place to prevent violations of human rights occurring. In this context, unconstrained discretion is generally insufficient for human rights purposes to ensure that powers are exercised in a manner that is compatible with human rights.[32]

1.48 The statement of compatibility, while not explicitly acknowledging that the obligation to consider the best interests of the child is limited, provides some information as to whether a limitation could be considered to be permissible.[33]

1.49 The statement of compatibility argues that the objective of the measure is 'preventing abuse of the citizenship program'.[34] The previous analysis concluded that, based on further information provided by the minister in relation to the 2014 bill, this was likely to be considered a legitimate objective for the purposes of international human rights law. It would have been useful if this further information were included in the statement of compatibility accompanying the 2017 bill.

1.50 The statement of compatibility further argues that the measure is rationally connected to that objective on the basis that 'it prevents applicants from accessing citizenship through fraud or misrepresentation, including by possible exploitation of a child's application for citizenship, and provides a disincentive for people to provide fraudulent or misleading information on application'.[35] It is acknowledged that in

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31 EM, SOC 79.

32 See, for example, Human Rights Committee, *Freedom of movement (Art.12)*, UN Doc CCPR/C/21/Rev.1/Add.9, General Comment No.27, *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977; See, *Hasan and Chaush v Bulgaria*, ECHR, Application No. 30985/96 (26 October 2000) [84].

33 EM, SOC 79.

34 EM, SOC 79.

35 EM, SOC 79.

broad terms the measure could act as a disincentive to fraud and misrepresentation in this way, and therefore may be regarded as rationally connected to the stated objective of the measure.

1.51 The statement of compatibility points to a number of matters as a basis for the measure being a proportionate limitation including that:

- there will be policy guidance in the form of a non-exclusive list of examples of types of evidence and material that might be needed for the minister to be 'satisfied' of fraud or misrepresentation;
- current legislation also allows the minister to revoke citizenship following a conviction for fraud or misrepresentation in relation to the citizenship application;
- there is an interpretative note at the end of proposed section 34AA referring to section 34 of the Citizenship Act which provides that the child of a person whose citizenship is revoked may also cease to be an Australian citizen. However, the minister must not revoke a child's Australian citizenship under section 34 if the child would be rendered stateless;
- a child whose citizenship is revoked will automatically be granted an ex-citizen visa (which does not have a travel facility and ceases on a person's departure from Australia).[36]

1.52 Based on these factors it is unclear that the power to remove citizenship on the basis that the minister is 'satisfied' that the person became an Australian citizen as a result of fraud or misrepresentation, by themselves or a third party, is a proportionate means of achieving the stated objective. As noted in the previous human rights analysis the following factors indicate that the measure is not a proportionate limitation:

1.53 First, as the measure explicitly removes the requirement that fraud or misrepresentation be proven in court to a criminal standard of beyond reasonable doubt, there is a greater risk that citizenship may be removed in circumstances where the fraud or misrepresentation did not in fact occur. While the statement of compatibility indicates that policy guidance will be provided in relation to the type of evidence that may be relevant for the minister to be 'satisfied' that fraud or misrepresentation has occurred, this is less stringent than the protection of statutory processes, and falls far short of the ordinary manner in which fraud or misrepresentation is determined to have occurred, that is, through adjudication by a court. Such guidance can be removed, revoked or amended at any time and is not required as a matter of law.

36 EM, SOC 79.

1.54 Second, in the absence of a definition of what constitutes 'fraud' or 'misrepresentation', the minister's power to revoke citizenship on the basis of, for example, minor or technical misrepresentations may not be proportionate to the stated objective of the measure.

1.55 Third, the current law, which allows the minister to revoke citizenship following a conviction, raises questions about whether there are less rights restrictive means of achieving the stated objective of the measure. In this respect, the statement of compatibility does not fully explain why the current law is insufficient for the stated objective of preventing fraud and misrepresentation.

1.56 Fourth, the measure would allow the removal of a person's citizenship (including a child's citizenship) where the person concerned is not alleged to have engaged in or had knowledge of any fraud or misrepresentation themselves. This would mean that a child's citizenship could be revoked for conduct alleged to have been committed (but not necessarily proven) by a third party in relation to the child's application, including conduct of which the child had no knowledge, or was unable to prevent. Given the extremely serious and lifelong consequences for a child in such circumstances, the breadth of the power may be disproportionate to the aims sought.

1.57 Fifth, the protection against a child being rendered stateless appears to relate to consequential revocation under section 34 of the Citizenship Act in circumstances where the child's parent's citizenship has been revoked. While this is a relevant safeguard, it is unclear that it applies in circumstances where a child's citizenship is revoked directly under proposed section 34AA. If this is the case, it means that there may still be a risk that a child is rendered stateless.

1.58 Sixth, while the grant of another visa is a relevant safeguard, such ex-citizen visas do not have a travel facility attached and may be subject to cancellation. Accordingly, the measure does not appear to be a proportionate limitation on the obligation to consider the best interests of the child as a primary consideration.

Committee comment

1.59 The committee notes that this measure is reintroduced.

1.60 The preceding analysis indicates that the measure engages and limits the obligation to consider the best interests of the child as a primary consideration.

1.61 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Compatibility of the measure with the child's right to nationality

1.62 Every child has the right to acquire a nationality under article 7 of the CRC and article 24(3) of the ICCPR.[37] Accordingly, Australia is required to adopt measures, both internally and in cooperation with other countries, to ensure that every child has a nationality when born. Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference. The terms 'nationality' and 'citizenship' are interchangeable as a matter of international law.

1.63 The previous human rights analysis noted that Australia's obligations under article 8 of the CRC should be read in accordance with Australia's obligations under article 3 of the CRC to consider the best interests of the child and article 8(1) of the Convention on the Reduction of Statelessness, which provides that a state shall not deprive a person of their nationality if such deprivation would render the person stateless.[38]

1.64 As noted above, the proposed power would allow for the removal of a child's Australian citizenship. The previous human rights analysis stated that, by removing the requirement of conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, the proposed measure engages and may limit a child's right to nationality.

1.65 While the statement of compatibility for the 2014 bill acknowledged that this measure engaged the right to nationality, the statement of compatibility for the 2017 bill does not. The statement of compatibility for the 2017 bill therefore does not provide any assessment of whether the measure constitutes a permissible limitation on the right to nationality. The statement of compatibility for the 2014 bill argued that the measure engaged the right to nationality but that any limitation was justifiable.[39] It further acknowledged that the measure could result in statelessness for some children.[40]

1.66 As set out above, it is acknowledged that the measure pursues a legitimate objective and is rationally connected to that objective. However, as set out in the previous human rights analysis of the measure, serious concerns arise as to the proportionality of the measure, noting in particular the matters above at [1.53] - [1.58]. Of particular concern from the perspective of a child's right to nationality is that the measure could result in statelessness for some children. Under international human rights law ministerial discretion, in and of itself, does not constitute a sufficient safeguard against the risk that the power may be exercised in a manner

37 Article 24(3) of the ICCPR.

38 Articles 1 and 8 of the Convention on the Reduction of Statelessness 1961.

39 See 2014 bill Explanatory Memorandum (EM), Attachment A, 2.

40 2014 bill EM, Attachment A, 2.

which would not be proportionate to the stated objective of the measure. The same is true in relation to a requirement that a power be exercised in the public interest.

Committee comment

1.67 The committee notes that this measure is reintroduced.

1.68 The preceding analysis indicates that the measure engages and limits a child's right to nationality and could result in statelessness for some children.

1.69 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Compatibility of the measure with the right of the child to be heard in judicial and administrative proceedings

1.70 Article 12 of the CRC provides that state parties shall assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child. The views of the child must be given due weight in accordance with the age and maturity of the child.

1.71 In particular, this right requires that the child is provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

1.72 The committee's previous report considered that the proposed discretionary power to revoke Australian citizenship without a court finding may limit the right of the child to be heard. The statement of compatibility does not address this issue and provides no information about whether a child would be afforded the opportunity to be heard in relation to new administrative processes. Further, the statement of compatibility does not address the fact that currently a court process leading to determination as to 'fraud' or 'misrepresentation' may afford particular children the ability to be heard, and this will be lost in the proposed amendments. Neither the statement of compatibility to the 2014 bill nor the 2017 bill, nor the minister's response in relation to the 2017 bill provide any information as to whether the limitation is permissible. Accordingly, based on the information available it is not possible to conclude that the measure is compatible with the right of the child to be heard.

Committee comment

1.73 The committee notes that this measure is reintroduced.

1.74 The preceding analysis indicates that the measure engages and may limit a child's right to be heard.

1.75 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Compatibility of the measure with the right to a fair trial and fair hearing

1.76 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, and to cases before both courts and tribunals. There are also specific further guarantees in the determination of a criminal charge under articles 14 and 15 of the ICCPR such as the right to be presumed innocent.

1.77 The Citizenship Act presently allows for the power to revoke citizenship on the grounds of fraud. This requires first that there has been a conviction for a relevant offence (for example, the offence of false statements or representations), proven in court to the criminal standard of beyond reasonable doubt.

1.78 The effect of the measure is to replace current court processes and determinations of guilt beyond a reasonable doubt solely with the views of the minister as to whether 'fraud' or 'misrepresentation' has occurred. Accordingly, the analysis in the committee's previous report considered that removing the requirement of a conviction, and giving the minister a discretionary power to revoke a person's Australian citizenship, engages and may limit the right to a fair trial and fair hearing. The statement of compatibility does not acknowledge that these rights are engaged and therefore does not provide an assessment as to whether the measure is compatible with these rights.

1.79 The previous human rights analysis stated that revoking citizenship via administrative rather than criminal processes in this way could constitute punitive action against the individual; and may be considered to be a form of banishment,[41] which has historically been regarded as one of the most serious forms of punishment.[42] As such the removal of an Australian's citizenship in circumstances

41 See, J Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law', *Georgetown Immigration Law Journal* (1999) 27. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists" 39(2) *Queen's Law Journal* (2014) 573; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40(1) Queen's Law Journal (2014) 1-54.

42 See, Rebecca Kingston, 'The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France', (2005) 9 *Citizenship Studies* 23. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14. Barry, Christian and Luara Ferracioli, 'Can Withdrawing Citizenship Be Justified?', *Political Studies* (forthcoming), accessed at http://philpapers.org/archive/BARCWC-3.pdf.

which may ultimately lead to banishment may be considered to be a form of punishment under international human rights law.[43]

1.80 It is noted that revoking citizenship would be an administrative process and would not be classified as 'criminal' under Australian law. A person charged with a criminal offence would continue to enjoy the rights associated with a criminal trial in Australia.

1.81 However, as set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A provision that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14 and 15 ICCPR such as the right to be presumed innocent, the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself.[44] The right to be presumed innocent requires, for example, that the case against a person be demonstrated on the criminal standard of proof; that is, be proven beyond reasonable doubt.

1.82 The criteria for determining whether a penalty may be considered 'criminal' under human rights law in circumstances where it is not classified as criminal under domestic law relates to the nature of the penalty and the severity of the penalty.

1.83 In relation to the nature of the penalty, the penalty is likely to be considered criminal for the purposes of human rights law if (a) the purpose of the penalty is to punish or deter; and (b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context).

1.84 In this respect, the purpose of the measure is 'preventing abuse of the citizenship program' and so appears designed to act as a deterrent. Further, the measure could apply to a broad number of naturalised citizens so that it may not be limited to a particular regulatory context.

1.85 These factors mean that the measure may be more likely to be considered 'criminal' for the purposes of international human rights law.

1.86 However, even if both these aspects of the test were not fully satisfied, a penalty may be considered 'criminal' depending upon its severity. The previous human rights analysis stated that the serious consequences that ultimately may flow

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43 An Australian citizen whose citizenship is revoked will be granted an ex-citizen visa. However, a visa including an ex-citizen visa may be cancelled on a range of grounds, which means that the person may be subject to deportation.

44 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) 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)).

from the revocation of a person's citizenship also mean that the penalty is more likely to be considered 'criminal' for the purpose of human rights law. Accordingly, the full range of criminal process rights under articles 14 and 15 of the ICCPR apply.

1.87 As noted in the previous human rights analysis, given that the proposed provision removes the requirement that there be prior determination of guilt to the criminal standard of beyond reasonable doubt, the measure appears to limit the right to a fair trial. No justification has been provided in relation to this limitation.

1.88 The right to a fair hearing applies regardless of whether the revocation of citizenship may be considered criminal. In particular, as noted in the previous human rights assessment of the measure, internal administrative processes are not equivalent to external independent and impartial review and, accordingly, are not sufficient for the purposes of international human rights law. Also, other provisions of this bill remove the availability of merits review in relation to personal decisions of the minister stated to be in the public interest.[45] This would mean that merits review may not be available in relation to a decision to revoke citizenship where it is made personally by the minister.

1.89 Finally, it is acknowledged that judicial review would still be available in relation to such decisions. However, judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law and represents a considerably limited form of review in that it allows a court to consider only whether the decision was lawful (that is, for example, within the power of the decision maker). The court cannot undertake a full review of the facts (that is, the merits) of a particular case to determine whether the case was correctly decided.

Committee comment

1.90 The committee notes that this measure is reintroduced.

1.91 The preceding analysis indicates that the measure engages and limits the right to a fair trial and the right to a fair hearing.

1.92 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Compatibility of the measure with the right to freedom of movement

1.93 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[46]

45 See, item 126, proposed section 52.

46 Article 12 of the ICCPR.

1.94 If a person's citizenship is revoked under the proposed measure then the person will be granted an ex-citizen visa.[47] However, an ex-citizen visa ceases on a person's departure from Australia.[48] Accordingly, the measure may limit the right to freedom of movement.

1.95 As noted in the previous human rights analysis, when a person who has an ex-citizen visa leaves Australia they may not be able to return, even in circumstances where Australia is their 'own country', a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties.[49] While a person on an ex-citizen visa will be able to apply for other visas with a travel facility, the grant of such a visa is by no means assured. The question of whether a person has been arbitrarily deprived of their right to enter one's own country under article 12 of the ICCPR is much broader than whether domestic laws and processes have been followed. In *Nystrom v Australia* the UN Human Rights Committee noted the following in relation to 'arbitrariness' in article 12(4):

> even interference provided for by law should be in accordance with the provisions, the aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.[50]

1.96 The right to freedom of movement and the right to return to one's own country were not addressed in the statement of compatibility. In its previous consideration of the measure the committee sought a response from the minister about this issue. None of this information has been included in the statement of compatibility for the 2017 bill.

Committee comment

1.97 The committee notes that this measure is reintroduced.

1.98 The preceding analysis indicates that the measure engages and limits the right to enter, remain or return to an individual's 'own country'.

47 EM, SOC 80; See also *Migration Act 1958* section 35.

48 EM, SOC 78.

49 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007.

50 Views: Communications No 1557/2007, 102nd session, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) ('Nystrom'), [7.6]. Emphasis added.

1.99 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Extending the good character requirement to include applicants for Australian citizenship under 18 years of age

1.100 Currently, the good character requirements under the Citizenship Act apply only to applicants aged 18 and over. The concept of 'good character' is undefined in the Citizenship Act but, as a matter of policy, is understood to cover the 'enduring moral qualities of a person' and 'whether they are likely to uphold and obey the laws of Australia, and other commitments they make through the Australian Citizenship Pledge'.[51]

1.101 The bill would extend these 'good character' requirements to applicants for Australian citizenship aged under 18 years of age.

Compatibility of the measure with the obligation to consider the best interests of the child

1.102 Under the CRC, Australia is required to ensure that in all actions concerning children, the best interests of the child is a primary consideration.[52] In its previous analysis, the committee's report noted that the extension of the 'good character' test to child applicants would add an additional requirement for Australian citizenship which may not be compatible with the best interests of the child. This is because such a requirement may operate to deny child applicants Australian citizenship.

1.103 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child but argues that 'while it may be in the best interests of the child to obtain citizenship the best interests of the child must be weighed against other competing interests.'[53] It is unclear whether or not this is an acknowledgement that the measure limits the obligation to consider the best interests of the child.

1.104 Limitations on human rights may be permissible where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. It is noted that the statement of compatibility does not expressly apply this criteria, however, it appears to identify an objective of the measure as 'preserving the integrity of the citizenship program'.[54] It

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51 Department of Immigration and Border Protection, *Good character and offences*, http://www.border.gov.au/Trav/Citi/Appl/What-documents-do-you-need/good-character-and-offences.

52 Article 3(1) of the CRC.

53 SOC 81.

54 SOC 81.

argues that the measure is needed for consistency with the 'good character' requirements under the Migration Act. However, in the absence of any detailed explanation, it was not apparent whether the measure, in seeking such consistency, may be regarded as addressing a pressing or substantial concern for the purposes of international human rights law.

1.105 In relation to the proportionality of the measure and the availability of safeguards, the committee's previous report raised a range of concerns.

1.106 As currently drafted, an assessment of the human rights compatibility of the measure must take into account the possibility that children under 16 (including very young children) may be subject to the 'good character' test.

1.107 The statement of compatibility notes that there is a policy intention that, in practice, the Australian Citizenship Instructions will instruct decision makers to consider Convention on the Reduction of Statelessness and the best interests of the child 'amongst other things'.[55] However, there are no such safeguards in the legislative measure. As noted above, discretionary and administrative safeguards alone are likely to be insufficient for the purposes of ensuring that limitations on human rights are sufficiently circumscribed and are proportionate.

1.108 Further, the previous human rights analysis of the measure noted that both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[56]

1.109 In this context, the denial of Australian citizenship to a child on the basis of such conduct may not be in accordance with accepted understandings of the capacity and culpability of children under international human rights law. Further, international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.

1.110 The denial of a child's citizenship on the basis of a 'good character' test, and its ongoing (and possibly lifelong) effect, may impose a disproportionately adverse effect on that child's best interests. As such, there are serious concerns over the proportionality of this measure in pursuing its stated objective.

Committee comment

1.111 The committee notes that this measure is reintroduced.

1.112 The preceding analysis indicates that the measure engages and limits the obligation to consider the best interests of the child.

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55 SOC 81; 2014 bill EM, Attachment A, 4.

56 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), http://www.un.org/documents/ga/res/40/a40r033.htm.

1.113 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Citizenship to a child found abandoned in Australia

1.114 Section 14 of the Citizenship Act currently provides that a person is an Australian citizen if they are found abandoned in Australia as a child unless the contrary is proved.[57]

1.115 Proposed section 12(8) would replace current section 14 of the Citizenship Act to provide that a person found abandoned in Australia as a child is taken to have been born in Australia and to be an Australian citizen by birth, unless it is proved that the person was outside Australia before they were found abandoned or they are not an Australian citizen by birth.[58] This measure is reintroduced.

Compatibility of the measure with the obligation to consider the best interests of the child and a child's right to nationality

1.116 As noted above under the CRC, Australia is required to ensure that in all actions concerning children the best interests of the child is a primary consideration as well as assuring the right of the child to acquire nationality.[59]

1.117 The statement of compatibility acknowledges that the measure engages the obligation to consider the best interests of the child.[60] The previous human rights analysis noted that the proposed provision creates additional qualification requirements for Australian citizenship, which may not be in the best interests of the child. Accordingly, the measure may limit the obligation to consider the best interests of the child and the rights of the child to nationality.

1.118 The statement of compatibility states that the objective of replacing current section 14 of the Citizenship Act is to 'clarify the meaning of the abandoned child provision.'[61] However, it does not provide supporting reasons to demonstrate that this objective addresses a pressing or substantial concern.

1.119 Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be permissible in international human rights law.

1.120 In this regard, it is unclear whether there is a rational connection between the stated objective of the measure and the terms of the measure itself. This is

57 Citizenship Act, section 14.

58 EM, Attachment A, 12.

59 Article 3(1), 7 of the CRC.

60 EM, SOC 84.

61 EM, Attachment A, 12.

because, while the stated objective of the measure is to 'clarify' a provision (with the implication that there is no substantive change to the provision), the proposed measure in fact introduces a new factor that can disqualify an abandoned child from being an Australian citizen, which is that the child was 'outside Australia at any time before [they were] found abandoned in Australia as a child'.[62] Accordingly, as noted in the previous human rights analysis, insufficient information has been provided to justify the limitation for the purpose of international human rights law.

Committee comment

1.121 The committee notes that this measure is reintroduced.

1.122 The preceding analysis indicates that the measure engages and limits the obligation to consider the best interests of the child and the right of the child to a nationality.

1.123 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Limiting automatic citizenship at 10 years of age

1.124 Currently section 12 of the Citizenship Act provides that a child born in Australia will automatically be an Australian citizen if either their parent is a citizen or permanent resident when they were born or the child is 'ordinarily resident' in Australia for their first 10 years of life.[63] There is a limited exception in cases where the child's parent is an enemy alien.

1.125 The bill would amend section 12 to deny automatic citizenship for a child born in Australia in any of the following circumstances arising at any time during the child's first 10 years of life:

- one or both of the child's parents were foreign diplomats;
- the child did not hold a valid visa (that is, they were present in Australia as an unlawful non-citizen);
- the child travelled outside Australia and did not hold a visa permitting them to travel to, enter and remain in Australia (this will not apply to New Zealand citizens); or

62 See, SOC 84.

63 The current definition of 'ordinarily resident' is if the child has their home in Australia or it is their permanent abode even if he or she is temporarily absent from Australia. In effect, this means that a child born and raised in Australia automatically becomes an Australian citizen on their tenth birthday, regardless of whether they or their parents hold a valid visa.

- one or both of the child's parents came to Australia before the child was born, did not hold a substantive visa at the time of the child's birth and was an unlawful non-citizen at any time prior to the child's birth.[64]

1.126 As the measure amends the circumstances in which Australian citizenship may be granted to children ordinarily resident in Australia for the first 10 years of their life, the measure engages the obligation to consider the best interests of the child.

Compatibility of the measure with the obligation to consider the best interests of the child

1.127 As noted above under the CRC, Australia is required to ensure that in all actions concerning children the best interests of the child is a primary consideration.[65]

1.128 While acknowledging that the child's right to nationality is engaged, the statement of compatibility does not acknowledge that the measure also engages the obligation to consider the best interests of the child.[66] By preventing certain children born in Australia from qualifying for Australian citizenship the measure engages and may limit this obligation.

1.129 In relation to the objective of the measure, the statement of compatibility states:

> this amendment aims to encourage lawful migration and acquisition of Australian citizenship, and to discourage abuse of the ten year rule by unlawful non-citizens.[67]

1.130 However, no evidence is provided as to how the measure addresses a substantial and pressing concern—for example, by providing evidence of any abuse of the 10-year rule.

1.131 Further, no evidence is provided as to how the measure is rationally connected to this objective.

1.132 As noted in the previous human rights analysis, the measure would apply to children born in Australia who have lived their whole life in Australia and have not reached their tenth birthday. It is unclear how denying these children an automatic right to citizenship is rationally connected to an objective of encouraging parents to regularise their immigration status before having children in Australia.

64 See, item 20 of the bill.

65 Article 3(1) of the CRC.

66 EM, Attachment A, 12.

67 EM, SOC 83.

1.133 Limited information is provided in the statement of compatibility as to whether the measure is proportionate.[68] It is noted in this respect that further information was previously provided in relation to the proportionality of the measure in response to the committee's inquires, however, this was insufficient to satisfy the test of proportionality as a matter of international human rights law.

Committee comment

1.134 The committee notes that this measure is reintroduced.

1.135 The preceding analysis indicates that the measure engages and limits the obligation to consider the best interests of the child.

1.136 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Personal ministerial decisions not subject to merits review

1.137 Currently, a decision refusing to grant or approve citizenship, or revoke citizenship, under the Citizenship Act is subject to full merits review by the Administrative Appeals Tribunal (AAT). The AAT provides an independent review process, considering afresh the facts, law and policy relating to certain administrative decisions.

1.138 The bill proposes removing the power of the AAT to review a decision made by the minister personally under the Citizenship Act, if the minister has stated in a notice that the decision was made in the public interest.[69] No definition of what might constitute the public interest is included in the bill.[70] This measure is reintroduced.

Compatibility of the measure with the right to a fair hearing

1.139 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, including where rights and obligations are determined (*suit at law*). The revocation of citizenship involves the removal of an existing right that would create a suit at law for the purposes of article 14 of the ICCPR; and a decision to cancel citizenship may create a suit at law having regard to the individual facts of each case.

1.140 While the bill would preserve judicial review under section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*, judicial review cannot examine the merits of the decision and is limited to particular grounds such as an identifiable error of law. Judicial review is therefore not equivalent to, or a complete

68 See, EM, SOC 83.

69 See item 126, proposed new subsection 52(4). See also section 47 of the Migration Act.

70 See item 126.

substitute for, access to merits review by the AAT, and so does not fully mitigate the possible limitation on the right to a fair hearing.

1.141 However, this issue was not identified in the statement of compatibility and so no assessment is provided regarding the compatibility of the measure with this right. The committee previously sought the further advice of the minister about the human rights compatibility of this measure with the right to a fair hearing.

1.142 The statement of compatibility provides some explanation of the measure ostensibly in relation to article 16 of the ICCPR and recognition as a person before the law. However, it does not explain the objective of the measure and how it addresses a substantial and pressing concern or how the measure is rationally connected and proportionate to that objective.

Committee comment

1.143 The committee notes that this measure is reintroduced.

1.144 The preceding analysis indicates that, in relation to the cancellation or revocation of a person's citizenship, removal of a merits review process engages and limits the right to a fair hearing.

1.145 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Ministerial power to set aside decisions of the AAT if in the public interest

1.146 Currently under the Citizenship Act, a decision refusing or cancelling approval for a person to become an Australian citizen, because the person was not of good character or because of doubts as to the person's identity, is subject to review by the AAT. The AAT is empowered to make a decision setting aside that refusal or cancellation.

1.147 The bill proposes empowering the minister to set aside such a decision made by the AAT if the minister's delegate had originally decided that an applicant for citizenship was not of good character, or was not satisfied as to the person's identity, and the minister is satisfied it is in the public interest to set aside the AAT's decision.[71] This measure is reintroduced.

Compatibility of the measure with the right to a fair hearing

1.148 As noted above, the right to a fair trial and fair hearing is protected by article 14 of the ICCPR. The right applies to both criminal and civil proceedings, including where rights and obligations are determined (*suit at law*). Procedures for determining citizenship create a suit at law for the purposes of article 14 of the ICCPR.

71 See, item 127, proposed section 52A.

1.149 The statement of compatibility noted that the measure engages the right to a fair hearing, but concluded that the measure does not 'breach' the right to a fair hearing as:

- affected applicants will still be entitled to seek judicial review; and
- the 'AAT has stated that the Minister's power to set aside AAT decisions does not compromise its independence as a tribunal'.[72]

1.150 While the continued constitutional availability of judicial review is acknowledged, it is not equivalent to, or an effective substitute for, merits review. Judicial review can only examine the lawfulness of a decision rather than the merits of a decision. For example, there will be no reassessment of the substantive question of whether the applicant is of 'good character' in proceedings for judicial review.

1.151 Further, it is unclear, from the information provided, how the minister's proposed power to substitute decisions of the AAT with his own decision does not significantly interfere with the independence and effectiveness of the current system.

1.152 As the measure allows the minister to substitute and therefore overrule the decision of the AAT, the committee's previous report considered that the measure limits the right to a fair hearing, by effectively removing a person's right to a hearing before an independent and impartial tribunal. Minimal justification for the measure was provided in the statement of compatibility.

Committee comment

1.153 The committee notes that this measure is reintroduced.

1.154 The preceding analysis indicates that the measure engages and limits the right to a fair hearing.

1.155 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

Extension of bars to citizenship where a person is subject to a court order

1.156 Currently, section 24(6) of the Citizenship Act requires that a person not be approved for citizenship by conferral when a prescribed period of time has not passed since they were in prison for certain offences, or the person is subject to proceedings in relation to certain offences.

1.157 The proposed amendments would extend this bar on approval for citizenship to cases where a person is subject to home detention or a court order in connection with proceedings for a criminal offence, or that requires the person to participate in a residential scheme (including a residential drug rehabilitation scheme or a

72 EM, SOC 87.

residential program for those experiencing mental illness).[73] This measure is reintroduced.

Right to equality and non-discrimination

1.158 As noted above, the right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR and article 5 of the CRPD.

1.159 'Discrimination' under the ICCPR encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability)[74] which has a discriminatory intent (direct discrimination) and measures which have a discriminatory effect on the enjoyment of rights (indirect discrimination).[75]

1.160 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.[76]

1.161 The statement of compatibility identifies that the right to equality and non-discrimination is engaged by the measure because the proposed bar on approval for citizenship 'extends to people who have a mental illness and who have been subject to an order of the court requiring them to participate in a residential program for the mentally ill'.[77]

1.162 It states that the measure pursues the legitimate objective of 'strengthening and achieving greater consistency across the citizenship programme, in the interests of the Australian community and national security'.[78] It argues that the measure is rationally connected to this objective as '[b]eing of good character is a fundamental tenet of the citizenship programme'.[79]

1.163 The statement of compatibility argues that the measure is proportionate to the stated objective because 'it reflects the criminal law, which imposes

73 See, item 103, section 30(8); EM, SOC 81.

74 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).

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

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

77 EM, SOC 82.

78 EM, SOC 81.

79 EM, SOC 82.

consequences for committing a criminal offence on all persons, including those with a mental illness'.[80]

1.164 However, there is no clear relationship between this explanation of the measure and the terms of the measure itself which concerns the citizenship of a person who would otherwise be entitled to citizenship by conferral. This indicates that the measure may not be rationally connected to or a proportionate means of achieving its objective.

1.165 As noted in the committee's previous report, while the explanation of the measure refers to 'consequences for committing a criminal offence',[81] the measure is considerably broader and would affect people who have not committed a criminal offence but are merely involved in 'proceedings for an offence'. This would include people who have not been convicted and who are on bail or on remand, or who have been determined to be unfit to plead or have been found not guilty of an offence by reason of mental illness. While noting that the bar on gaining citizenship is not necessarily permanent (that is, unless the individual is permanently confined in a psychiatric facility), it would still operate to bar a person who is subject to a court order from citizenship whether or not they had been convicted of a crime at least on a temporary basis. It would also leave the relevant person vulnerable to visa cancellation on character grounds. Further, the statement of compatibility does not show how denying citizenship to individuals who are confined on the basis of mental illness upholds the integrity of the citizenship program.

Committee comment

1.166 The committee notes that this measure is reintroduced.

1.167 The preceding analysis indicates that the measure may not be compatible with the right to equality and non-discrimination on the basis of disability.

1.168 Noting the concerns raised in the previous human rights assessment of the measure and the above analysis, the committee draws the human rights implications of the bill to the attention of parliament.

80 EM, SOC 82.

81 EM, SOC 82.

Migration Amendment (Validation of Decisions) Bill 2017

Purpose	Seeks to ensure that visa cancellations or refusals based on information gained from gazetted law enforcement officers under section 503A of the *Migration Act 1958* remain valid at law
Portfolio	Immigration and Border Protection
Introduced	House of Representatives, 21 June 2017
Rights	Prohibition on expulsion without due process; liberty; protection of the family; non-refoulement; freedom of movement; and effective remedy (see **Appendix 2**)
Status	Seeking additional information

Validation of decisions

1.169 Section 503A of the *Migration Act 1958* (the Migration Act) provides that information communicated to an authorised migration officer by a gazetted agency (such as law enforcement or intelligence agencies or a war crimes tribunal) for the purposes of making a decision to refuse or cancel a visa on character grounds, is protected from disclosure, not only to the person whose visa is refused or cancelled, but also to any court or tribunal reviewing that decision, and to parliament or a parliamentary committee. The Minister has the non-compellable discretion to allow the disclosure after consulting the gazetted agency. Section 503A is currently being challenged before the High Court of Australia in *Graham* and *Te Puia*.[1]

1.170 The Migration Amendment (Validation of Decisions) Bill 2017 (the bill) seeks to ensure that should section 503A be found to be invalid, the minister or delegate's decisions regarding visa refusal or cancellation will remain valid, notwithstanding their reliance upon or regard to confidential information purportedly protected by section 503A.

Compatibility of the measure with the prohibition on expulsion without due process

1.171 The right not to be expelled from a country without due process is protected by article 13 of the International Covenant on Civil and Political Rights (ICCPR). It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of

1 *Graham v. Minister for Immigration and Border Protection*, High Court of Australia, Case No. M97/2016; *Te Puia v. Minister for Immigration and Border Protection*, High Court of Australia, Case No. P58/2016.

> national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

1.172 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[2] which protects the right to a fair hearing.[3] To the extent that domestic law gives authority to courts or tribunals to decide on expulsion or deportation decisions, the guarantees of fairness and equality of arms apply.[4] These demand that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[5] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[6]

1.173 Under section 503A, both the person whose visa is refused or cancelled and any authority outside the department reviewing the decision are unable to require production of particular information on which the decision is based. The person is therefore prevented from effectively contesting or correcting potentially essential information and the reviewing authority is unable to scrutinise whether the decision was correct or reasonably made, thereby engaging and limiting the right of an alien to due process prior to expulsion.

1.174 Article 13 does contain an exception to the requirement to afford due process where 'compelling reasons of national security' exist. However, section 503A is broader than this exception. It does not require the minister to be satisfied that

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2 See UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007), [17], [62].

3 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v. Denmark* (2288/2013), 23 July 2015, [6.4]; *Chadzjian et al. v. Netherlands* (1494/2006), 22 July 2008, [8.4]; and *K. v. Canada* (1234/2003), 20 March 2007, [7.4]-[7.5].

4 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007) [62] ['the procedural guarantees of article 13 incorporate notions of due process also reflected in article 14 and thus should be interpreted in light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable'].

5 UN Human Rights Committee, *General Comment No. 32: The right to equality before courts and tribunals and to a fair trial*, (2007), [13], citing *Jansen-Gielen v. The Netherlands* (846/1999), Human Rights Committee, 3 April 2001, [8.2] and *Äärelä and Näkkäläjärvi v. Finland* (779/1997), Human Rights Committee, 24 October 2001, [7.4].

6 UN Human Rights Committee, *General Comment No. 15: The position of aliens under the covenant,* (1986), [10].

compelling national security reasons exist, but merely that the information relied upon is communicated to an authorised migration officer by a gazetted agency on the condition that it be treated as confidential. Indeed, there is no requirement to assess whether confidentiality is necessary against any standards. This raises serious questions as to whether section 503A is compatible with article 13.

1.175 The bill seeks to validate decisions to cancel or refuse a visa which had regard to information protected under section 503A, in the event that the section is struck down on the basis of a constitutional challenge currently before the High Court of Australia.[7] In seeking to validate decisions which relied upon section 503A information in the event that the provision is determined to be unconstitutional and thereby invalid, it further limits the right to due process prior to expulsion under article 13.

1.176 The right to due process prior to expulsion was not addressed in the statement of compatibility, and accordingly no assessment was provided as to whether the limitation was permissible. In the context of other rights, considered below, the statement of compatibility stated that the measure is a reasonable response to a legitimate objective. As discussed below at 1.192 to 1.193, whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, there are serious questions as to whether the measure is effective to achieve, and proportionate to, those objectives.

Committee comment

1.177 The preceding analysis raises questions as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR.

1.178 The committee therefore requests the advice of the minister as to the compatibility of the measure with the right to due process prior to expulsion under article 13 of the ICCPR, particularly regarding the inability of affected individuals to contest or correct information on which the refusal or cancellation is based, and the absence of any standard against which the need for confidentiality of section 503A information is independently assessed or reviewed.

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7 *Graham v. Minister for Immigration and Border Protection*, High Court of Australia, Case No. M97/2016; *Te Puia v. Minister for Immigration and Border Protection*, High Court of Australia, Case No. P58/2016. The applicants are challenging the constitutionality of section 503A on the grounds that its denial of information to the courts (i) offends against the constitutional separation of powers and (ii) interferes with the High Court's judicial review function established in s75(v) of the Constitution. The High Court has reserved its judgment in both cases.

Compatibility of the measure with the right to liberty

1.179 The right to liberty, contained in Article 9 of the ICCPR, prohibits the arbitrary and unlawful deprivation of liberty. This prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law, but the concept of arbitrariness also extends beyond the apparent 'lawfulness' of detention to include elements of injustice, lack of predictability and lack of due process.[8] The right to liberty applies to all forms of deprivations of liberty, including immigration detention, although what is considered as arbitrary may vary depending on context.

1.180 Under the Migration Act, the cancellation of the visa of a non-citizen living in Australia results in that person being classified as an unlawful non-citizen, and subject to mandatory immigration detention prior to removal or deportation.[9] By validating decisions to cancel a visa which may otherwise be invalid if section 503A is found invalid, the measure accordingly engages and limits the right to liberty.

1.181 However, the statement of compatibility argues that the bill does not limit the right to liberty as it merely:

> introduces a legislative amendment that preserves the grounds upon which certain non-citizen's visas were cancelled, or their applications refused, the result of which may be subsequent detention, supporting existing laws that are well-established, generally applicable and predictable.[10]

1.182 The concept of 'non-arbitrariness' under international law is not limited to general applicability and predictability, although it includes both those concepts. The detention of a non-citizen on cancellation of their visa will generally not constitute arbitrary detention, as it is permissible to detain a person for a reasonable time pending their deportation. Detention may however become arbitrary in the context of mandatory detention, where individual circumstances are not taken into account, and a person may be subject to a significant length of detention without knowing or being able to contest the information on which their detention is based before an independent body.[11]

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8 See, for example, Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [11]-[12].

9 See *Migration Act 1958*, sections 189, 198.

10 Statement of compatibility (SOC) 6.

11 See *F.K.A.G v. Australia* (2094/2011), Human Rights Committee, 20 August 2013, [9.5]; *M.M.M et al v Australia* (2136/2012), Human Rights Committee, 25 July 2013, [10.4] ['the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them… They are also deprived of legal safeguards allowing them to challenge their indefinite detention'].

1.183 In relation to section 503A, arbitrariness may arise because a person is prevented from accessing and addressing evidence upon which the visa cancellation, and therefore detention pending removal, is based. In seeking to broadly validate decisions which had regard to section 503A information, the bill would perpetuate the existing serious concerns in relation to section 503A, including the engagement and limitation of the right to liberty.

1.184 In relation to the risk of indefinite detention, the statement of compatibility states that '[t]he determining factor [in whether detention is arbitrary] is not the length of detention, but whether the grounds for the detention are justifiable'.[12] However, as stated by the United Nations Human Rights Committee (UNHRC) '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[13] The risk of arbitrariness in this situation is exacerbated where a person is deprived of legal safeguards to effectively challenge the basis of their detention, such as access to information relied upon in refusing or cancelling a visa.[14]

1.185 A measure may permissibly limit the right to liberty where it supports a legitimate objective, is rationally connected to that objective, and is a proportionate way to achieve that objective.

1.186 The statement of compatibility identifies the objectives of the measure as being:

> …[to ensure] the safety of the Australian community and integrity of the migration programme — as it seeks to uphold certain character refusal or cancellation decisions in the event of a High Court ruling on the validity of section 503A. These non-citizens pose an unacceptable risk to the Australian community if their cancellation decisions are overturned and they are required to be released from immigration detention into the community.[15]

1.187 The statement of compatibility indicates that the measures are reasonable as:

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12 SOC 6.

13 Human Rights Committee, *General Comment 35: Liberty and security of person* (2014), [18].

14 *F.K.A.G v. Australia* (2094/2011), Human Rights Committee, 20 August 2013, [9.5] [The authors of the communication were detained in Australia as they were refused visas to stay following adverse security assessments from ASIO, but were unable to be returned to their country of origin due to their refugee status. The Committee held in relation to five of the authors: 'Given the vague and too general justification provided by the State party as to reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2 of the Covenant'].

15 SOC 6.

> This Bill will not prevent the affected non-citizens from individually challenging their decisions in a court. The detention of a non-citizen under these circumstances is considered neither unlawful nor arbitrary under international law.[16]

1.188 However, it is unclear upon what basis an affected non-citizen would be able to challenge their visa cancellation or refusal in a court. Indeed, the intent of the measure appears to be to preclude affected persons from successfully challenging visa cancellations or refusals made in reliance on information that was not disclosed pursuant to section 503A, in the event that section 503A is held to be invalid.

1.189 With particular reference to the risk that a person may be arbitrarily detained, the statement of compatibility states:

> The Government has processes in place to mitigate any risk of a non-citizen's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.[17]

1.190 As considered in a previous human rights assessment of visa cancellation powers,[18] ensuring the safety of Australians and the integrity of the immigration system are capable of constituting legitimate objectives for the purposes of international human rights law.

1.191 However, the measure seeks to validate administrative decisions made with regard to information which was not disclosed to the affected person, and could not be effectively tested in a court for reliability, relevance or accuracy. The effectiveness of the measure to ensure the safety of Australians and the integrity of the immigration system is therefore questionable.

1.192 Moreover, in order for a measure to be a proportionate limitation on a right, it must be the least rights restrictive means of achieving the legitimate objective of the measure. It is difficult to see how validating decisions to cancel visas based on information that is kept from the person affected, broadly as a class, is the least rights restrictive means of achieving the stated objectives. If the initial cancellation is put into question as a result of a High Court decision invalidating section 503A, it would appear to be possible for the minister to make a renewed decision to refuse or cancel the visa of an affected person on an individual basis. Insofar as information is sought to be kept from the public or the affected person for reasons of national security, the statement of compatibility does not address alternative means that may

16 SOC 6.

17 SOC 6.

18 Parliamentary Joint Committee on Human Rights, *Nineteenth report of the 44th Parliament*, (3 March 2015) 18.

be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal. More broadly, it is not clear from the statement of compatibility why existing criminal justice or national security mechanisms are insufficient to counter any risk a person may pose should the cancellation of their visa be invalid as a consequence of such a High Court decision.

1.193 No detail is provided regarding the functioning or effectiveness of internal review processes, or the oversight processes referred to in the statement of compatibility. While the administrative and discretionary processes identified may in some circumstances mitigate the risk of arbitrary or indefinite detention, they are unlikely to constitute sufficient safeguards under international law, due to their discretionary nature.[19]

Committee comment

1.194 The preceding analysis raises questions as to the compatibility of the measure with the right to liberty.

1.195 The committee therefore requests the advice of the Minister for Immigration and Border Protection as to the compatibility of the measure in relation to the right to liberty, particularly regarding:

- **why the broad legislative validation of a class of decisions is required, when it appears that the minister could make a renewed decision to refuse or cancel the visa of an affected person on an individual basis;**
- **any alternative means that may be available that would protect such information only to the extent required for national security or alternative processes that would still allow such information to be tested in some way before a court or tribunal; and**
- **the availability of less rights restrictive criminal justice or national security mechanisms to address any risk posed by affected individuals.**

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

1.196 The right to protection of the family under article 17 of the ICCPR includes ensuring that family members are not involuntarily and unreasonably separated from one another. This right may be engaged where a person is expelled from a country without due process and is thereby separated from their family life.[20] The measure engages and limits the right to protection of the family as the validation of a visa cancellation could operate to separate family members.

19 For example, the Commonwealth Ombudsman cannot override the decisions of agencies it deals with, but tries to resolve disputes through consultation and negotiation.

20 *Leghaei v Australia* (1937/2010), Human Rights Committee, 26 March 2015.

1.197 The statement of compatibility reasons that the amendments cannot be said to give rise to arbitrary interference with family life as they do not 'expand visa cancellation powers or impact the grounds upon which a person may have had their visa cancelled'.[21]

1.198 However, the bill seeks to validate decisions to cancel or refuse a visa which had regard to information protected under section 503A, in the event that they would otherwise be invalid. In each such individual case, the measure has potential for arbitrary interference with family life, due to a lack of due process provided to the affected person.

1.199 Of relevance in this respect is the case of *Leghaei v Australia*, in which the author of the communication to the UNHRC was denied a permanent visa to remain in Australia on the basis that the author had been assessed by the Australian Security Intelligence Organisation (ASIO) as being a threat to national security. His wife and four children were either Australian citizens or permanent residents. The UNHRC found a violation of article 17 of the ICCPR:

> While his legal representatives were provided with information on evidence held against him, they were prevented, by a decision by the judge, from communicating to the author any information that would permit him to instruct them in return and to refute the threat that he allegedly posed to national security.
>
> In light of the author's 16 years of lawful residence and long-settled family life in Australia and absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for 'compelling reasons of national security', the Committee finds that the State party's procedure lacked due process of law… the Committee considers that the State Party has violated the author's rights under article 17, read in conjunction with article 23…[22]

1.200 Section 503A goes further than the provision at issue in *Leghaei v Australia* in withholding the information from not only the person, but their lawyer and the court. There is therefore a serious risk that decisions based on information protected by section 503A limit the right to freedom from arbitrary interference in family life. The statement of compatibility did not address the matters raised in *Leghaei v Australia*.

Committee comment

1.201 The preceding analysis raises questions as to the compatibility of the measure with the right to protection of the family.

1.202 The committee therefore requests the advice of the minister as to:

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21 SOC 7.

22 *Leghaei v Australia* (1937/2010), Human Rights Committee, 26 March 2015, [10.4]-[10.5].

- **any safeguards in relation to the particular circumstances of families; and**
- **the concerns outlined in *Leghaei v. Australia*, including the inability of affected individuals to contest or correct information on which the refusal or cancellation is based.**

Compatibility of the measure with the right to non-refoulement and the right to an effective remedy

1.203 Australia has non-refoulement obligations under the Refugee Convention, the ICCPR and the Convention Against Torture (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[23] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.204 As the committee has previously stated on numerous occasions, effective and impartial review by a court or tribunal of decisions to deport or remove a person, including merits review in the Australian context, is integral to giving effect to non-refoulement obligations.[24]

1.205 The statement of compatibility acknowledges that the bill may 'engage [the right to non-refoulement] because one eventual consequence of confirming the validity of decisions to refuse or cancel a visa may be removal from Australia'. However, it goes on to state that the amendments do not set out that the automatic consequence of validating the decision will be removal from Australia and that consideration of non-refoulement obligations is undertaken 'before a non-citizen is considered to be available for removal from Australia. Any removal from Australia is conducted in accordance with Australia's non-refoulement obligations'.[25]

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23 See Refugee Convention, article 33. The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations available both to refugees and to people who are not covered by the Refugee Convention, and so are 'complementary' to the Refugee Convention.

24 ICCPR, article 2; *Alzery v Sweden* (1416/2005), UN Human Rights Committee, 25 October 2006. See, for example, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 45; and *Fourth Report of the 44th Parliament* (18 March 2014) 51; *Report 2 of 2017* (21 March 2017) 10.

25 SOC 7-8.

1.206 Under section 501E of the Migration Act, a person whose visa is refused or cancelled on character grounds is prohibited from applying for another visa.[26] Section 198 of the Migration Act requires an immigration officer to remove an unlawful non-citizen in a number of circumstances as soon as reasonably practicable. Section 197C of the Migration Act also provides that, for the purposes of exercising removal powers under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. There is no statutory protection ensuring that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia, nor is there any statutory provision granting access to effective and impartial review of the decision as to whether removal is consistent with Australia's non-refoulement obligations. As stated in previous human rights assessments, ministerial discretion not to remove a person is not a sufficient safeguard under international law.[27] Therefore concerns remain that the measure may engage and limit the right to non-refoulement in conjunction with the right to an effective remedy.

Committee comment

1.207 The committee notes that the obligation of non-refoulement is absolute and may not be subject to any limitations.

1.208 The committee notes that the measure does not provide a non-discretionary bar to refoulement, nor merits review of decisions relating to the validation of visa cancellation or refusal decisions, and is therefore likely to be incompatible with Australia's obligations under the ICCPR and the Convention Against Torture.

Compatibility of the measure with freedom of movement (right to enter one's own country)

1.209 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'.[28]

1.210 The reference to a person's 'own country' is not restricted to the formal status of citizenship. It includes a country to which a person has very strong ties, such

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26 A person may apply for a protection visa or, if formally invited by the minister to do so, a Bridging R (Class WR) Visa. However, if the visa that was cancelled was a protection visa, the person will be prevented from applying for another protection visa unless the minister exercises a personable, non-compellable power to do so. The Bridging R (Class WR) Visa is temporary and applies so long as the minister is satisfied that the person's removal is not reasonably practicable.

27 See for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) 77-78.

28 Article 12 of the ICCPR.

as the country in which they had resided for a substantial period of time and established their home.[29]

1.211 The right to freedom of movement is engaged by this measure, as an eventual consequence of validating visa cancellation decisions is the deportation and re-entry ban of a person who may, despite not holding formal citizenship, have such strong ties to Australia that they consider Australia to be their 'own country'.

1.212 The statement of compatibility does not acknowledge that the right to enter one's own country is engaged and limited, however in the context of other rights, states that the measure is a reasonable response to a legitimate objective. As discussed above at 1.192 to 1.193, whilst the safety of the community and the integrity of the migration system are capable of constituting legitimate objectives under international human rights law, there are serious questions as to whether the measure is effective to achieve, and proportionate to, those objectives.

Committee comment

1.213 The preceding analysis raises questions as to the compatibility of the measure with the right to freedom of movement (the right to enter one's own country).

1.214 The committee therefore seeks further information from the minister as to the proportionality of the measure, in particular regarding any safeguards applicable to individuals for whom Australia is their 'own country', such as ensuring their visa is only cancelled as a last resort where other mechanisms to protect the safety of the Australian community are unavailable.

Compatibility of the measure with the right to an effective remedy

1.215 Should section 503A impermissibly limit a human right, those affected have the right to an effective remedy. The right to an effective remedy is protected by article 2 of the ICCPR, and may include restitution, guarantees of non-repetition of the original violation, or satisfaction. The right to an effective remedy may take many forms, however it is not able to be limited according to the usual proportionality framework.

1.216 In relation to the human rights implications of section 503A, the right to an effective remedy would likely include a fresh review of the expulsion decision, where the person affected is entitled to access and challenge adverse evidence, including section 503A protected information.

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29 See, for example, *Nystrom v Australia* (2011), UN Human Rights Committee, CCPR/C/102/D/1557/2007 [explaining that a person may have stronger ties with a country of which they are not a national, than a country of which they hold citizenship]; Parliamentary Joint Committee on Human Rights, *Thirty-fourth report of the 44th parliament* (23 February 2016) 46-50.

1.217 Should section 503A be declared invalid or read down in the current litigation before the High Court, it is unclear whether the bill would allow affected persons to challenge the decision anew and access the information previously protected by section 503A in those proceedings.

1.218 The statement of compatibility does not acknowledge that the right to an effective remedy was engaged by the measure.

Committee comment

1.219 The committee therefore seeks the advice of the minister as to whether in the event that section 503A is held to be invalid, a person whose decision is validated under the amendments will be able to challenge the refusal or cancellation decision anew and access information previously protected under section 503A, in those proceedings.

Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017

Purpose	Seeks to amend the *Social Security Act 1991* to restrict access to the relocation scholarship to students relocating within Australia and students studying in Australia
Portfolio	Social Services
Introduced	House of Representatives, 21 June 2017
Right	Social security (see **Appendix 2**)
Status	Seeking additional information

Restricting access to the relocation scholarship

1.220 The relocation scholarship provides supplementary payments to recipients of Youth Allowance or ABSTUDY who relocate for tertiary study.[1]

1.221 The Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017 (the bill) seeks to remove access to the relocation scholarship for:

- students whose parental home or usual place of residence is outside of Australia and who relocate to attend university in Australia; and
- students studying in Australia who relocate to undertake part of their Australian courses outside of Australia.[2]

Compatibility of the measure with the right to social security

1.222 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.

1.223 Under international human rights law, Australia has obligations to progressively realise the right to social security 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 this right. Restricting access to the relocation scholarship would appear to be a backwards step in relation to social security and accordingly this limitation on the level of attainment needs to be justified. It is noted that for an individual student the loss of the relocation

1 Explanatory Memorandum (EM) 4. Department of Social Services, *Guide to Social Security Law*, Version 1.234, 3.8.15.10 Qualification for Relocation Scholarship Qualification, http://guides.dss.gov.au/guide-social-security-law/3/8/15/10.

2 EM 4-5.

scholarship is significant as it currently pays $4,376 in the first year and between $2,189 and $1,094 in subsequent years in addition to regular Youth Allowance or ABSTUDY social security payments.[3]

1.224 Limitations on the right to social security 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. The statement of compatibility acknowledges that the measure engages the right to social security and identifies the purpose of the measure as to 'simplify and streamline the delivery of the Relocation Scholarship to better reflect the policy intent of the Scholarship'.[4] However, 'simplifying' and 'streamlining' do not constitute legitimate objectives for the purposes of international human rights law and do not acknowledge the extent of the payment reduction. Rather, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.225 It is noted that the statement of compatibility identifies some safeguards that may go to the proportionality of the limitation, and therefore its compatibility with human rights. However, in order to assess whether the measure is a proportionate limitation, it is first necessary to identify a legitimate objective.

Committee comment

1.226 The preceding analysis raises questions as to whether the measure is a permissible limitation on the right to social security.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of 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.**

3 Department of Human Services, *Relocation Scholarship*, https://www.humanservices.gov.au/customer/services/centrelink/relocation-scholarship.

4 Statement of Compatibility (SOC) 24.

Social Services Legislation Amendment (Welfare Reform) Bill 2017

Purpose	Seeks to amend various acts to: create a Jobseeker Payment to replace seven existing payments as the main payment for people of working age from 20 March 2020 and replace other payment types; remove the ability of Newstart Allowance and certain special benefit recipients aged 55 to 59 to satisfy the activity test by engaging in voluntary work for at least 30 hours per fortnight; remove certain exemptions for drug or alcohol dependence; provide that a job seeker's Newstart Allowance or Youth Allowance be payable from the date they attend their initial appointment with their employment services provider; provide that job seekers are not able to use drug or alcohol dependency as an excuse for failing to meet their requirements; introduce a new compliance framework for mutual obligation requirements in relation to participation payments; establish a two year drug testing trial in three regions for 5,000 new recipients of Newstart Allowance and Youth Allowance; enable certain information obtained in the course of an administrative action to be used in subsequent investigations and criminal proceedings; and to exempt two social security laws from the operation of the *Disability Discrimination Act 1992*
Portfolio	Social Services
Introduced	House of Representatives, 22 June 2017
Rights	Social security; adequate standard of living; equality and non-discrimination; privacy; protection of the family; rights of children (see **Appendix 2**)
Status	Seeking additional information

Nature of key rights engaged

1.228 The Social Services Legislation Amendment (Welfare Reform) Bill 2017 (the bill) contains a number of schedules that impact on the administration, qualification and receipt of social security.

1.229 These measures engage the right to social security and the right to an adequate standard of living. The human rights assessment of the bill below addresses individual measures that raise human rights concerns in relation to these rights.

1.230 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.[1]

1.231 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.

1.232 A retrogressive measure is a type of limitation on an economic, social or cultural right and accordingly needs to be justified. A limitation on a right may be permissible provided that it addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective. A legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.233 Certain schedules of the bill also engage the right to privacy and the right to equality and non-discrimination, which are set out below.

Schedules 1-7 – creation of a new jobseeker payment and cessation of other payment types

1.234 Schedules 1-7 of the bill seek to create a new jobseeker payment which will be the main working age social security payment and provide that a number of other social security payments will cease. The bill proposes to cease Newstart Allowance, Sickness Allowance, Wife Pension, Bereavement Allowance, Widow Allowance, Widow B Pension and Partner Allowance.[2]

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

1.235 The statement of compatibility acknowledges that the measures engage the right to social security and refers to jurisprudence of the UN Committee on Economic Social and Cultural Rights (UNCESR) explaining that:

> [the UNCESCR] stated that there is 'a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.' The [UNCESCR] places a burden on the State party that has introduced deliberately retrogressive measures to 'prove that they have been introduced after the most careful consideration of all alternatives and that they are duly justified…'[3]

1.236 At the outset, given the complexity of the measures, it is not clear whether they are retrogressive. In relation to the creation of the Jobseeker Payment and the

1 See, International Covenant on Economic Social and Cultural Rights (ICESCR) articles 9, 11.

2 Statement of compatibility (SOC) 136.

3 SOC 137.

cessation of other payment types, the statement of compatibility states that over 99.9 percent of social security recipients will continue to be eligible for income support. These recipients will transition from the payment types that are ceasing to the Age Pension, the Jobseeker Payment or Carers Payment with a range of transitional arrangements provided as safeguards.[4] It appears that it is intended that most current social security recipients will be transitioned onto new payment types with the exception of some recipients residing overseas.[5] The explanatory memorandum explains that the creation of the Jobseeker Payment 'will have the same basic qualification, payability and rate as existing Newstart Allowance, however, the payment will be broader in scope than Newstart Allowance'.[6]

1.237 Given that the qualification requirements and the amount payable to social security recipients varies between types of payments, the question arises as to whether certain individuals may be worse off than under current arrangements. In other words, there is some potential that these measures could be retrogressive. For example, following the death of a partner, subject to means and asset testing, the Bereavement Allowance currently pays up to $803.30 per fortnight for a period of 14 weeks. By contrast, current fortnightly payments for Newstart Allowance for a single person are $535.60. With the cessation of the Bereavement Allowance, the explanatory memorandum states that certain new and existing social security recipients will become entitled to an additional one off payment following the death of their partner instead of Bereavement Allowance. It is not stated whether the amount payable would be equivalent to the current amount payable under the Bereavement Allowance or whether qualification for it will be the same.

Committee comment

1.238 The statement of compatibility acknowledges that the measure engages the right to social security. However, it is unclear whether the measures constitute a reduction in the level of attainment of the right to social security.

1.239 Accordingly, the committee seeks the advice of the minister as to:

- **whether the cessation of certain social security types could result in reductions in the amount payable or qualification for any new or existing social security recipients, or whether such payments will be equivalent to the types of payments that are ceasing;**
- **whether any new or existing social security recipients would be worse off under the transitional arrangements;**

4 See, for example, Explanatory Memorandum (EM) 44.

5 See, SOC 137-139.

6 EM 2.

- **what safeguards are provided in relation to the measures (for example, to ensure that individuals continue to receive social security); and**
- **if there are any reductions in the amount of social security payable (retrogressive measures), whether they pursue a legitimate objective; are rationally connected to their stated objective; and are a reasonable and proportionate measure for the achievement of that objective.**

Schedule 10 – Start date for Newstart and Youth Allowance payments

1.240 Under current RapidConnect requirements, persons claiming Newstart Allowance or Youth Allowance, unless otherwise exempt, are required to attend an interview with an employment services provider before their income support is payable.[7] Payment is not made until claimants attend such an interview but is currently backdated to the date on which the claim was made. In some cases, this may be the date of first contact with the Department of Human Services.

1.241 Persons claiming Newstart and Youth Allowance, unless exempt, are also currently required to serve a waiting period of 7 days before payment is made, usually beginning from the date of claim.[8]

1.242 Schedule 10 of the bill seeks to amend the *Social Security (Administration) Act 1999* so that payments for individuals who are claiming Newstart Allowance or Youth Allowance, and are subject to RapidConnect, will be backdated to the day the individual attends their initial appointment with an employment services provider, instead of the date of claim.[9]

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

1.243 The right to social security and the right to an adequate standard of living are engaged and limited by this measure.

1.244 By proposing to backdate Newstart and Youth Allowance payments to the date an applicant attends an initial interview with a job services provider, instead of the earlier date of claim, the measure appears to reduce the initial amount payable to the applicant. Accordingly, the measure may impact on an individual's ability to afford the necessities to maintain an adequate standard of living.

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7 See, Department of Social Services, *Guide to Social Security Law*, Version 1.234, 3.2.1.40 RapidConnect - Impact on NSA Payability.

8 The one-week waiting period - or Ordinary Waiting Period (OWP) - also applies to persons claiming the parenting payment and sickness allowance. A number of exemptions are available, including for persons experiencing financial hardship.

9 This measure does not apply to persons claiming Youth Allowance who are new apprentices or full-time students. See EM 56.

1.245 By bringing forward the start day for payments to some applicants under Newstart and Youth Allowance, the proposed measure would appear to constitute a backwards step in the realisation of these rights and, accordingly, this limitation needs to be justified.

1.246 While acknowledging that the measure engages the right to social security and the right to an adequate standard of living, the statement of compatibility sets out that any limitations on these rights are 'necessary and proportionate' to achieving 'the legitimate policy objective of encouraging greater workforce participation and self-support for job seekers who have no significant barriers to employment'.[10]

1.247 While this may be considered a legitimate objective for the purposes of international human rights law, limited information is provided in the statement of compatibility as to whether the measure is effective to achieve the stated objective and is a proportionate means of doing so.

1.248 At present, payment of Newstart and Youth Allowance is not made until the claimant, unless exempt, attends an interview with a job services provider. Therefore, an incentive to connect with a job services provider would appear to already exist. The statement of compatibility does not explain why this existing measure is inadequate in encouraging Newstart and Youth Allowance claimants to connect promptly with their job services provider. Without such detail, it is not clear that the proposed measure is the least rights restrictive way of achieving the stated objective.

1.249 The statement of compatibility sets out some information which may be relevant to the proportionality of the measure. This includes that the measure would not apply to job seekers who are exempt from RapidConnect, including disadvantaged job seekers, and that the secretary may take account of individual circumstances when a claimant fails to attend an interview to determine the start day for payment. In particular, the statement of compatibility notes that if an appointment with a job services provider is not available within two business days, payment is backdated to the date on which the original requirement to attend an interview was made.[11]

1.250 However, it is unclear from the statement of compatibility what time period exists between the date a claim for payment is made and the date on which the requirement to attend an interview is imposed. Nor is it stated how the proposed measure interacts with the 7 day Ordinary Waiting Period for claimants, and whether back pay or the length of the waiting period is affected in this context. Accordingly, it is not clear how many days a claimant may have to wait from the original date of

10 EM, SOC 147.

11 EM, SOC 146.

claim to the start day for payment or the maximum period of time a person may go without back pay. This information is necessary to determine the extent to which a job seeker's initial payment would be affected by this measure or the extent of the limitation on the right to social security and the right to an adequate standard of living.

Committee comment

1.251 The preceding analysis raises questions as to whether the measure is a proportionate limit on the right to social security and the right to an adequate standard of living.

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

- **how the measure is effective to achieve (that is, rationally connected to) the objective; and**
- **how the limitation is a reasonable and proportionate measure to achieve the stated objective (including why existing measures are insufficient to achieve the stated objective of the measure, the existence of relevant safeguards and the period of time a person may be required to go without payment or back pay).**

Schedule 12 – Mandatory drug-testing trial

1.253 Schedule 12 seeks to establish a two year trial of mandatory drug-testing in three regions, involving 5,000 new recipients of Newstart Allowance and Youth Allowance. New recipients will be required to acknowledge in the claim for Newstart Allowance and Youth Allowance that they may be required to undergo a drug test as a condition of payment, and will then be randomly subjected to drug testing.

1.254 Recipients who test positive will then be subject to income management for 24 months and be subject to further random tests. If a recipient tests positive to a subsequent test, they will be required to repay the cost of these tests through reduction in their fortnightly social security payment. This may be varied due to hardship. Recipients who test positive to more than one test during the 24 month period will be referred to a contracted medical professional for assessment.[12] If the medical professional recommends treatment, the recipient will be required to complete certain treatment activities, such as counselling, rehabilitation or ongoing drug testing, as part of their employment pathway plan.[13]

1.255 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients

12 See EM 63.

13 An employment pathway plan sets out particular activities certain recipients must do in order to receive their Newstart Allowance or Youth Allowance payments.

would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[14]

1.256 Recipients who refuse to take the test will have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, their payment will not be payable for 4 weeks from the date of cancellation, and they will still be required to undergo random mandatory drug-testing.[15]

Compatibility of the measure with the right to privacy

1.257 The right to privacy includes the right to protection against arbitrary or unlawful interference with a person's privacy, family, home or correspondence. As acknowledged in the statement of compatibility,[16] the right to privacy extends to protecting a person's bodily integrity against compulsory procedures such as drug testing. Drug testing is an invasive procedure and may violate a person's legitimate expectation of privacy. Further, the measure requires the divulging of private medical information to a firm contracted to conduct the drug testing. A person may need to provide evidence of their prescriptions and/or medical history to the company to avoid false positives that, for example, detect prescribed opioids. Finally, the use of a card in purchasing essential goods after a person's benefit is quarantined will disclose that a person receives quarantined social security payments. On these bases, the measure engages and limits the right to privacy.

1.258 A limitation on the right to privacy may be permissible where it is pursuant to a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to achieve that objective. In assessing whether a measure is proportionate, some of the relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case, whether affected groups are particularly vulnerable, and whether there are other less restrictive ways to achieve the same aim.

1.259 The statement of compatibility states that the objective of the drug testing trial is twofold:

- [to] maintain the integrity of, and public confidence in, the social security system by ensuring that tax-payer funded welfare payments are not being used to purchase drugs or support substance abuse; [and]

14 EM 63. See discussion of Schedules 13 and 14 below.

15 EM 63.

16 SOC 156.

- [to] provide new pathways for identifying recipients with drug abuse issues and facilitating their referral to appropriate treatment where required.[17]

1.260 In support of the need for the measure, the statement of compatibility referred to statistics indicating that a greater number of people are using drug and alcohol use as an exemption to mutual obligation requirements.[18] The statement of compatibility argues that the drug testing measure will help direct people into treatment before the drug use becomes too severe and a barrier to employment.[19]

1.261 The statement of compatibility does not provide evidence of a pressing social need to address the use of welfare payments to purchase drugs or support substance abuse. However, on the basis of the information and arguments presented, the measure can be understood as pursuing the objectives of the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency. These are likely to constitute legitimate objectives under international human rights law.

1.262 There are, however, serious concerns as to whether the measure is effective to achieve, and proportionate to these legitimate objectives.

1.263 First, the measure appears to be overly broad. The randomised drug test is not reliant on any reasonable suspicion that a person has a drug abuse problem. Any selected person is then made to disclose medical information to the private firm contracted to conduct the testing, and subjected to an invasive medical procedure. If they test positive once, even if it was the first time they had used an illicit drug[20] or it was a false positive,[21] their payments are quarantined for two years, during which period they must use a cashless welfare card.[22] This card will immediately disclose that a person is receiving a welfare payment, whenever they use it. Yet, the single

17 SOC 151.

18 SOC 156-157. Mutual obligation requirements are either participation or activity test requirements that a person must meet in order to receive certain social security payments, including Newstart Allowance and Youth Allowance.

19 SOC 156-157.

20 Cannabis has much longer windows of detection than opiates, amphetamines and cocaine, and can be detected up to 10 days after use where a urine test is used. See Australian National Council on Drugs, *Position Paper: Drug Testing*, August 2013.

21 The person can dispute the result and request a retest, however it is not clear how this would operate, and if it would still result in the payment being quarantined.

22 Proposed subsection 123UFAA(1C) provides that the Secretary may determine that a person is not subject to the income management regime, but this is a non-compellable discretion, and only applies if the Secretary is satisfied that being subject to the regime 'poses a serious risk to the person's mental, physical or emotional wellbeing'. See EM 76-77.

use of the drug is unlikely to constitute a barrier to employment, nor necessarily lead to dependence.[23]

1.264 Second, it is unclear whether there will be adequate privacy safeguards as to the medical and drug-related information disclosed to a private provider of drug tests. The statement of compatibility states:

> This trial will be subject to the existing safeguards in the *Privacy Act 1988* and the confidentiality provisions in the *Social Security (Administration) Act 1999* which protect the collection, use and disclosure of protected information. A joint Privacy Impact Assessment by the Department of Human Services and the Department of Social Services is being conducted for this measure and will be submitted to the Office of the Australian Information Commissioner to ensure implementation of the measure minimises privacy law risks.[24]

1.265 The existing safeguards in the *Privacy Act 1988* and the *Social Security (Administration) Act 1999* (Social Security Administration Act) may not be sufficient in this context to establish the proportionality of the limitation. For example, it appears that they may not prevent the Department of Human Services from disclosing the fact of a person's positive drug test to law enforcement, state welfare agencies or the Department of Immigration and Border Protection. The risk of prosecution, visa cancellation or loss of child custody, may prevent people from attempting to access Newstart or Youth Allowance payments, causing destitution. Further, it appears that they may not prevent the Department of Human Services or a private contractor from disclosing information regarding a particular welfare recipient to the public to correct that person's criticism of the trial.[25]

1.266 A question also arises as to how long drug test samples will be retained. The taking and retention of bodily samples for testing purposes can contain significant personal information. International jurisprudence has noted that genetic information contains 'much sensitive information about an individual' and given the nature and amount of personal information contained in cellular samples 'their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned'.[26]

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23 One study indicated that the percentage of users who developed a dependency was 9% for marijuana, 15% for alcohol, 17% for cocaine, and 23% for heroin: U.S. National Academy of Sciences, Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* (Washington D.C., 1999).

24 SOC 157.

25 The Department of Human Services has previously maintained that it is permissible to disclose welfare recipients' personal information to correct media statements. See http://www.abc.net.au/news/2017-03-02/department-of-human-services-defends-release-blogger-personal/8317910.

26 *S and Marper v UK*, ECtHR, 4 December 2008, [72]-[73].

1.267 Rules made by the minister pursuant to proposed section 38FA[27] of the Social Security Administration Act as well as the preparation of a Privacy Impact Assessment, may result in further safeguards which would address concerns regarding retention and disclosure of drug test samples. However, no detail has been provided as to the intended content of the rules.

1.268 Third, the trial may limit the privacy rights of a large group of people, in order to identify a very small number of people who had used illicit drugs or have a drug abuse problem. For example, in relation to drug testing in the United States jurisdiction of Florida, only 2.6% of welfare recipients tested were found to have used drugs, most commonly marijuana. This trial may target areas with a higher percentage of drug users which may identify a higher number of people.[28] However, it still raises the concern that the measure is disproportionate.

1.269 Fourth, there appear to be a variety of less rights restrictive methods to achieve the objective of providing new pathways for referral to treatment of those who have or are likely to develop substance abuse issues, not least increasing the availability and promotion of treatment options for those with drug and alcohol dependency. This was not addressed in the statement of compatibility.

Committee comment

1.270 The right to privacy is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is a permissible limitation on that right.

1.271 The committee therefore seeks further advice from the minister as to how the measure is effective to achieve and proportionate to its objectives, including:

- **whether overseas experience indicates that this trial will be effective to achieve its objectives;**
- **whether there will be a process to apply to remove income quarantining measures if no longer necessary or if special circumstances exist;**
- **whether there will be additional safeguards in place in relation to the disclosure of drug test results, particularly to law enforcement, immigration authorities, other agencies and the public and the nature of those safeguards; and**

27 Proposed section 38FA provides that the Minister may make rules providing for a number of matters, including the confidentiality and disclosure of drug test results.

28 See SOC 150: 'The trial sites will be set out in a legislative instrument and will be selected based on the best available evidence and data around drug use in Australia, as well as the availability of alcohol and other drug treatment options'; and EM, 62: 'These locations will be selected by considering a range of factors, including crime statistics, drug use statistics, social security data and health service availability'.

- **the availability of less rights restrictive measures to achieve the objectives of the trial.**

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

1.272 The measure engages the right to social security and an adequate standard of living in three ways. First, the measure may result in a reduction in payments to cover the costs of positive drug tests, or to penalise a person for failing to fulfil their mutual obligation requirements. Second, the risk of the result of the test being disclosed to law enforcement, immigration or other welfare authorities may cause people to avoid applying for necessary welfare payments, causing destitution. Third, the measure may impermissibly discriminate against those with substance addictions which rise to the level of disability, as further discussed below under the right to equality and non-discrimination.

1.273 A limitation on the right to social security and an adequate standard of living may be permissible where it is pursuant to a legitimate objective, effective to achieve that objective, and proportionate to that objective. As discussed above, the objectives of early treatment of harmful drug use to prevent drug dependency and addressing barriers to employment created by drug dependency are likely to be legitimate objectives for the purposes of human rights law. However, there are serious concerns regarding whether the measure is effective to achieve and proportionate to those objectives.

1.274 The statement of compatibility states:

> Income management does not reduce the total amount of income support available to a person, just the way in which they receive it… Job seekers placed on Income Management under this trial will still be able to purchase items at approved merchants and pay rent and bills with their quarantined funds… Evidence collected on Income Management in Western Australia indicates that the program is improving the lives of many Australians. It has given many participants a greater sense of control of money, improved housing stability and purchase restraint for socially harmful products while reducing a range of negative behaviours in their communities including drinking and violence.[29]

1.275 While income management does not reduce the amount of income support available, the committee has previously examined income management measures and considered them to raise concerns, particularly where income management was not voluntary or inflexibly applied. The committee found that whilst compulsory income management did reduce spending of income managed funds on proscribed items, it could increase welfare dependence, and interfere with a person's private

29 SOC 153.

and family life.'[30] In particular, the committee highlighted that '[t]he compulsory income management provisions operate inflexibly raising the risk that people who do not need assistance managing their budget will be caught up in the regime.'[31] Similarly, in this instance, the imposition of income management for two years may be disproportionate to the objectives pursued, particularly where inflexibly imposed on a person who may have used an illicit drug but does not have ongoing drug abuse issues.

1.276 Further, it appears that once the drug test is positive, the contractor may issue a notice to the Secretary that the person should be subject to income management, even where the person requests a second drug test. The mechanics of requesting a second drug test or providing evidence of legal medication are unclear. It appears possible that a person may be subject to income management for a period even where the result is challenged and a retest scheduled.

1.277 The measure will require those who test positive to drugs to repay the cost of the drug test over time, via deductions from their payments. Given the basic rate of Newstart and Youth Allowance,[32] there is a significant risk that repaying the cost of tests, even capped at a 10% reduction in the payment, will compromise a person's ability to afford necessities to live and successfully look for work. The explanatory memorandum refers to the existence of safeguards against hardship, specifically the power of the secretary to vary the rate of repayment where the person's circumstances are 'exceptional', and the person would suffer 'severe financial hardship'.[33] The existence of a safeguard is welcomed, however the proposed test sets a very high threshold for the exercise of this power. On its face, it appears the test may be difficult to meet even when experiencing hardship. For example, it is questionable whether it would be satisfied where many people are experiencing similar circumstances of severe hardship, and therefore their individual circumstances are not considered to be 'exceptional'.

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30 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures*, (16 March 2016) 60-61.

31 Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures*, (16 March 2016) 61, [4.101].

32 Henry Review of Australia's Future Tax System *Final Report*, F1 [Income support payments], http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/Papers/Final_Report_Part_2/chapter_f1-2.htm; Business Council of Australia, *Submission to the Senate Inquiry into the Adequacy of the Allowance Payment System for Jobseekers and Others*, August 2012, http://www.bca.com.au/publications/submission-to-the-senate-inquiry-into-the-adequacy-of-the-allowance-payment-system-for-jobseekers-and-others; Senate Standing Committees on Education and Employment, *The adequacy of the allowance payment system for jobseekers and others, the appropriateness of the allowance payment system as a support into work and the impact of the changing nature of the labour market*, 29 November 2012, 3.5, 3.83.

33 Proposed section 1206XD(1) of the *Social Security Act 1991*. EM 71.

1.278 The reduction in payments to penalise a person for failing to undertake treatment activities as part of their employment pathway plan, may also severely compromise a person's ability to afford basic necessities. The statement of compatibility reasons that Australia's welfare system is founded on principles of mutual obligation, and that 'it is reasonable to expect the job seeker to pursue treatment as part of their Job Plan and be subject to proportionate consequences if they fail to do so.'[34] However, there are questions regarding whether withholding subsistence payments for failure to attend treatment takes into account evidence that addiction often involves cycles of relapse before recovery.[35] In this respect, the statement of compatibility argues that there are provisions in place to address individual vulnerabilities:

> the vulnerability of people and the impact of their circumstances on their ability to comply with their mutual obligation requirements is considered under social security law through reasonable excuse and exemption provisions, and delegates have significant discretionary powers regarding the application of compliance actions to consider the circumstances of each individual case.[36]

1.279 Other measures in the bill, as discussed below, seek to ensure that drug addiction is not considered as a reasonable excuse or exemption. Given the basic rate of Youth Allowance and Newstart, the requirements to use up most of one's savings before becoming eligible for Newstart, and these reasonable excuse and exemption measures, it is unclear how a delegate's discretion will prevent those addicted to drugs from being unable to afford basic needs.

1.280 As stated above, should the regulations not adequately circumscribe the disclosure of drug test results, including by private contractors, this measure may also result in people in need of social security avoiding accessing payments due to the fear of consequences such as prosecution, deportation or loss of child custody. The risk that the measure may prevent people from attempting to access Newstart or Youth Allowance payments, despite need, also affects the proportionality of the measure.

1.281 Finally, as discussed above in relation to the right to privacy, the statement of compatibility does not address the availability of less rights restrictive measures to achieve the objectives of the measure. This is particularly important in the context of

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34 SOC 154.

35 See Australian National Council on Drugs, *Position Paper: Drug Testing*, August 2013, 14; National Institute on Drug Abuse, *Principles of Drug Addiction Treatment: A Research Based Guide*, December 2012, 12 [Figure illustrating relapse rates between drug addiction and other chronic illnesses: drug addiction was 40 to 60% of all patients. 'For the addicted individual, lapses to drug abuse do not indicate failure — rather, they signify that treatment needs to be reinstated or adjusted, or that alternative treatment is needed'].

36 SOC 154.

the right to social security given the strong presumption that retrogressive measures are prohibited under the International Covenant on Economic Social and Cultural Rights (ICESCR) and that the state has the burden of proving that they were introduced after the most careful consideration of all alternatives.[37]

Committee comment

1.282 The right to social security and an adequate standard of living is engaged and limited by this measure. The preceding analysis raises questions as to whether the measure is compatible with these rights.

1.283 The committee seeks further advice from the minister as to the effectiveness and proportionality of the measure including:

- **whether recipients will be informed that they may request a retest or provide evidence of legal medications, and how these processes will occur;**
- **whether there is a mechanism to challenge or review the imposition of income management;**
- **whether a person can successfully have their rate of repayment reduced where they would experience severe hardship, but their circumstances are similar to others;**
- **further detail as to how the discretion of delegates will operate to consider the vulnerability of those with drug dependencies and ensure that their payments are not reduced such that they are unable to afford basic needs;**
- **whether there will be limits placed on the disclosure of drug test results to law enforcement, immigration authorities or other agencies; and**
- **whether there are less rights restrictive methods to achieve the objectives of the measure.**

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

1.284 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2 of the ICESCR. It is further protected with respect to persons with disabilities by Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The right applies to the distribution of welfare benefits or social security.[38]

1.285 Article 26 of the ICCPR provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination. It effectively

37 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security* (art. 9), 23 November 2007, [42], discussed above at [1.8].

38 Art. 2 and 9 ICESCR; S.*W.M Broeks v Netherlands*, Communication No. 172/1984, CCPR/C/OP/2 at 196 (1990).

prohibits the law from discriminating on any ground such as race, sex, religion, political opinion, national origin, or "other status."

1.286 Where the person's drug use rises to that of dependence or addiction, the person has a disability, which is not only considered an "other status"[39] but is also protected from discrimination by the CRPD.[40] As acknowledged by the statement of compatibility, there may also be a disproportionate impact against Indigenous people, due to higher levels of drug and alcohol use.[41] Further the drug-testing will not be entirely random, but based on the development of a risk profile, which identifies risk factors to drug misuse.

1.287 The possible interference of prescription medications may also disadvantage those with communication difficulties who fail to disclose their prescriptions and therefore are tested as positive for illicit drugs.

1.288 To the extent that this measure affects those with drug and alcohol dependencies and Indigenous people it engages the right to non-discrimination. Under international human rights law, differential treatment[42] 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.

1.289 The statement of compatibility argues that the objective of the measure is to ensure that tax-payer funded welfare payments are not being used to support substance abuse and provide new pathways for identifying recipients and facilitating their referral to treatment where required.

1.290 As stated above, the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency are likely to be legitimate objectives for the purposes of human rights law. However, as discussed above, it is not clear that the measure is effective to achieve and proportionate to the stated objectives, and there would appear to be less rights restrictive methods to achieving these objectives.

Committee comment

1.291 The right to equality and non-discrimination is engaged by this measure. The preceding analysis raises questions as to the compatibility of the measure with this right.

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39 Concluding Observations on Ireland (2000) UN Doc A/55/40, [422]-[51], [29e]; Panama, 2008, [8]; Sweden (2009), [9], Dominican Republic (2012) [9].

40 The Department of Human Services has stated that they are required to seek an exemption from the operation of the *Disability Discrimination Act 1992.*

41 SOC 155.

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

1.292 The committee seeks further advice from the minister as to whether the measure is proportionate to its objective, in particular whether there are less rights restrictive alternatives to the measure to achieve the objective.

Schedules 13-14 – Removal of exemptions for drug or alcohol dependence; and changes to reasonable excuses

1.293 Under current social security law, a person may be *exempted* from participation or activity test requirements (mutual obligation requirements) in relation to the receipt of certain social security payments such as Newstart Allowance, Youth Allowance, parenting payments and special benefits. If they are not exempted from the requirements, and commit a 'participation failure' (such as failing to attend a participation interview or undertake a compulsory work activity) they will have their payments suspended, cancelled or reduced. However, where a person fails to meet a mutual obligation requirement or commits a participation failure, they will not be subject to a suspension or a non-payment penalty where that person has a 'reasonable excuse'.

1.294 Schedule 13 of the bill seeks to ensure that exemptions from mutual obligation requirements are not available where the reason for the exemption is wholly or predominantly attributable to drug or alcohol dependency or misuse.

1.295 Schedule 14 of the bill provides the secretary with a power to make a legislative instrument setting out the matters that must not be taken into account when deciding whether a person has a 'reasonable excuse' for committing a participation failure.

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

1.296 As noted above, the right to equality and non-discrimination provides that all persons are equal before the law and entitled to equal protection of the law without any discrimination. It effectively prohibits the law from discriminating on grounds such as race, sex, religion, political opinion, national origin, or "other status".[43]

1.297 Alcohol and drug dependence is considered to be a disability, and therefore considered "other status"[44] as well as protected from discrimination by the CRPD.[45]

1.298 As stated in the statement of compatibility, the measure:

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43 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).

44 Concluding Observations on Ireland (2000) UN Doc A/55/40, paras 422-51, para 29e; Panama, 2008, para. 8; Sweden (2009), para 9, Dominican Republic (2012) [9].

45 The Department of Human Services has stated that they are required to seek an exemption from the operation of the *Disability Discrimination Act 1992.*

> engages the rights to equality and non-discrimination because people who may have a disability or illnesses associated with drug or alcohol dependency (such as alcoholism) will be subject to differential treatment insofar as they will not be eligible for the exemption that people with another illness or disability could potentially access.[46]

1.299 The statement of compatibility also acknowledges potential discrimination against Aboriginal and Torres Strait Islander people who experience higher rates of drug and alcohol dependencies.

1.300 The statement of compatibility however states that in both instances, the differential treatment is permissible because the measure is 'reasonable and proportionate to the objective of encouraging these recipients to address the underlying cause of their incapacity'.[47] While this may be a legitimate objective for the purposes of human rights law, it is questionable whether the measures are effective to achieve (that is, rationally connected to) and proportionate to that objective.

1.301 The proposed preclusion on obtaining an exemption is quite broad, affecting both the rational connection and proportionality of the measure to the objective of 'encouraging these recipients to address the underlying cause of their incapacity'.[48] The measure refers to circumstances, illness or accident 'predominantly attributable to a person's misuse of alcohol or another drug' and therefore appears to cover not only ongoing drug and alcohol misuse but diseases that may result from past misuse such as Alcoholic Liver Disease or brain damage. In these circumstances, a person may have already done all they can to address 'the underlying cause of their incapacity'. It may also cover injuries resulting from accidents when intoxicated, where again, the cause cannot be addressed as the misuse occurred in the past. In addition, it appears to cover circumstances where a person has undergone treatment unsuccessfully several times, and may no longer have the mental capacity to be assessed as a suitable candidate for treatment.

1.302 The explanatory memorandum states that an exemption would not cover 'a special circumstances exemption due to a major personal crisis because they have been evicted from their home due to drug or alcohol misuse'.[49] The measure therefore appears intended to have the effect that if a person fails to attend a participation interview or undertake a compulsory work activity because that person has, for instance, been rendered homeless, that person's social security payments will be suspended, cancelled or reduced, if this homelessness is predominantly attributable to drug or alcohol dependency.

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46 SOC 161.

47 SOC 162.

48 SOC 162.

49 EM 80.

1.303 It is difficult to see how making a person subject to mutual obligation requirements when they are in crisis due to eviction, caused by alcohol or drug misuse, which depending on severity may be a disability, will encourage that person to address the 'underlying cause of their incapacity'. The withdrawal of social security in circumstances of personal crisis may indeed exacerbate substance abuse problems, rather than encourage treatment.

1.304 Whilst the explanatory memorandum and statement of compatibility reason that the measure will allow treatment to be sought as part of mutual obligation requirements, it appears to rely on the exercise of discretion by the Department of Human Services. The legal basis for requiring treatment as part of an employment pathway plan is not apparent, and this is not addressed by the statement of compatibility.[50]

1.305 In order for a measure to be a proportionate limitation on the right to equality and non-discrimination, it must be shown that there were no less rights restrictive methods available to achieve the objective. In this instance, it is unclear, for example, why encouraging treatment and investing in additional treatment and referral services, as would be the case with other disabilities, is insufficient to encourage recipients to address the underlying cause of their incapacity.

1.306 A potentially important safeguard within the Social Security Administration Act is the mechanism by which a person will not be subject to a suspension or non-payment penalty for non-compliance with mutual obligation requirements where that person has a 'reasonable excuse'. As noted above, schedule 14 provides the secretary with a power to make a legislative instrument setting out what constitutes a reasonable excuse. The statement of compatibility states that this power is intended to be exercised so as to ensure that income support recipients will not be able to repeatedly use drug or alcohol abuse or dependency as a reasonable excuse for participation failures.[51] This raises a concern that what constitutes a 'reasonable excuse' may not cover the particular circumstances of those suffering from addiction. However, the statement of compatibility further explains that it is intended that they will still be able to use drug or alcohol abuse or dependency in the first instance, and be offered treatment as part of their employment pathway plan.[52]

1.307 The explanatory materials provide some further information about the likely content of such a legislative instrument made under schedule 14 and state that the penalty would not be imposed where treatment was not appropriate, or available:

50 Compare, *Social Security (Employment Pathway Plan Requirements) Determination 2015 (No. 1*) [F2015L02029], s 5(a)(ii) and (iii).

51 SOC 165.

52 SOC 165.

It is intended that existing reasonable excuse provisions will continue to apply following the initial relevant participation failure due to drug or alcohol misuse or dependency where treatment is unavailable/inappropriate, including where the job seeker:

- is ineligible or unable to participate;
- has already participated in all available treatment;
- has agreed but not yet commenced in treatment; or
- has relapsed since completing treatment and is seeking further treatment.[53]

1.308 The content of these safeguards is important in assessing the human rights compatibility of the measure. However, without reviewing the legislative instrument, which will set out what constitutes a reasonable excuse, it is difficult to determine the extent of any limitation on the right to equality and non-discrimination and whether there will be sufficient safeguards to ensure that the limitation on this right is proportionate.

Committee comment

1.309 The preceding analysis indicates that Schedules 13 and 14 engage the right to equality and non-discrimination.

1.310 The committee seeks further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- **whether less rights restrictive measures would be workable; and**
- **whether adequate safeguards are available to protect the rights of people with disabilities relating to alcohol or drugs.**

1.311 Noting that the details of what is to constitute a 'reasonable excuse' is to be provided by legislative instrument, the committee seeks the further information from the minister regarding the safeguards to be included in this instrument.

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

1.312 Removing drug and alcohol dependence as an exemption to mutual obligation requirements means that more people will be required to comply with such requirements. As a failure to meet these requirements without a reasonable excuse will result in the reduction or suspension of social security payments, the measure engages and may limit the right to social security and the right to an adequate standard of living. Further, the changes to what constitutes a 'reasonable excuse' in these circumstances also engages and may limit these rights to the extent

53 EM 86.

that drug and alcohol abuse and dependency no longer constitute a reasonable excuse for failing to meet a mutual obligation requirement.[54]

1.313 As discussed above, whilst encouraging recipients to address their underlying barriers to work is a legitimate objective under international law, there are questions as to whether the measures are effective to achieve and proportionate to that objective.

1.314 In the context of the right to social security and an adequate standard of living, these provisions may be particularly disproportionate as they restrict the discretion of compliance officers to take into account the particular hardship suffered by a person, where alcohol and drugs are involved, and therefore may operate to deny a person basic necessities. As stated above, many welfare payments are already paid at a basic rate, and require a person to have used the majority of their savings in order to be eligible. Therefore, there may not be a financial buffer for personal crises or illnesses that cause difficulties in meeting mutual obligation requirements. It is particularly concerning that a person may be subject to suspension or cancellation of social security payments in circumstances where they have been evicted from their housing due to alcohol or drug use. Under the intended rules of Schedule 14, it does not appear that they will then be able to access reasonable excuse provisions more than once. This kind of inflexibility may cause significant deprivation and fail to support people in addressing their substance misuse issues.

Committee comment

1.315 The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to social security and an adequate standard of living.

1.316 The committee seeks further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- **whether less rights restrictive measures would be workable; and**
- **whether adequate safeguards are available to protect people from suffering deprivation.**

Compatibility with the right to protection of the family and the rights of the child

1.317 The rights of the family and child to protection and assistance are protected by Article 10 of ICESCR, as well as various provisions of the Convention on the Rights of the Child.

1.318 The statement of compatibility acknowledges that the right is engaged but argues that any penalties would only apply to income support payments made to the parent in respect of themselves. It states that '[a]ny payments made to the parents

54 See, Schedule 14.

for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs would not be affected by the penalty'.[55] The statement of compatibility further notes that some principal carer parents on working age payments are only required to meet part time mutual obligation requirements, even if denied an exemption to the requirements due to alcohol or drug misuse. Finally, it states that these measures will encourage parents to address barriers to employment and move into work.[56] However, it is unclear how it is envisaged this will operate. If a parent is having difficulty paying rent or purchasing food due to the imposition of a financial penalty, this would naturally affect the standard of living of the children under their care. This raises questions about the proportionality of the measure to the protection of the family and the rights of the child.

Committee comment

1.319 The preceding analysis indicates that Schedules 13 and 14 engage and limit the right to protection of family and the rights of the child.

1.320 The committee seeks further information from the minister as to whether the measures are reasonable and proportionate for the achievement of their objective and in particular:

- **whether less rights restrictive measures would be workable; and**
- **whether there are adequate safeguards to protect the rights of children.**

Schedule 15 – compliance framework

1.321 Currently, job seekers who receive an activity-tested income support social security participation payment (that is, Newstart Allowance and, in some cases, Youth Allowance, Parenting Payment or special benefit) are subject to the compliance framework set out in Division 3A of the Social Security Administration Act and must comply with mutual obligation requirements.[57]

1.322 Schedule 15 of the bill proposes to introduce a new compliance framework, including:

- Payment suspension for non-compliance with a mutual obligation requirement;
- Financial penalties for refusing work; and

55 SOC 161.

56 SOC 159.

57 Mutual obligation requirements include a range of requirements a job seeker can be compelled to undertake under social security law, such as attending employment service provider appointments or appointments with relevant third party specialist organisations or undertaking job search requirement: Department of Human Services, Guide to Social Security Law [3.2.8.10] http://guides.dss.gov.au/guide-social-security-law/3/2/8/10.

- Financial penalties for persistent non-compliance.

1.323 The committee has previously examined several bills which contained measures similar to those proposed in this schedule.[58] Measures raising human rights concerns are discussed below.

Payment suspension for mutual obligation failures

1.324 Job seekers will have their income support payment suspended for every failure to meet a mutual obligation requirement without a reasonable excuse.[59] The suspension period ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day. If the job seeker fails to reconnect with employment services within four weeks, their social security participation payment will be cancelled.[60] The measure is similar to those currently contained in division 3A of the Social Security Administration Act.

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

1.325 As the measure operates to suspend social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. As set out above, such limitations are permissible provided certain criteria are met.

1.326 The statement of compatibility identifies the legitimate objective of the measure as 'encouraging persons to remain engaged with employment services and actively seek and accept suitable work'.[61] This is likely to be a legitimate objective for the purposes of international human rights law.

1.327 It is noted that the existence of safeguards is relevant to the proportionality of the measure. The statement of compatibility outlines some of the relevant safeguards including that the suspension does not apply if the person has a 'reasonable excuse'. What constitutes a reasonable excuse is to be outlined in a legislative instrument. The statement of compatibility notes that a 'reasonable excuse' may include, for example, 'whether the person or a close family member has suffered an illness or was prevented from complying by circumstances beyond their

58 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70; *Thirty-Second Report of the 44th Parliament*, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (1 December 2015) 92-100; *Thirty-Third Report of the 44th Parliament*, Social Security Legislation Amendment (Community Development Program) Bill 2015 (2 February 2016) 7-12.

59 See proposed sections 42AC, 42AJ.

60 See SOC 169.

61 SOC 172.

control'.[62] However, other aspects of this bill, as outlined above, seek to limit what constitutes a reasonable excuse. Without reviewing the legislative instrument, which will include further information on what constitutes a reasonable excuse, it is difficult to determine whether or not this mechanism will operate as an effective safeguard.

1.328 The statement of compatibility outlines some other safeguards including that:

- Job seekers will continue to be eligible for concession card benefits while suspended (but not cancelled);
- cancelations and suspensions are subject to review both internally and externally;
- if a job seeker's payment is cancelled as a result of failing to reengage within four weeks, they are able to reclaim benefits immediately; and
- the payment suspension can be ended by fulfilling the reconnection requirement (such as attending an interview with their employment service provider) and be fully back paid.[63]

Committee comment

1.329 The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.330 The committee requests the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its legitimate objective, in particular, what criteria will apply to whether a person is considered to have a 'reasonable excuse' for failing to comply with a mutual obligation requirement.

Financial penalties for refusing work

1.331 Job seekers who fail to accept an offer of suitable work will have their social security payment suspended. They will also be subject to payment cancellation and a 4 week non-payment period if they are found to have refused or failed to commence the work without a reasonable excuse.[64]

1.332 Job seekers who leave suitable work voluntarily without a valid reason or are dismissed from suitable work due to misconduct will (in addition to having their payment cancelled if they are receiving payment) be subject to a 4 week non-

62 SOC 172.

63 EM 88-89; SOC 144.

64 EM 170.

payment period (or 6 weeks where the person received relocation assistance to move to take up the work).[65]

1.333 Currently, under section 42N of the Social Security Administration Act a person would be subject to a non-payment period of 8 weeks. However, the secretary has the discretion to end this period if it would cause 'severe financial hardship'.[66]

1.334 The bill would remove the ability for the non-payment penalty to be waived on the basis of financial hardship.

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

1.335 As the measure operates to suspend social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. The statement of compatibility identifies the objective of the measure as having:

> demonstrably employable job seekers remain committed to obtaining work as soon as they can rather than continuing to remain in receipt of income support at tax-payers' expense.[67]

1.336 In relation to the proportionality of the measure, the statement of compatibility outlines some safeguards and that this measure would reduce the non-payment penalty from eight-weeks to four-weeks.[68] This reduction on its own would make the current arrangements less rights restrictive.

1.337 However, concerns remain as to whether, during this four-week period, there would be sufficient support for a person to meet basic necessities. In particular, the measure would remove the ability for the non-payment penalty to be waived on the basis of financial hardship. In this regard, the explanatory memorandum explains:

> There will be no waivers for non-payment or preclusion periods under the new compliance framework. The current widespread availability of waivers, where over 88 per cent of penalties for serious failures are waived, has undermined the effectiveness of these penalties to the extent that they no longer provide a deterrent to job seekers who persistently fail to meet their requirements.[69]

1.338 The committee has previously examined the removal of the waiver and raised concerns regarding the compatibility of the measure with the right to social

65 EM 170.

66 Social Security Administration Act, section 42Q.

67 SOC 176.

68 SOC 175-176.

69 EM 90.

security and the right to an adequate standard of living.[70] It is unclear from the materials provided in the statement of compatibility that these concerns have been addressed.

1.339 While the statement of compatibility provides information as to the percentage of cases in which a waiver has been applied, the assessment does not establish that the removal or limitation of the waiver will, of itself, provide a deterrent against non-compliance with job seekers' obligations.[71] In particular, the figures provided on the proportion of waivers granted are not accompanied by any basis to conclude that these were inappropriate, excessive or misused. It is therefore unclear how limiting the availability of a waiver on the ground of a job seeker's severe financial hardship, would achieve the stated objective of the measures. Even if so, it appears possible to address potential excessive reliance on the waiver without removing the waiver altogether.

Committee comment

1.340 The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.341 The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.342 The committee therefore requests the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, and in particular:

- **whether the waiver was being misused or was ineffective;**
- **whether there are less rights restrictive options that are reasonably available, for instance, whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and**
- **whether there are any safeguards in relation to the application of the measure (such as crises or when a person is unable to meet basic necessities).**

Repeated non-compliance penalties

1.343 Schedule 15 proposes that recipients of the participation payments who have repeatedly failed to comply with their mutual obligation requirements will be

70 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70.

71 EM 90.

subject to escalating reductions in their income support social security payments for further non-compliance with requirements.[72]

1.344 For the first failure of persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.[73] For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.[74] For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a 4 week non-payment period, starting from the date of cancellation, will apply if the job seeker reapplies for payment. There will be no waivers for non-payment periods.[75]

1.345 Proposed section 42AR(1) obliges the minister to make a legislative instrument determining the circumstances in which the secretary must, or must not, be satisfied that a person has committed a persistent obligation failure.

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

1.346 As the measure operates to suspend or cancel social security payments, it engages and may limit the right to social security and the right to an adequate standard of living. As noted above, the objective of 'encouraging persons to remain engaged with employment services and actively seek and accept suitable work' is likely to be considered a legitimate objective for the purposes of international human rights law.[76]

1.347 In relation to the proportionality of the measure, the explanatory memorandum explains:

> In practice, administrative arrangements will ensure that job seekers will need to have committed multiple failures without a reasonable excuse before they can be determined to be persistently non-compliant, and their provider and the Department of Human Services (DHS) will conduct checks to ensure the job seeker does not have any undisclosed issues that are affecting their ability to comply, and that their employment pathway plan is suitable for their circumstances. The factors that the Secretary must consider as constituting persistent non-compliance will be included in a legislative instrument.[77]

1.348 However, in order for a measure to be a proportionate limitation on human rights, it must be accompanied by sufficient safeguards in legislation. Accordingly,

72 EM 90; SOC 176.

73 EM 90; SOC 176.

74 EM 90; SOC 176.

75 EM 90; SOC 176.

76 SOC 172.

77 EM 89.

the criteria to be included in the legislative instrument that the Secretary must consider as constituting persistent non-compliance is relevant to the proportionality of the measure.

1.349 Additionally, the measure would remove the ability for the four-week non-payment penalty to be waived. The committee has previously examined the removal of the waiver and raised concerns regarding the compatibility of the measure with the right to social security and the right to an adequate standard of living.[78] As noted above, it is unclear how limiting the availability of a waiver on the ground of a job seeker's severe financial hardship would achieve the stated objective of the measure. It is also unclear, during the four-week non-payment period, whether there would be sufficient support for a person to meet basic necessities or other safeguards.

Committee comment

1.350 The statement of compatibility acknowledges that the measure engages the right to social security and the right to an adequate standard of living.

1.351 The preceding analysis indicates that the measure may limit these rights and there are some questions about whether the safeguards are sufficient to ensure that the limitation is proportionate.

1.352 The committee therefore requests the advice of the minister as to whether the measure is reasonable and proportionate for the achievement of its stated objective, in particular:

- **whether the waiver was being misused or was ineffective;**
- **whether there are less rights restrictive options that are reasonably available;**
- **whether there are any safeguards in relation to the application of the measure (such as, crises or when a person is unable to meet basic necessities);**
- **whether a waiver could be provided where circumstances justify the waiver in accordance with a more structured framework that allows for consistent and appropriate application of the waiver; and**
- **what criteria will be set out in the legislative instrument as matters the Secretary must or must not consider as constituting persistent non-compliance.**

78 See, Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) 66-70.

Schedule 17 – Information gathering powers and referrals for prosecution

1.353 Currently, the secretary may require a person to give information or produce a document that is in a person's custody or control in order to assess a person's qualification, payability or rate of payment.[79]

1.354 Schedule 17 of the bill would allow information and documents obtained in the course of such administrative action by the Department of Human Services to be used in subsequent investigations and criminal proceedings.[80]

1.355 It also proposes to provide that a person is not excused from giving information or producing a document on the ground that the information might tend to incriminate the person.[81]

Compatibility of the measure with the right to privacy

1.356 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information and the right to control the dissemination of information about one's private life. As the measure would allow for the compulsory collection and sharing of information about an individual it engages and limits the right to privacy. It does so in circumstances where the person providing the information or document will not be afforded the privilege against self-incrimination.

1.357 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective, and be rationally connected and proportionate to achieving that objective. The statement of compatibility acknowledges that this measure engages the right to privacy but argues that this limitation is permissible.[82]

1.358 The statement of compatibility explains that currently information and documents obtained under section 192 of the *Social Security (Administration) Act 1999* are inadmissible in criminal proceedings. It notes that the current process is to obtain such information by search warrant:

> Because of this, admissible evidence is obtained by using search warrants pursuant to section 3E of the Crimes Act 1914 (Cth). The Department of Human Services requests around 1,000 of these warrants annually. Each warrant requires two to three business days of a seconded Australian

79 *Social Security (Administration) Act 1999,* Part 5, section 197. There are equivalent provisions under *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Student Assistance Act 1973* and the *Paid Parental Leave Act 2010.*

80 SOC 179.

81 See, item 54, proposed section 197A.

82 SOC 182.

> Federal Police agent's effort. This process places a significant burden on the Department of Human Services, the Australian Federal Police, warrant recipients and the courts, particularly when this information has already been collected under section 192 of the SS(Admin) Act for administrative purposes.[83]

1.359 The statement of compatibility identifies the objective of the measure as 'to streamline the process of gathering evidence for welfare fraud prosecution'.[84] Matters of administrative ease or streamlining processes on their own are unlikely to be considered a legitimate objective for the purpose of international human rights law. Rather, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.

1.360 Further, the statement of compatibility does not demonstrate that the measure imposes a proportionate limitation on the right to privacy. In particular, the statement of compatibility does not address whether there are adequate safeguards in place with respect to the exercise of this information gathering and sharing power. It is noted that a warrant system by its nature provides external safeguards that would not be present in the new system. In order to be a proportionate limitation on the right to privacy a measure must be the least rights restrictive way of achieving its legitimate objective.

Committee comment

1.361 The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right to privacy.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **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 not to incriminate oneself

1.363 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14 of the ICCPR include the right not to incriminate oneself (article 14(3)(g)).

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83 SOC 179.

84 SOC 181.

1.364 Requiring a person to provide information or produce a document even if this information may incriminate them engages and limits the right not to incriminate oneself. This right may be subject to permissible limitations where the measure pursues a legitimate objective and is rationally connected to, and proportionate to achieving, that objective.

1.365 The statement of compatibility acknowledges this right is engaged. However, as noted above, it is unclear from the statement of compatibility whether the abrogation of the privilege against self-incrimination pursues a legitimate objective for the purpose of international human rights law.

1.366 The statement of compatibility identifies some matters which may go towards whether the measure is proportionate.[85] In particular, the statement of compatibility outlines that a 'use' and 'derivative use' would be available in relation to information provided.[86] Such immunities are important safeguards. However, in this case it is noted that the immunities are subject to a range of exceptions. In light of these exceptions, it is unclear whether the measure is sufficiently circumscribed so as to ensure the limitation is proportionate.

Committee comment

1.367 The preceding analysis indicates that there are questions as to whether the measure is a permissible limitation on the right not to incriminate oneself.

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

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **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 (including whether the exceptions to the 'use/derivative use' immunities are sufficiently circumscribed).**

Schedule 18 – Exempting social security laws from disability discrimination law

1.369 The *Social Security Act 1991* is currently exempt from the *Disability Discrimination Act 1992*. After this exemption was established, certain provisions

85 SOC 180.

86 A 'use' immunity provides that where a person has been required to give incriminating evidence, that evidence cannot be used directly against the person in any civil or criminal proceeding. A 'derivative use' immunity provides that self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.

from the *Social Security Act 1991* were transferred to two new acts – the *Social Security (Administration) Act 1999* and the *Social Security (International Agreements) Act 1999*. The exemption from the *Disability Discrimination Act 1992* was not extended to these two new acts. The bill seeks to include the *Social Security (Administration) Act 1999* and the *Social Security (International Agreements) Act 1999* in the list of legislation exempt from the operation of the Disability Discrimination Act, as well as legislative instruments made under the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*.

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

1.370 The right to equality and non-discrimination is protected by articles 2, 16 and 26 of the ICCPR and article 2 of the ICESCR. It is further protected with respect to persons with disabilities by Article 2 of the CRPD. The right applies to the distribution of welfare benefits or social security.[87]

1.371 'Discrimination' under international law encompasses differential treatment on the basis of a protected attribute, such as disability, as well as treatment having a disproportionate impact on people with a protected attribute.[88] However, differential treatment based on a protected attribute may be permissible where it is a 'special measure', or in the words of the CRPD, a specific measure 'necessary to accelerate or achieve the de facto equality of persons with disabilities'.[89]

1.372 As the proposed schedule extends the exemption from the *Disability Discrimination Act 1992* to two additional acts and legislative instruments, the measure engages and limits the right to equality and non-discrimination.

1.373 In relation to the purpose of the measure, the statement of compatibility states that:

> This exemption from the Disability Discrimination Act is designed to ensure that social security pensions, allowances and benefits, including for people with disability, can be appropriately targeted according to the purposes of the payments…. Payments under social security law are made to eligible people on the basis of a variety of factors such as their health, disability, age, income and asset levels. This ensures that Australia's social security

87 Art. 2 and 9 ICESCR; S.*W.M Broeks v Netherlands*, Communication No. 172/1984, CCPR/C/OP/2 at 196 (1990).

88 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'.

89 Convention on the Rights of Persons with Disabilities, art 5(4).

> system is targeted based on people's circumstances and need and constitutes legitimate differential treatment.[90]

1.374 It should be noted that section 45 of the *Disability Discrimination Act 1992* already exempts special measures 'designed to assist people who have a disability to obtain greater equality of opportunity or provide them with benefits to meet their special needs'. An exemption therefore is not required in order to pay benefits to people with disabilities, but would be required for measures which negatively impact people with a disability, such as reducing or suspending payments to those who fail to meet mutual obligation requirements due to their disability where that disability is a drug or alcohol dependency.

1.375 It is unclear from the limited information provided in the statement of compatibility as to why such a broad exemption is required for all social security laws, given section 45 of the Disability Discrimination Act.

Committee comment

1.376 The committee therefore seeks further information from the minister as to how the broad exemption of all social security law is permissible under international law, in particular why such an exemption is required in view of section 45 of the Disability Discrimination Act.

90 SOC 184-185.

Advice only

1.377 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.

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Amendment Determination 2017 [F2017L00659]

Purpose	Amends tables relating to the assessment of work-related impairment for the Disability Support Pension, to eliminate Table 6 – Functioning Related to Alcohol, Drug & Other Substance Use
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*, subsection 26(1)
Disallowance	This regulation was disallowed on 21 June 2017
Rights	Social security, non-discrimination, disability (see **Appendix 2**)
Status	Advice only

Qualification for disability support pension

1.378 In order to qualify for the Disability Support Pension (DSP), a person must, in addition to other requirements, have a physical, intellectual or psychiatric impairment assessed as attracting an impairment rating of 20 points or more under the tables for the assessment of work-related impairment (impairment tables). In order for the Impairment Tables to apply, the person must have a medical condition and resulting impairment that are both considered as permanent for DSP purposes. There are a number of tables tailored to different functions such as mental health function, hearing, visual function, continence and spinal function.[1]

1.379 Table 6 is for functioning relating to alcohol, drug and other substance abuse for people who have 'current, continuing alcohol, drug or other harmful substance use disorders and those in active treatment' who have a 'permanent condition resulting in functional impairment'.[2] The Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Amendment

1 Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 [F2011L02716].

2 Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011 [F2011L02716], Table 6.

Determination 2017 [F2017L00659] (the measure) sought to repeal Table 6 and rely on the remaining tables to assess functional impairment.[3] The effect of removing Table 6 is to restrict qualification for the Disability Support Pension.

Compatibility of the measure with human rights

1.380 By restricting qualification for the DSP, the measure engages and may limit the right to social security, the right to an adequate standard of living, the right to equality and non-discrimination and the rights of persons with disabilities. These rights may be subject to permissible limitations providing they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

1.381 The statement of compatibility states that the removal of Table 6 will ensure 'no one will qualify for the DSP on the basis of substance misuse without demonstrating a permanent functional impairment' and therefore 'maintain the integrity of, and public confidence in, the social security system' and encourage people with substance abuse issues to manage or overcome their issues.[4]

1.382 Maintaining the integrity of and confidence in the social security system and encouraging those with substance abuse issues to manage or overcome their issues is capable of constituting a legitimate objective under international human rights law. However, it is not evident from the statement of compatibility that the measure is effective to achieve (that is, rationally connected to) and proportionate to that objective.

1.383 In relation to rational connection, Table 6 already requires that a person have a permanent condition resulting in functional impairment, and that the condition be fully treated, stabilised and likely to persist for the next two years. It is therefore unclear how removing Table 6 will encourage affected persons, who have already undergone some treatment or are in active treatment, to 'manage or overcome their issues'.

1.384 The statement of compatibility further states that a person with a substance use disorder may still qualify for DSP if their impairment is able to be assessed under the remaining tables, pointing to specifically the Mental Health table.[5] It is noted that the Table 6 appears to have been initially created on the basis that there was a perceived need for a separate table focusing on the functional impact of alcohol,

3 Explanatory Statement (ES) 1.

4 Statement of compatibility (SOC) 3.

5 SOC 3.

drug or other substance use.[6] It is further noted that certain impacts inherent in the dependency and addiction such as compulsion and time spent to procure and consume alcohol, drugs or other substances are not directly covered by other function tables, but are inherent to the disorder.

1.385 The statement of compatibility also points to the availability of other income support such as Newstart Allowance. However, this form of social security is at a lower rate of pay, is aimed at supporting people into employment and is subject to activity tests and mutual obligation requirements. The requirement of achieving 20 points under Table 6 means that these people have 'severe functional impact' and must meet most of a list of indicators including neglecting personal hygiene and health, spending most of their time using or procuring substances and/or recovering from their effects, having a physical or cognitive impairment resulting from the use, having only brief remission, and being frequently absent from work and other activities.[7] It is not clear that those who have a permanent disorder that is fully stabilised, treated and resulting in severe functional impairment will be able to meet mutual obligation requirements, and therefore have meaningful access to income support, nor have a reasonable chance at securing and maintaining employment.

Committee comment

1.386 The committee draws the human rights implications of the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Amendment Determination 2017* to the minister and parliament.

1.387 The committee notes that the determination was disallowed on 21 June 2017.

6 See, Advisory Committee Final Report, Submitted to the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs https://www.dss.gov.au/sites/default/files/documents/05_2012/dsp_impairment_tbls_final_rpt.pdf.

7 Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011, Table 6.

Bills not raising human rights concerns

1.388 Of the bills introduced into the Parliament between 8 and 10 August, 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 Broadcasting Corporation Amendment (Regional Australia) Bill 2017;
- Education Services for Overseas Students Amendment Bill 2017;
- Education Services for Overseas Students (TPS Levies) Amendment Bill 2017;
- International Monetary Agreements Amendment (New Arrangements to Borrow) Bill 2017;
- Product Emissions Standards Bill 2017;
- Product Emissions Standards (Consequential Provisions) Bill 2017;
- Product Emissions Standards (Customs) Charges Bill 2017;
- Product Emissions Standards (Excise) Charges Bill 2017; and
- Social Security Amendment (Caring for People on Newstart) Bill 2017.

Chapter 2

Concluded matters

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

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

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

Purpose	Seeks to make a range of amendments to the *Australian Federal Police Act 1979*, *Crimes Act 1914*, and the *Criminal Code Act 1995* 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 *Crimes Act 1914*
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 reports	4 of 2017 and 5 of 2017
Status	Concluded examination

Background

2.3 The committee first reported on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Minister for Justice by 26 May 2017.[1]

2.4 The minister's response to the committee's inquiries was received on 29 May 2017 and discussed in *Report 5 of 2017*.[2] The committee requested further

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

2 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 34-41.

information from the minister by 30 June 2017 in relation to the human rights issues identified in that report.

2.5 The Minister's response to the committee's inquiries was received on 30 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Functions of the Australian Federal Police – assistance and sharing information

2.6 Schedule 1 of 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-government organisations in relation to the provision of police services or police support services.

2.7 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

2.8 As noted in the initial human rights analysis, 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.[3]

3 Explanatory memorandum (EM) 8.

2.9 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.

2.10 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.[4]

2.11 The initial analysis stated that this was likely to be, in broad terms, a legitimate objective for the purposes of international human rights law. However, the analysis raised questions about the adequacy of safeguards in place with respect to AFP assistance and cooperation with such bodies, including the sharing of information. The concern in relation to the right to privacy was addressed by the Minister's initial response, however, the committee requested further information in relation to the right to life and the prohibition on torture (discussed further below).[5]

2.12 In particular, 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 were not addressed in the statement of compatibility. In addition, 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 also not addressed in the statement of compatibility.

2.13 In relation to both the right to life, and the prohibition on torture, or cruel, inhuman and degrading treatment or punishment, the committee sought the advice of the minister about the compatibility of the measure with the relevant rights (including any relevant safeguards).

Minister's initial response

2.14 The minister's initial response explained 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. The committee's previous report stated that, nonetheless, the proposed new function still engages a range of human rights by permitting the sharing of information overseas.

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4 EM 8.

5 The first of these related to the right to privacy and the application of the Australian Privacy Principles to the measure, which was clarified by the Minister. The committee therefore concluded in its *Report 5 of 2017* the measure was likely to be compatible with the right to privacy.

2.15 The committee's previous report welcomed the AFP's commitment, as outlined in the minister's response, to review both the National Guideline on Death Penalty and the National Guideline on torture, or cruel, inhuman and degrading treatment or punishment (the guidelines) in light of the measure.

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

2.16 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.

2.17 The minister's initial response did not provide a copy of the guidelines referred to. 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 advised the minister that it would be assisted by a current 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.

Minister's further response

2.18 In response to the committee's request, the minister provided copies of both sets of guidelines.

Right to life

2.19 The AFP National Guideline on international police-to-police assistance in death penalty situations (death penalty guideline) relevantly provides:

> **Assistance before detention, arrest, charge or conviction**
>
> 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.
>
> Senior AFP management (Manager /SES-level 1 and above) must consider prescribed factors before approving provision of assistance in matters with possible death penalty implications, including:
>
> - the purpose of providing the information and the reliability of that information
> - the seriousness of the suspected criminal activity
> - the nationality, age and personal circumstances of the person involved
> - the potential risks to the person, and other persons, in providing or not providing the information
> - Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime
> - the degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed.

2.20 The death penalty guideline further provides that 'Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty'.

2.21 However, the safeguards outlined in the current death penalty guideline do not require that the AFP not share information that could contribute to the application of the death penalty overseas. The death penalty guideline does not prohibit cooperation when the information could be used or is likely to be used in a death penalty case. Rather the death penalty guideline only requires the relevant AFP officer to consider exposure to the death penalty as a possible factor within the list of prescribed factors. The death penalty guideline does not set out how these different factors are to be weighed or how potential conflicts may be resolved. Further, the Senior Executive Service level consideration of a request only applies if the AFP 'is aware' that the information is likely to result in the prosecution of the identified person with a death penalty charge. Accordingly, the guideline may not capture cases where the AFP may not be aware of a possible prosecution on a death

penalty charge, without itself making inquiries to ascertain whether such a risk is present.

2.22 As noted in the minister's previous response, the government has agreed to amend the death penalty guideline by setting out:

- that the guideline specifically applies to all persons not just Australian citizens;
- that in cases where the AFP deems that there is a 'high risk' of exposure to the death penalty, such cases will be directed to the minister for decision; and
- the criteria used by the AFP to determine whether requests are ranked 'high', 'medium' or 'low' risk.

2.23 While this appears likely to strengthen the level of safeguards in the death penalty guideline, it is unclear from the information provided from the minister why these amendments to the death penalty guideline have not yet occurred. They also do not address many of the concerns set out above.

2.24 Further, it is noted that discretionary or administrative safeguards alone, such as those contained in the death penalty guideline, are likely to be insufficient for the purpose of permissible limitations on the right to life.[6] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time. It is noted that there is currently no direct prohibition under Australian law of sharing information in circumstances where a person may be exposed to the death penalty. This raises concerns about the adequacy of protections in relation to the right to life.

2.25 Under international human rights law every human being has the inherent right to life, which should be protected by law. The right to life imposes an obligation on state parties to protect people from being killed by others or identified risks. While the International Covenant on Civil and Political Rights (ICCPR) does not completely prohibit the imposition of the death penalty, international law prohibits nation states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another nation state. As the United Nations Human Rights Committee (UNHRC) has made clear, this not only prohibits deporting or extraditing a person to a country where they may face the death penalty, but also prohibits the provision of information to other countries that may be used to investigate and convict someone of an offence to which the death penalty applies. In this context, the UNHRC stated in 2009 its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in

6 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement* (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State'.[7]

Torture, cruel, inhuman or degrading treatment or punishment

2.26 In relation to the disclosure of information to foreign authorities, the TCIDTP guideline relevantly provides:

> Where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority, AFP appointees must consider the:
>
> - purpose for which the information is being sought by the foreign authority
> - laws, practices and human rights record of the foreign authority involved (if known)
> - evidence of past significant harm or past activity which may give rise to such harm
> - pattern of conduct shown by the receiving country in similar cases
> - consequences of lawfully disclosing information, including the likelihood that the person could be detained by a foreign authority (if the person is not already in detention)
> - operational requirements
> - consequences of withholding the information, including the potential impact on AFP relationships with foreign partner agencies.
>
> Where the AFP appointee considers that there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP, formal approval for the release of the information must be obtained from Manager International Engagement…
>
> Manager International Engagement must:
>
> - determine whether such assistance should be provided, and any limitations or restrictions that may apply
> - record the decision and reasons in PROMIS as a critical decision.

2.27 Under international human rights law, states have an obligation not to expose anyone to the real risk of torture.[8] The prohibition on torture, cruel, inhuman and degrading treatment is absolute and may never be subject to any limitations. In

7 UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [20].

8 See, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3-5. See, also, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: a commentary* (2008) 116-7, 308-21.

this respect, it is noted that the TCIDTP guideline does not prohibit information being provided where there is a real risk that it will cause or contribute to the risk of torture. The TCIDTP guideline only requires referral to the Manager of the International Engagement Office where the AFP appointee considers there are 'substantial grounds for believing the person would be in danger of being subjected to TCIDTP.'[9] The Manager of International Engagement has the discretion to decide whether or not to disclose information regardless of the risk of TCIDTP.

2.28 Further, for the reasons set out above, discretionary or administrative safeguards alone, such as those contained in the TCIDTP guideline, are likely to be insufficient for the purpose of ensuring compliance with the prohibition on torture. It is noted that there is currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured.

Committee response

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

2.30 In relation to the right to life, neither Australian law or the AFP's current guidelines and policies prohibit sharing information that may expose people to the death penalty in foreign jurisdictions. Accordingly, currently there is a risk that information sharing may occur in circumstances where it is incompatible with the right to life, that is, where the death penalty may be applied.

2.31 In relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment, the AFP's current guidelines do not prohibit sharing information that may lead to or contribute to torture. There is also currently no requirement under Australian law to decline to disclose information where it may result in a person being tortured. Accordingly, currently there is a risk that information sharing may occur in circumstances where it is incompatible with the prohibition on torture.

2.32 The AFP has committed to review both the guidelines in light of the measure. In order to ensure the compatibility of the measure with human rights, the committee recommends that such a review give consideration to the matters outlined above, including instituting statutory safeguards.

9 'Substantial grounds for believing a person would be in danger of being subjected to TCIDTP' are defined in the TCIDTP guideline as 'established in circumstances where there is a foreseeable, real and personal risk to the particular individual'.

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 *Criminal Code Act 1995* 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**)
Previous report	5 of 2017
Status	Concluded examination

Background

2.33 The committee first reported on the Electoral and Other Legislation Amendment Bill 2017 (the bill) in its *Report 5 of 2017*, and requested a response from the Special Minister of State by 30 June 2017.[1]

2.34 The minister's response to the committee's inquiries was received on 30 June 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

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

2.35 Proposed section 321D of the bill 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.[2] Under proposed section 321D, subject to exceptions, all types of communication fall within the authorisation

1 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 14-21.

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

and notification requirements including, for example, printed material, leaflets, text messages, voice messages, telephone calls and conversations in the course of door-knocking.[3]

2.36 '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 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.

2.37 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.

2.38 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).

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

2.40 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).[4]

Compatibility of the measure with the right to freedom of expression

2.41 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

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

4 See proposed section 110A.

medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[5]

2.42 The initial human rights analysis stated that, by expanding authorisation and notification requirements in relation to communication about electoral and referendum matters, the measure imposes a practical limitation on 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 effect to the authorisation, the measure imposes a restriction or burden on the form of communication.[6]

2.43 As noted in the initial analysis, the statement of compatibility acknowledges that the measure engages and limits the right to freedom of expression but argues that this limitation is permissible.[7] 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.[8]

2.44 The previous analysis stated that these objectives are likely to constitute legitimate objectives for the purposes of international human rights law and that the measure appears to be rationally connected to these objectives.

2.45 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

5 ICCPR, article 19(2).

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

7 Explanatory Memorandum (EM) 7.

8 EM 7.

- personal or internal communications of disclosure entities
- opinion polls and research relating to voting intentions.

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

2.47 However, the initial analysis identified concerns in relation to 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. It was stated in the previous analysis that, 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).[9]

2.48 As stated in the initial analysis, 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.

2.49 Accordingly, the committee requested 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.

9 EM 25.

Minister's response

2.50 The minister provided a range of information in response to the committee's inquiries. In relation to whether the measure is a proportionate limit on the right to freedom of expression, the minister states that:

> When considering whether the measure is proportionate, it is important to ensure first and foremost that its contribution to the promotion of civil and political rights is not disregarded. As noted in the Committee's analysis and the explanatory memorandum, the measure engages the right to freedom of expression, as the authorisation requirements amount to restrictions on anonymous political speech in limited circumstances. However, it does so to preserve and enhance Australia's system of representative government, including several of the rights in the International Covenant on Civil and Political Rights.
>
> With respect to the Committee's specific request for advice as to whether the measure is the least rights-restrictive way of achieving its objectives, I would highlight that the measure requires a person to communicate something additional to that political matter, and that additional communication is unlikely to detract substantially from the political communication itself. For example, the measure requires candidates to identify themselves, their party affiliation and the location of their principal office in robocalls made on their behalf. It does not otherwise impact the messages in the recording.

2.51 In relation to the specific concern raised in the committee's initial report about breadth of the communications that will be covered by the authorisation requirement, the minister states:

> While it is true that Schedule 1 covers a broad range of communications, this is both necessary and appropriate to achieve the purpose of the measure and capture all possible forms of communication that are relevant in achieving the object of promoting free and informed voting. To limit the requirements to specific forms of communication would severely undermine its intent. Such authorisation requirements are largely an extension of existing requirements that cover all forms of political communication, and will minimise the scope for existing transparency measures from being circumvented.

2.52 In relation to the relevant safeguards, including for volunteer based organisations, the minister's response provides that:

> With respect to the Committee's enquiry about relevant safeguards, the obligations in Schedule 1 are targeted at persons or entities with a particular interest in the outcome of an election, that have incurred significant expenditure in making gifts to candidates or political parties, or in the public expression of views relating to an election or election issue. This appropriately targets those who might seek to exert the most influence on voters, with the key test being engagement in political

> finance and/or paid political advertising. This is an important safeguard which ensures volunteer-based organisations are only subject to the requirements, to the extent that they engage in political finance or expression, where this incurs significant expenditure.
>
> The Government considers that there is a legitimate purpose for this burden on the implied freedom, as it facilitates free and informed voting at elections and referenda. On balance, the strong public interest in promoting free and informed voting at elections outweighs the slight burden placed on certain individuals and entities under Schedule 1. I therefore consider the restriction of the right to freedom of expression is reasonable and proportionate.

2.53 On the basis of the information provided in the minister's response, on balance, the measure appears likely to be a proportionate limit on the right to freedom of expression. Despite the practical burden on communication identified in the initial analysis, the extent of the limitation is not such as to prevent expression but rather a requirement to provide additional information with such expression; there is an understandable rationale for the application of authorisation requirements in a consistent way across different forms of communication, and volunteer-based organisations will only be subject to authorisation requirements where they engage in political financing.

Committee response

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

2.55 The committee notes that the measure is likely to be compatible with the right to freedom of expression.

Compatibility of the measure with criminal process rights

2.56 As outlined in the initial human rights analysis, 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 effectively 'criminal' for the purposes of international human rights law, it will engage the criminal process rights under articles 14 and 15 of the ICCPR.

2.57 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.[10] Where a penalty is 'criminal' for the purposes of

10 *Guidance Note 2* – see Appendix 4.

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.[11]

2.58 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.[12]

2.59 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.

2.60 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 was noted that while the proposed regime applies to regulate electoral and 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*.

2.61 As noted in the initial analysis, the final 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, 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.

2.62 Accordingly, the committee sought the advice of the minister as to whether the civil penalty provisions in the bill may be considered to be 'criminal' in nature for

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11 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)).

12 EM 7.

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)).

Minister's response

2.63 In response 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, the minister's response states:

> For the reasons outlined below, I am advised that the civil penalty provisions proposed in the Bill would not be considered 'criminal' for the purposes of international human rights law.
>
> *2a) Nature and purpose of the penalty*
>
> A penalty is likely to be considered criminal for the purposes of human rights law if the purpose of the penalty is to punish or deter, and if the penalty applies to the public in general. While the penalty is designed to deter persons or entities from hiding their identity in order to make false or misleading communication with voters, it is unlikely to apply to the public in general. The civil penalties introduced in the Bill are designed to regulate electoral and referendum matters. The new measures and penalties will only apply to a restricted number of people in a specific regulatory or disciplinary context, that is, those engaging in political finance or paid political advertising. Historic application to specified printed items has also been retained.
>
> The measures are unlikely to capture the general public, and will not impact the content of political communications. The measures will increase the transparency of the source of political communication to voters, promoting free and informed voting at elections.
>
> *2b) Severity of the penalty*

> Civil penalties may be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction. The civil penalty provision in Schedule 1 of the Bill would replace several current criminal offences associated with failure to authorise electoral communications in Part XXI of the *Commonwealth Electoral Act 1918.* The civil penalties do not have corresponding criminal provisions, and therefore do not carry a term of imprisonment.
>
> When setting the civil pecuniary penalty amount, I considered first and foremost, that the amount must be sufficient to act as a deterrent to deliberate non-compliance. This primary objective is different to the purposes of criminal penalties, which include punishment or retribution. For example, civil pecuniary penalties should contemplate the cost of court proceedings, and should be sufficiently high as to justify the need to go to court. With this in mind, I have been advised that the civil penalty provisions should be subject to a minimum of 60 penalty units.
>
> Secondly, I considered what amount would be fair, considering the object of the measure. In order for civil penalties to be fair, there should be a degree of proportionality between the seriousness of the contravention and the quantum of the penalty. I considered the potential gains that may be made or losses that may be caused by a person or body corporate through contravention of a civil penalty provision. Ultimately, contravening the civil penalty provision could influence the results of an election, and the effectiveness and legitimacy of Australia's system of representative government. I therefore considered that the civil penalty amount associated with the Bill needed to be substantial because of the potential harm that could be caused by non-compliance, as well as the strong incentives and significant financial resources of those who would do most harm through deliberate non-compliance.
>
> A complicating factor in this consideration was the fact that a key target of the Bill, political parties, are not legal entities. It is therefore necessary to identify responsible individuals within political parties. The Bill does this in a fair manner by identifying those actually responsible for the failure to authorise in a particular incident, and holding them accountable for it. This is the fairest, least rights restrictive way to implement the measure.
>
> *2c) Application to individuals*
>
> The Committee has also asked whether the application of the civil penalties could be limited so as to not apply as broadly to individuals. I consider that any such limitation is not possible, as this could undermine the purpose of the proposed provisions. In order for voters to be able to weigh the arguments in political debate, it is necessary to establish a level playing field in terms of transparency amongst those with a particular interest in the outcome of an election.

2.64 Accordingly, the minister's response addresses each element of the test for whether the civil penalty may be considered criminal for the purpose of international

human rights law. Based on the detailed information provided, including in relation to the regulatory context and the severity of the penalty and its application, the measure appears unlikely to be criminal for the purposes of international human rights law.

2.65 It follows that the criminal process rights under articles 14 and 15 of the ICCPR are unlikely to apply.

Committee response

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

2.67 In light of the additional information provided the committee notes that the measure appears unlikely to be 'criminal' for the purpose of international human rights law. The committee notes that this information would have been useful in the statement of compatibility.

Reverse evidential burden of proof

2.68 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).[13]

2.69 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.

2.70 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

2.71 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.

2.72 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

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

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.

2.73 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).

2.74 In this case, the previous analysis stated that 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.

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

2.76 The committee also requested the advice of the minister as to:

- whether the reverse burden offence is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse burden offence is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Minister's response

2.77 In relation to whether the reverse burden offence in proposed section 150.1 is reasonable and proportionate to achieving the stated objective, the minister's response states:

> Proposed section 150.1 of the Criminal Code introduces new offences to criminalise a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body. Proposed subsection 150.1(3) clarifies that, for the purposes of the new offences, it is immaterial whether the Commonwealth body exists or it is fictitious. Proposed subsection 150.1(4) provides that, if the Commonwealth body is fictitious, these offences do not apply unless a person would reasonably believe that the Commonwealth body exists.
>
> The Government considers that proposed subsection 150.1(4) does not create an offence-specific defence. Rather, the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that

element will sit with the prosecution. That is, there is no reversal of the onus of proof with respect to this subsection. This conclusion is based on the wording of the provision. The provision provides that, if the Commonwealth body is fictitious, the offences do not apply unless the condition is fulfilled.

The condition is therefore a condition precedent to the offence being applicable, and forms an element of the offence to be proven by the prosecution. For example, if a person falsely represents they are the Ministry for Hot Dog Appreciation - a fictitious Commonwealth body - no offence is committed unless the prosecution can prove that a member of the public would reasonably believe that the Ministry for Hot Dog Appreciation in fact exists.

2.78 In light of the minister's helpful advice that the condition of 'unless a person would reasonably believe that the Commonwealth body exists' in section 150.1(4) forms an element of the offence such that the burden of proving that element lies with the prosecution, the measure appears to be compatible with the presumption of innocence.

Committee response

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

2.80 The committee notes that, based on the information provided by the minister, the measure appears to be compatible with the presumption of innocence. The committee notes that this information would have been useful in the statement of compatibility.

2.81 The committee recommends that the explanatory materials be amended to include this information.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Purpose	Amends the *Fair Work Act 2009* to: increase maximum civil penalties for certain serious contraventions of the Act; hold franchisors and holding companies responsible for certain contraventions of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them; clarify the prohibition on employers unreasonably requiring their employees to make payments in relation to the performance of work; provide the Fair Work Ombudsman with evidence-gathering powers similar to those available to corporate regulators such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission
Portfolio	Employment
Introduced	House of Representatives, 1 March 2017
Rights	Fair trial; right to be presumed innocent; not to be tried and punished twice; not to incriminate oneself; privacy (see **Appendix 2**)
Previous reports	4 of 2017 & 6 of 2017
Status	Concluded examination

Background

2.82 The committee first reported on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the bill) in its *Report 4 of 2017*, and requested a response from the Minster for Employment by 26 May 2017.[1]

2.83 The minister's response to the committee's inquiries was received on 1 June 2017 and discussed in *Report 6 of 2017*.[2] The committee requested a further response from the minister by 14 July 2017.

2.84 A further response from the minister was received on 24 July 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

1 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) 17-27.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25.

Civil penalty provisions

2.85 Schedule 1, Part 1 of the bill would increase the maximum civil penalties for failure to comply with certain provisions of the *Fair Work Act 2009* (Fair Work Act) and would introduce a new civil penalty provision for 'serious contraventions' of certain existing provisions of the Fair Work Act.[3] The maximum penalty for a 'serious contravention' would be 600 penalty units ($126,000).[4]

2.86 Proposed section 557A provides that a contravention is a 'serious contravention' if the conduct was deliberate and part of a systematic pattern of conduct relating to one or more persons. The range of existing civil penalty provisions to which the 'serious contravention' provision would apply are mostly in respect of conduct by employers, however, some of the provisions also apply to individual persons including employees.[5] Depending on the particular civil penalty provision under the Fair Work Act, there may be a range of persons and organisations that may seek to have a civil penalty imposed including an employee, an employer, an employee organisation, an employer organisation or an inspector.[6]

2.87 Schedule 1, Part 2-5 of the bill would also introduce a number of new civil penalty provisions which can apply to individuals, including for failing to comply with a notice from the Fair Work Ombudsman (FWO), hindering or obstructing the FWO or providing false information or documents.[7]

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3 See proposed section 539(2).

4 See proposed section 539(2). As of 1 July 2017, a penalty unit increased to $210 so that 600 penalty units would be $126,000.

5 The range of existing civil penalty provisions to which the 'serious contravention' provision would apply include: for an employer contravening national employment standards (section 44 of the Fair Work Act); for a person contravening a term of a modern award (section 45 of the Fair Work Act); for a person contravening a term of an enterprise agreement (section 50 of the Fair Work Act); for a person contravening a workplace determination (section 280 of the Fair Work Act); for an employer contravening a national minimum wage order (section 293 of the Fair Work Act); for an employer contravening a term of an equal remuneration order (section 305 of the Fair Work Act); for an employer failing to comply with requirements regarding the method and frequency of payments (section 323 of the Fair Work Act); for an employer requiring an employee to unreasonably spend any part of an amount payable in relation to the performance of work (section 325 of the Fair Work Act); for an employer to fail to comply with obligations with respect to annual earnings (section 328 of the Fair Work Act); for an employer failing to comply with requirements to make and keep certain employee records (section 535 of the Fair Work Act); for an employer failing to comply with requirements with respect to payslips (section 536 of the Fair Work Act).

6 See Fair Work Act section 539.

7 See proposed sections 712B(1); 717(1); 718A(1).

Compatibility of the measure with criminal process rights

2.88 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 increased civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

2.89 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) and the right not to incriminate oneself, apply.[8]

2.90 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]

2.91 As noted in the initial human rights analysis, the statement of compatibility usefully refers to the committee's *Guidance Note 2* and undertakes an assessment of whether the civil penalty provisions in the bill should be considered to be 'criminal' for the purposes of international human rights law.[10] The provisions are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

2.92 In relation to 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 regard, the statement of compatibility argues that, since the penalty only applies to the regulatory regime of the Fair Work Act rather than to the public at large, and enforcement proceedings

8 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) 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)).

9 *Guidance Note 2* – see Appendix 4.

10 Explanatory memorandum (EM), Statement of compatibility (SOC) 3.

may be brought not only by the FWO but an affected employee or union, the nature of the penalty should not be considered 'criminal'.[11]

2.93 This argument supports the civil character of the relevant provisions under international human rights law, however a countervailing consideration is that the Fair Work Act governs terms of employment very broadly, such that it is unclear whether the regime can categorically be said not to apply to the public in general.

2.94 As the initial human rights analysis stated, in relation to the severity of the penalty, a penalty is likely to be considered criminal for the purposes of international human rights law if it carries a term of imprisonment or a substantial pecuniary sanction. A maximum penalty of 600 penalty units ($126,000)[12] is proposed in relation to a number of the provisions. In relation to the severity of the penalty, the statement of compatibility argues that the provisions should not be considered 'criminal' as:

> The severity of the relevant civil penalties should be considered low. They are pecuniary penalties (rather than a more severe punishment like imprisonment) and there is no sanction of imprisonment for non-payment of penalties. Only courts may apply a pecuniary penalty. The pecuniary penalties are set at levels which are considered to be consistent with the nature and severity of the corresponding contraventions.[13]

2.95 Further, according to the explanatory memorandum, the severity of the increased or new penalties proposed in the bill are aimed at addressing concerns about preventing the exploitation of vulnerable workers.[14] The explanatory memorandum states that the bill:

> …addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.[15]

2.96 The initial analysis noted that this provides one argument as to why the penalties may be considered civil in nature, rather than criminal, insofar as they apply to employers found to have contravened the relevant protections in the Fair Work Act. However, there is a significant, broader range of conduct in respect of

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11 EM, SOC 3-4.

12 As of 1 July 2017, a penalty unit increased to $210 so that 600 penalty units would be $126,000.

13 EM, SOC 5.

14 See EM i; EM, SOC 5.

15 EM i.

which the increased or new civil penalties will apply. While most of the provisions apply to employers, some of the provisions may apply to individuals, including *employees*.

2.97 For example, the failure of an individual employee together with other employees to comply with a workplace determination may result in the application of a significant civil penalty of 600 penalty units ($126,000), a 10-fold increase from the current maximum penalty of 60 penalty units.[16] The previous analysis noted that the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The analysis stated that it was unclear how the application of this substantial increase in the civil penalty to any contravention of a term of a workplace determination by 'a person' addresses the concerns regarding exploitation of vulnerable workers by employers identified in the explanatory memorandum.

2.98 The committee therefore sought the advice of the Minister for Employment 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 severity of the civil penalties that may be imposed on individuals including employees is such that the penalties may be considered criminal;
- whether the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individuals including employees; 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 (ICCPR, 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)).

Minister's initial response – civil penalty provisions

2.99 The minister's response, discussed in the committee's *Report 6 of 2017*,[17] provided a range of reasons as to why the proposed civil penalty provisions should not be considered 'criminal' for the purpose of international human rights law with respect to *employers* (including individual employers).

16 See item 8; see also section 280 of the Fair Work Act.

17 Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25.

2.100 However, the response failed to address the specific issue raised in the initial analysis about the application of some civil penalty provisions to individual *employees*, in relation to matters that do not appear related to combatting the exploitation of vulnerable workers (for example, the matter set out at [2.97] above).

2.101 In relation to whether the civil penalty provisions nevertheless comply with criminal process rights, the minister's response set out a range of information, including that the proposed provisions would not apply retrospectively; that the privilege against self-incrimination, while abrogated, would be replaced with immunities; and that there was no risk of being tried and punished twice because the proposed provisions 'are regulatory in nature and there are no apparent corresponding criminal offences'.

2.102 The previous analysis noted that some of these mechanisms provide relevant safeguards in relation to criminal process rights, particularly the protection against being tried and punished twice and that the provisions do not apply retrospectively. However, other aspects of the scheme do not comply with criminal process rights, namely the right to be presumed innocent which generally requires that the prosecution prove each element of the offence to the criminal standard of proof of beyond reasonable doubt. Accordingly, were the civil penalty provisions to be considered 'criminal' for the purpose of international human rights law, there would be serious questions about whether they are compatible with criminal process rights.

2.103 Accordingly, the committee requested the further advice of the minister as to whether:

- the severity of the civil penalties that may be imposed on individual employees is such that the penalties may be considered criminal; and
- the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individual employees.

Minister's further response – civil penalty provisions

2.104 The minister's response provides a range of information in relation to the committee's further request. In relation to the severity of the penalty that may be imposed, the minister argues the penalty should not be considered criminal because:

- there is no criminal sanction if there was a failure to pay the penalty
- the proportionate size of the maximum penalty, given the nature of the relevant contraventions and in particular the value of typical employee underpayments where contraventions have been both deliberate and systematic.

2.105 In this respect, the minister's response further points to the particular aims of the penalty as a basis for arguing that the penalty should not be considered criminal:

> The Explanatory Memorandum to the Bill explains that the exploitation of workers can result in significant losses to underpaid workers. These laws

> would also ensure that there is an even playing field for all employers regarding employment costs. Contraventions of these important entitlements undermine the workplace relations regime as a whole and deliberate contraventions demonstrate a flagrant disregard for the rule of law.

2.106 In relation to the potential scope of the application of the civil penalties, the minister's response states:

> The serious contraventions regime is limited to deliberate and systematic wrongdoing, and only applies in relation to the provisions identified in section 539 (as amended by the Bill) and listed in the Explanatory Memorandum. These provisions have been chosen because they predominantly prescribe employer obligations like minimum employee entitlements, requirements for employment records or related matters like sham contracting. This is the area of concern where deliberate and systematic contraventions have emerged, and the Bill seeks to address this behaviour. Situations where an employee inadvertently or mistakenly fails to engage in a dispute resolution clause will not be captured.
>
> Because the serious contraventions regime only applies in relation to deliberate and systematic wrongdoing, my assessment remains that the proposed regime does not engage any of the applicable human rights or freedoms and is appropriate.

2.107 It is accepted that the serious contraventions regime predominantly applies to employer obligations. However, as identified in the committee's previous *Report 4 of 2017* and again in *Report 6 of 2017*, some of these provisions relate to employee obligations and the severity of the penalty applied in this context raises concerns. The minister's response states generally in relation to the application of the penalty to individuals:

> …The Government also considers that a maximum penalty of 600 penalty units for individuals like sole traders is appropriate given the scale of potential loss that may result from a serious contravention and in light of evidence that the current penalties are simply too low to effectively deter the most serious wrongdoing in this area.

2.108 The minister's response still does not address concerns in relation to the application of the penalty to individual employees. The minister's response also does not address the committee's question as to whether the increases in the maximum civil penalties could be limited so as to not apply, or to be reduced, in respect of individual employees. Noting the severity of the penalty in the context of individual employees, and that the minister's response did not address this concern, it appears that the measure may be 'criminal' for the purposes of international human rights law. This means that the criminal process rights under articles 14 and 15 are likely to apply. However, as set out above at [2.102], the civil penalty regime, in its current form does not appear to comply with these rights.

Committee response

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

2.110 The preceding analysis indicates that the civil penalty may be 'criminal' for the purpose of human rights law noting the severity of the penalty and its application to individual employees and that the minister's response did not adequately address this issue.

2.111 This means that the criminal process rights contained in articles 14 and 15 of the ICCPR may apply. However, the civil penalty regime does not appear to be compatible with these rights.

Requirement to comply with Fair Work Ombudsman Notice – coercive information-gathering powers

2.112 The bill also proposes to provide the FWO with a range of evidence gathering powers. Proposed section 712A would empower the FWO to require a person, by notice (FWO notice) to give information, produce documents or attend before the FWO to answer questions where the FWO reasonably believes the person has information or documents relevant to an investigation.[18] Failure to comply with the FWO notice may result in a civil penalty of 600 penalty units ($126,000).[19]

2.113 Under proposed section 713(1) a person is not excused from giving information, producing a record or document or answering a question under the FWO notice on the basis that to do so might tend to incriminate the person.[20] Proposed section 713(3) provides that information provided by an individual under a FWO notice is not admissible in evidence against the individual in proceedings. This is subject to exceptions in relation to failures to comply with the FWO notice and false and misleading information. It is also subject to exceptions for particular criminal offences under the Criminal Code under section 137.1 or 137.2 relating to false and misleading information and section 149.1 in relation to the obstruction of Commonwealth officials.[21]

Compatibility of the measure with the right not to incriminate oneself

2.114 The initial human rights analysis noted that proposed section 713(1) engages and limits the right not to incriminate oneself by providing that a person is not excused from giving information, producing a record or document or answering a question under a FWO notice on the basis that to do so might tend to incriminate that person. Following correspondence with the minister, the committee concluded

18 See proposed section 712B.

19 See proposed section 712B; EM 17.

20 See proposed section 713.

21 See proposed section 713.

in *Report 6 of 2017* that these coercive evidence gathering powers were likely to be incompatible with the right not to incriminate oneself (noting in particular the breadth of the powers and the absence of a derivative use immunity).[22]

Compatibility of the measure with the right to privacy

2.115 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information about one's private life.

2.116 As stated in the initial human rights analysis, the breadth of this power to compel individuals to provide information including private and confidential information and attend for questioning is a serious and extensive limitation on the right to privacy. The power applies even in respect of information which may tend to incriminate the individual and serious penalties may be imposed for non-compliance.[23]

2.117 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

2.118 The statement of compatibility acknowledges that the powers would engage the right to privacy and identifies the objective of the powers as:

> …helping to achieve positive investigative outcomes where existing powers have been demonstrated to fall short…New powers will enable the most serious cases involving the exploitation of vulnerable workers to be propertly [sic] investigated and help ensure the lawful payment of wages.[24]

2.119 In broad terms, achieving positive investigative outcomes in relation to serious cases of exploitation and ensuring the lawful payment of wages is likely to be a legitimate objective for the purposes of international human rights law.

2.120 However, the statement of compatibility provides very limited information as to whether the measure will be rationally connected to, or a proportionate way of, achieving this objective. The initial analysis stated that there is no reasoning or evidence provided as to how it is anticipated that the powers will be effective in achieving their objective.

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22 See, Parliamentary Joint Committee on Human Rights, *Report 6 of 2017* (20 June 2017) 8-25 for a full analysis.

23 See proposed section 713(1).

24 EM, SOC 6.

2.121 Instead, the statement of compatibility states that the new powers are similar to those provided in other regimes, but provides no further details as to the effectiveness of these existing powers. As the initial analysis noted, the fact that some other bodies may have coercive evidence gathering powers does not mean those regimes are justifiable limits on the right to privacy, nor does it necessarily mean that such powers will be justifiable limits in this particular context. The committee has previously considered similar coercive evidence gathering powers in the workplace relations context for the building and construction industry, and could not conclude that such powers were compatible with the right to privacy.[25] The committee's consideration of similar measures and its previous concerns about human rights compatibility were not addressed in the statement of compatibility.

2.122 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. However, as stated in the previous analysis, there are serious questions about whether such powers constitute a proportionate limit on the right to privacy in this case.

2.123 First, the proposed powers appear to be insufficiently circumscribed with reference to the stated objective of the measure. The powers are not limited to achieving positive investigative outcomes in relation to the exploitation of workers and ensuring the lawful payment of wages. Rather, the information that might be compelled applies to a broad range of industrial matters. This could include, for example, matters relating to the regulation of industrial action by employees.

2.124 Second, the statement of compatibility argues that the 'FWO's graduated approach to compliance and enforcement means that these powers will only be used where other co-operative [approaches] have failed or are inappropriate.'[26] However, no such restriction on the use of these powers is contained in the bill. This means that the powers could be used in a much broader range of circumstances, again raising the question of whether the measure as drafted is sufficiently circumscribed.

2.125 Third, it is unclear whether there are sufficient safeguards to ensure that the measure is a proportionate limit on human rights. The statement of compatibility addresses some safeguards that may be available in relation to the exercise of the measure, including providing 14 days' notice to a person and permitting a person's lawyer to be present during questioning. However, as the initial analysis noted, the absence of external review of an FWO notice at the time it is made may substantially

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25 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66; Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

26 EM, SOC 6.

reduce the adequacy of these safeguards. For example, there is no requirement that an application be made to the Administrative Appeals Tribunal (AAT) for the grant of a notice as was the case with previous legislation which regulated particular industries. It is noted that such a process could assist to ensure a FWO notice is necessary in an individual case.[27] The statement of compatibility does not address the apparent lack of external safeguards that would apply prior to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime.

2.126 Fourth, as noted above, the committee has previously considered similar coercive evidence gathering powers in the workplace relations context and could not conclude that such powers were compatible with the right to privacy.[28] Australia has also been criticised for similar coercive information gathering powers by international treaty monitoring bodies on the basis of the breadth of the powers conferred and the absence of adequate safeguards on a number of occasions.[29]

2.127 Fifth, it is unclear whether such extensive coercive powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters. It was noted in this respect that section 713(1) also abrogates the privilege against self-incrimination.

2.128 The committee therefore sought the advice of the Minister for Employment as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including with regard to the matters set out at [2.121] to [2.127].

27 See *Fair Work (Building Industry) Act 2012* section 45 (now repealed).

28 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

29 See International Labour Organization, *Committee on Freedom of Association*, Case No 2326 (Australia), in which the committee requests to be kept informed of development - Report No 338, November 2005, [454]-[456]; Case No 2326 (Australia), Effect given to the recommendations of the committee and the Governing Body - Report No 353, March 2009, [21]-[24]; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, p 537 (in the context of the Labour Inspection Convention, 1947 (No 81)).

Minister's initial response – coercive information-gathering powers and the right to privacy

2.129 In relation to how the measure is effective to achieve (that is, rationally connected to) its stated objective, the minister initially provided the following advice:

> The proposed FWO powers are effective to achieve the stated objectives of:
>
> - more 'effectively deterring unlawful practices, including those that involve the deliberate and systematic exploitation of workers', and
> - ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations'.
>
> Inadequacies in the Fair Work Ombudsman's powers have been highlighted by some recent cases. In FWO investigations into 7-Eleven for example, the Fair Work Ombudsman resorted to CCTV footage and registers of fuel levels to reconstruct hours of work for underpaid workers due to a lack of cooperation by the company. Investigations into the Baiada group in New South Wales stalled altogether due to lack of cooperation. These are not discrete examples but form part of a broader picture of deliberate non-compliance by certain unscrupulous operators.
>
> These cases show how serious instances of underpayment may not be able to be investigated where any employer refuses to provide documents or cooperate with a FWO investigation. The limitation on the powers also means that vulnerable workers may not have sufficient confidence that they can come forward without facing retribution from their employer or others.

2.130 The minister's response further explained that the current law is ineffective in addressing such issues:

> While FWO Inspectors may interview people under the Fair Work Act, para 709(e), there is currently no penalty for a person who refuses or fails to answer questions. In these kinds of cases, investigations stall and the Act becomes very difficult if not impossible to enforce.

2.131 The committee's previous report acknowledged that the coercive information gathering powers may be of assistance in tackling and addressing systematic worker exploitation. Accordingly, they are likely to be rationally connected to the stated objective of the measure.

2.132 In relation to whether the limitation is proportionate to achieving its stated objective, the minister's response stated:

> The proposed FWO powers have been drafted to pursue the legitimate objective of ensuring 'the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of

> vulnerable workers and the deliberate obstruction of its investigations'. The breadth of the powers goes no further than necessary to achieve this stated objective.
>
> The proposed measure is carefully drafted to include appropriate safeguards, so the proposed new FWO powers are proportionate to the outcomes being sought. The safeguards have been modelled on provisions conferring similar powers on ASIC and the ACCC and are described in more detail in the Explanatory Memorandum.
>
> The Fair Work Act is the primary workplace legislation in Australia and it is critical that it is, and is seen to be, enforceable and enforced.

2.133 Accordingly, the committee's previous report acknowledged that the measure pursues a legitimate objective. The minister's response stated that the measure goes 'no further than necessary' to achieve this objective. However, as noted above, the coercive information gathering powers would apply across an extremely broad range of conduct under the Fair Work Act including conduct by individual employees and in circumstances where there are no allegations or evidence of worker exploitation. The measure accordingly appears to be insufficiently circumscribed. This concern is reinforced by the committee's previous conclusions,[30] and the criticism by international supervisory bodies, regarding similar coercive information gathering powers set out above at [2.126].[31]

2.134 The minister's response stated that there are sufficient safeguards to ensure that the measure is a proportionate limit on the right to privacy. However, no information was provided about these safeguards or response made to the concerns raised in the initial human rights analysis. The response did not address the apparent lack of external safeguards that would apply *prior* to issuing an FWO notice, nor what oversight mechanisms will exist in relation to the regime. Finally, the minister's response did not address why the powers, which go beyond those that are usually available to police in the context of criminal investigations, are proportionate to the investigation of industrial matters or why it is necessary to abrogate the privilege against self-incrimination.

2.135 Accordingly, the committee requested the further advice of the minister as to the proportionality of the measure including:

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30 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

31 See, International Labour Organization (ILO), Committee on Freedom of Association (CFA), Case No 2326 (Australia) [454]-[456]; Case No 2326 (Australia), Report No 353, March 2009, [21]-[24]; ILO Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

- what safeguards exist in relation to the measure;
- whether additional safeguards could be included in relation to the measure (such as external safeguards);
- whether the power could be further circumscribed so as to only apply to cases where there is suspected exploitation of employees; and
- why the extent of the limitation is proportionate to the investigation of industrial matters noting that the powers go beyond those usually available to the police.

Minister's further response – coercive information-gathering powers and the right to privacy

2.136 The minister provides a range of information in response to the committee's inquiries as to the proportionality of the measure. In relation to what safeguards exist in relation to the regime, the minister's response states:

> The Bill includes extensive safeguards, which have been modelled on comparable provisions that apply to the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.
>
> The Bill's Explanatory Memorandum notes at paragraph 105 that the proposed safeguards have also been framed consistently with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 and the Administrative Review Council Report 48, *The Coercive Information-gathering Powers of Government Agencies*. The safeguards include:
>
> - the Fair Work Ombudsman (FWO) may only exercise the proposed new information-gathering powers if it has reasonable grounds to believe a person can help with an investigation—this imposes an objective standard, so a suspicion is not enough
> - the proposed new power to issue a FWO notice may only be exercised by the Fair Work Ombudsman personally, or a delegate who is a Senior Executive (SES) or acting SES member of staff
> - an interview conducted under the new powers may only be conducted by the FWO personally or by an SES or acting SES member of staff
> - a FWO notice must be in writing and in the form prescribed by the regulation (if any)
> - a recipient of a FWO notice has a guaranteed minimum of 14 days to comply with the notice
> - a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount

- there is protection from liability relating to FWO notices
- self-incriminating information, documents or answers given in response to a FWO notice cannot be used against the person who gave the evidence in any proceedings.

> The overarching legal framework includes robust oversight arrangements. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the *Privacy Act 1988* (Privacy Act).
>
> …in light of the safeguards described above, I am satisfied the proposed limitation on the right to privacy is proportionate. The proposed amendments will ensure alleged contraventions of workplace laws may be properly investigated, and more effectively deter deliberate and serious non-compliance with the law. There are no less intrusive measures that could be implemented that would achieve the same outcome.

2.137 While these safeguards are relevant, as set out above at [2.123] – [2.125], the previous human rights analysis raised serious concerns in relation to their adequacy and effectiveness. In relation to whether additional safeguards could be included, the minister's response states:

> This issue was also given consideration in the Senate Education and Employment Legislation Committee's report on the Bill, dated May 2017. The Report acknowledged concern raised regarding the expansion of the Fair Work Ombudsman's evidence-gathering powers, but found the proposed new information-gathering powers would only be used as a last resort and only for the most difficult and complex cases.
>
> I am satisfied the proposed safeguards provide significant practical protection to examinees. The Government will however carefully consider any proposals to provide additional safeguards during the Parliamentary debate process.

2.138 While the conclusions of other committees may assist this committee in its work, it is the function of this committee to examine legislation against Australia's obligations under international human rights law. In particular, legislation will be incompatible with human rights if it grants powers which may be used to limit the enjoyment of rights, without being sufficiently circumscribed and containing sufficient safeguards to only limit rights in a necessary and proportionate manner. Identifying whether legislation is sufficiently circumscribed is a core aspect of this committee's function, which is distinct from other parliamentary committees.

2.139 While it may be the current policy intention of the government and the FWO to use coercive evidence gathering powers only as a last resort, the proposed powers are not restricted in this manner in the bill. As set out above at [2.123], this means that the powers could be used in a much broader range of circumstances and indicates that the power as drafted is insufficiently circumscribed. An argument that, as a matter of policy, these laws will not be used in particular ways does not adequately address human rights concerns. However, for example, introducing a

mechanism such as a requirement that an application be made to the AAT for the grant of a notice could assist to ensure a FWO notice is necessary in an individual case.[32]

2.140 In relation to whether the power could be further circumscribed, the minister states:

> I do not accept the proposed information-gathering powers should be further circumscribed so as to only apply to cases where there is suspected exploitation of employees.

2.141 However, one of the reasons the committee's previous report had asked about whether the power could be further circumscribed in this way was that the statement of compatibility identified the legitimate objective of the power as preventing the exploitation of employees. As noted in the previous analysis, in order to be a proportionate limitation on the right to privacy, a power should be no more extensive than strictly necessary to achieve its legitimate objective. By not restricting the power to cases where there is exploitation of workers the power is much more extensive than is necessary to achieve the previously stated objective of the measure.

2.142 The minister's further response appears to acknowledge that the proposed power is broader than addressing the objective of preventing the exploitation of workers, and argues that:

> The *Fair Work Act 2009* (the Fair Work Act) codifies a set of rules and conduct 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians ...' (section 3). It is the primary mechanism through which a variety of internationally recognised human rights are guaranteed. Each objective described in section 3 of the Fair Work Act is legitimate, and has a role to play in striking the right balance. The rationale for enhanced information-gathering powers applies equally across the Fair Work Act.
>
> The Explanatory Memorandum explains enforcing workplace laws has become increasingly difficult, and sometimes almost impossible, without access to more effective procedures than the traditional methods such as workplace inspections and notices to produce documents. This is particularly so where there are no relevant records, or records may have been falsified.

2.143 These objectives were not identified in the statement of compatibility, or the minister's initial response, and apart from the above statement, evidence has not been provided as to why such extensive information gathering-powers are required in respect of *all* matters under the Fair Work Act. It is further noted that some

32 See *Fair Work (Building Industry) Act 2012* section 45 (now repealed).

aspects of the Fair Work Act, including the restrictions on industrial action, have been criticised by international supervisory mechanisms as going beyond what is permissible under international law.[33] In these circumstances, providing further powers to enforce such laws may exacerbate underlying human rights concerns in relation to the Fair Work Act.

2.144 Even if it were accepted that the new objectives identified constituted legitimate objectives for the purposes of international human rights law, there remain serious concerns in relation to the proportionality of the measure, namely the breadth of the powers and insufficiency of safeguards explained above. In relation to why the extent of the limitation is proportionate to the investigation of industrial matters, noting that the powers go beyond those usually available to the police, the minister's response states:

> I do not accept that the Committee's comparison of the proposed new information-gathering powers with police powers is apt, given the Fair Work Act predominately provides for civil, not criminal sanctions under Australian law. The consequences of wrongdoing under the Fair Work Act are very different from those under the general criminal law, and this important difference should be recognised.

2.145 It is true that in key respects the workplace relations context is different to the investigation of criminal offences. In terms of the proportionality of rights limiting measures, matters that are more serious may, by their nature, justify more rights intrusive measures. The limitation imposed on the right to privacy by this measure in the workplace relations context is extensive, more so than the powers usually available in the criminal investigation context, and may apply to conduct that may be less serious in relative terms. Accordingly, the extent of the power would not appear to be proportionate in a non-criminal context.

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1. See, UN Committee on Economic Social and Cultural Rights (UNCESCR), Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29]-[30]: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101st ILC session, 2013; ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, See also, UNCESCR, Concluding Observations on Australia, E/C.12/AUS/CO/4 (12 June 2009) 5.

2.146 As noted above, the committee has previously considered similar coercive evidence gathering powers in the workplace relations context and could not conclude that such powers were compatible with the right to privacy.[34] Jurisprudence from international treaty monitoring bodies and supervisory mechanisms also supports a finding that the power is not a proportionate limitation on the right to privacy in the workplace relations context.[35] Accordingly, the measure appears to be incompatible with this right.

Committee response

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

2.148 The preceding analysis indicates that the measure is likely to be incompatible with the right to privacy.

34 See, for example, Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament* (26 August 2014) 66 and *Second Report of the 44th Parliament* (11 February 2014) 17. Compare, Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 24-25.

35 See, ILO CFA Case No 2326 (Australia) [454]-[456]; Case No 2326 (Australia), Report No 353, March 2009, [21]-[24]; ILO CEACR Report III (Part 1A), General Report and observations concerning particular countries, International Labour Conference, 102nd Session, 2013, 537 (in the context of the Labour Inspection Convention, 1947 (No 81).

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	*Social Security (Administration) Act 1999*
Last day to disallow	19 June 2017
Rights	Social security; private life; equality and non-discrimination (see **Appendix 2**)
Previous report	5 of 2017
Status	Concluded examination

Background

2.149 The committee first reported on the Social Security (Administration) (Trial Area) Amendment Determination 2017 [F2017L00210] (the determination) in its *Report 5 of 2017*, and requested a response from the Minister for Social Services by 30 June 2017.[58]

2.150 No response was received at the time of finalising this report. Accordingly, the committee's concluding remarks on the determination are made in the absence of further information from the minister.[59]

Extending a trial of cashless welfare arrangements

2.151 The determination extends trials of cashless welfare arrangements in Ceduna and its surrounding region, and East Kimberley for six months. This extension brings the total period of the trials to 18 months in each location.[60]

58 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) 31-33.

59 See Parliamentary Joint Committee on Human Rights, *Correspondence register*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register.

Compatibility of the measure with human rights

2.152 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),[61] and the Social Security (Administration) (Trial - Declinable Transactions) Amendment Determination (No. 2) 2016 [F2016L01248] (declinable transactions determination).[62] The Debit Card bill amended the *Social Security (Administration) Act 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.[63]

2.153 As noted in the initial human rights analysis, 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.

2.154 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.[64]

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60 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.

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

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

63 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.

64 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.

2.155 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,[65] it has raised concerns as to whether the measures are rationally connected to and proportionate to their objective.[66] In this instance, the statement of compatibility has not provided enough information to establish why extending the trials is necessary and will be effective to achieve the objectives of the trials, and is a proportionate limitation on the above human rights.

2.156 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 therefore sought 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.

Committee comment

2.157 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 initial analysis noted that previous human rights assessments of the trials identified concerns in relation to the right to social security, the right to a private life and the right to equality and non-discrimination, and that 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.

2.158 As noted above, no response from the minister was received at the time of finalising this report. In the absence of further information, it is not possible to conclude that the determination is necessary and effective to achieve the

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

66 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.

objectives of the trials or is a proportionate limitation on the human rights set out above.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

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

- Aged Care (Subsidy, Fees and Payments) Amendment Determination 2017 [F2017L00743];
- Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment Determination 2017 [F2017L00744];
- Australian Border Force Amendment (Protected Information) Bill 2017;
- Autonomous Sanctions Amendment (Democratic People's Republic of Korea) Regulations 2017 [F2017L00880];
- CASA EX74/17 - Exemption — DAMP organisations collecting and screening of oral fluid and urine body samples outside capital city areas [F2017L00837];
- Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00878];
- Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017;
- Criminal Code Amendment (Control Orders—Legal Representation for Young People) Regulations 2017 [F2017L00843];
- Criminal Code (Terrorist Organisation—Boko Haram) Regulations 2017 [F2017L00842];
- Criminal Code (Terrorist Organisation—Islamic State) Regulations 2017 [F2017L00838];
- Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2017 [F2017L00822]; and
- Therapeutic Goods Legislation Amendment (2017 Measures No. 1) Regulations 2017 [F2017L00853].

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

- Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment List 2017 [F2017L00675];
- Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 [F2017L00637];
- Foreign Evidence (Certificate to Adduce Foreign Government Material - Prescribed Form) 2015 [F2017L00643]; and

- Treasury Laws Amendment (Agricultural Lending Data) Regulations 2017 [F2017L00706].

Appendix 2

Short guide to human rights

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

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

Right to life

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

4.3 The right to life has three core elements:

- it prohibits the state from arbitrarily killing a person;
- it imposes an obligation on the state to protect people from being killed by others or identified risks; and
- it imposes on the state a duty to undertake an effective and proper investigation into all deaths where the state is involved (discussed below, [3.5]).

4.4 Australia is also prohibited from imposing the death penalty.

Duty to investigate

Articles 2 and 6 of the ICCPR

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

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

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

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

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

Prohibition against torture, cruel, inhuman or degrading treatment

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

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

4.7 The prohibition contains a number of elements:

- it prohibits the state from subjecting a person to torture or cruel, inhuman or degrading practices, particularly in places of detention;
- it precludes the use of evidence obtained through torture;
- it prevents the deportation or extradition of a person to a place where there is a substantial risk they will be tortured or treated inhumanely (see also non-refoulement obligations, [3.9] to [3.11]); and
- it requires an effective investigation into any allegations of such treatment and steps to prevent such treatment occurring.

4.8 The aim of the prohibition against torture, cruel, inhuman or degrading treatment is to protect the dignity of the person and relates not only to acts causing physical pain but also acts causing mental suffering. The prohibition is also an aspect of the right to humane treatment in detention (see below, [3.18]).

Non-refoulement obligations

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

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

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

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

Prohibition against slavery and forced labour

Article 8 of the ICCPR

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

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

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

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

Right to liberty and security of the person

Article 9 of the ICCPR

Right to liberty

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

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

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

- the right to compensation for unlawful arrest or detention.

Right to security of the person

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

Right to humane treatment in detention

Article 10 of the ICCPR

4.18 The right to humane treatment in detention provides that all people deprived of their liberty, in any form of state detention, must be treated with humanity and dignity. The right complements the prohibition on torture and cruel, inhuman or degrading treatment or punishment (see above, [3.6] to [3.8]). The obligations on the state include:

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

Freedom of movement

Article 12 of the ICCPR

4.19 The right to freedom of movement provides that:

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

Right to a fair trial and fair hearing

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

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

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

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

Presumption of innocence

Article 14(2) of the ICCPR

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

Minimum guarantees in criminal proceedings

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

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

- the presumption of innocence (see above, [3.22]);
- the right not to incriminate oneself (the ill-treatment of a person to obtain a confession may also breach the prohibition on torture, cruel, inhuman or degrading treatment (see above, [3.6] to [3.8]);
- the right not to be tried or punished twice (double jeopardy);
- the right to appeal a conviction or sentence and the right to compensation for wrongful conviction; and
- other specific guarantees, including the right to be promptly informed of any charge, to have adequate time and facilities to prepare a defence, to be tried in person without undue delay, to examine witnesses, to choose and meet with a lawyer and to have access to effective legal aid.

Prohibition against retrospective criminal laws

Article 15 of the ICCPR

4.24 The prohibition against retrospective criminal laws provides that:

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

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

Right to privacy

Article 17 of the ICCPR

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

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

4.27 The right to privacy contains the following elements:

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

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

Right to protection of the family

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

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

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

4.29 The right also encompasses:

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

Right to freedom of thought and religion

Article 18 of the ICCPR

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

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

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

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

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

Right to freedom of opinion and expression

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

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

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

Right to freedom of assembly

Article 21 of the ICCPR

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

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

Right to freedom of association

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

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

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

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

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

Right to take part in public affairs

Article 25 of the ICCPR

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

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

Right to equality and non-discrimination

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

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

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

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

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

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

Rights of the child

CRC

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

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

Obligation to consider the best interests of the child

Articles 3 and 10 of the CRC

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

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

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

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

4.47 Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state (see above, [3.29]).

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

Article 12 of the CRC

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

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

Right to nationality

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

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

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

Right to self-determination

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

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

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

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

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

Rights to and at work

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

Right to work

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

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

Right to just and favourable conditions of work

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

Right to social security

Article 9 of the ICESCR

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

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

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

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

Right to an adequate standard of living

Article 11 of the ICESCR

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

Right to health

Article 12 of the ICESCR

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

Right to education

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

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

Right to culture

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

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

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

Right to an effective remedy

Article 2 of the ICCPR

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

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

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

Appendix 3

Correspondence

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

MC17-005670

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

Dear Chair Ian

I am writing in relation to Report 5 of 2017 by the Parliamentary Joint Committee on Human Rights (the Committee), in which the Committee sought further information in relation to the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017*.

The Committee has requested copies of the AFP National Guidelines referenced in my earlier response of 29 May 2017. In response to this request, I enclose the following documents for the Committee's consideration:

- the AFP National Guideline on international police-to-police assistance in death penalty situations (**Attachment A**), and
- the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (**Attachment B**).

Should your office require any further information, the responsible adviser for this matter in my office is Talitha Try, who can be contacted on 02 6277 7290.

Yours sincerely

Michael Keenan

AFP National Guideline on international police-to-police assistance in death penalty situations

1. Disclosure and compliance

This document is marked **For Official Use Only** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on information management.

Compliance

This instrument is part of the AFP's professional standards framework. The AFP Commissioner's Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the *Australian Federal Police Act 1979* (Cth).

2. Acronyms

AFP	Australian Federal Police
MIE	Manager International Engagement
NMIO	National Manager International Operations
PNG	Papua New Guinea
PROMIS	Police Real-time Online Management Information System

3. Definitions

Commissioner – means the Commissioner of Police of the AFP, as defined in s. 4 of the AFP Act.

Minister – means the Commonwealth minister responsible for the AFP.

4. Guideline authority

This guideline was issued by the National Manager International Operations using power under s. 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegated by the Commissioner under s. 69C.

5. Introduction

This guideline governs police-to-police assistance in possible death penalty cases, and has been developed in consultation with the Attorney-General's Department.

6. Authority to provide information to foreign law enforcement agencies

The AFP is authorised to provide assistance and cooperate with foreign law enforcement agencies in accordance with the *Australian Federal Police Act 1979* (Cth) and Ministerial Direction. Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of conducting international police cooperation.

This guideline applies only to the provision of assistance, including the sharing of information, which can be provided on a police-to-police basis. This guideline does not apply to the provision of assistance that requires a mutual assistance request. In such cases, s. 8(1A) and s. 8(1B) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) apply. That Act is administered by the Attorney-General's Department.

7. Policy for cooperation with foreign law enforcement agencies

On 29 January 2009, the Attorney-General approved a range of measures to strengthen current policy governing international crime cooperation in death penalty cases.

Assistance before detention, arrest, charge or conviction

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.

Senior AFP management (Manager /SES-level 1 and above) must consider prescribed factors before approving provision of assistance in matters with possible death penalty implications, including:

- the purpose of providing the information and the reliability of that information
- the seriousness of the suspected criminal activity
- the nationality, age and personal circumstances of the person involved
- the potential risks to the person, and other persons, in providing or not providing the information
- Australia's interest in promoting and securing cooperation from overseas agencies in combatting crime
- the degree of risk to the person in providing the information, including the likelihood the death penalty will be imposed.

Assistance after detention, arrest, charge or conviction

Ministerial approval is required in any case in which a person has been arrested or detained for, charged with, or convicted of an offence which carries the death penalty.

Assistance by AFP appointees in Papua New Guinea (PNG)

The Australian Government PNG Death Penalty Framework endorsed by the Attorney-General on 2 June 2014 sets out the whole-of-government approach to managing death penalty issues. Attachment A to that framework applies specifically to AFP appointees in PNG.

8. Approval process

Procedures before detention, arrest, charge or conviction

Where no person has been arrested or detained for, charged with, or convicted of an offence, and the AFP is aware the provision of information is likely to result in the prosecution of an identified person for an offence carrying the death penalty:

Step 1	The case officer or business area seeking assistance approval must complete the 'Assistance in Potential Death Penalty Situations – Approval Request' form (AFP Investigator's Toolkit) and have it endorsed by their functional coordinator. Should assistance be required members should consult the International Network Engagement team and/or Post.
Step 2	The case officer sends the endorsed form via a PROMIS task to International Operations (IO-INET) for approval by MIE/NMIO.

Procedures after detention, arrest charge or conviction

Where a person has been arrested or detained for, charged with, or convicted of an offence carrying the death penalty:

Step 1	The case officer or business area seeking assistance approval prepares a ministerial brief with a covering executive brief to MIE/NMIO for the attention of the Deputy Commissioner Operations. The ministerial brief should cover the same prescribed factors (listed above) that an AFP delegate must consider.
Step 2	If approved, requests will be progressed to the Attorney-General or the Minister via the AFP Ministerial team.

Procedures for AFP appointees in Papua New Guinea (PNG)

All AFP appointees in PNG must comply with the procedures and approval processes in the Papua New Guinea – Australia Policing Partnership Mission

Commander's Orders regarding assistance provided to PNG counterparts in matters involving offences for which the death penalty may be imposed.

9. Reporting

The Commissioner will report to the Minister annually on the nature and number of cases where assistance is provided to foreign law enforcement agencies in death penalty cases.

10. Further advice

Queries about the content of this guideline should be referred to NMIO.

11. References

- *Australian Federal Police Act 1979* (Cth)
- *Mutual Assistance in Criminal Matters Act 1987* (Cth)
- Ministerial Direction (AFP Hub)
- Australian Government PNG Death Penalty Framework.

FOR INTERNAL AFP USE ONLY

AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment

1. Disclosure and compliance

This document is marked **For Official Use Only** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the AFP National Guideline on information management.

Compliance

This instrument is part of the AFP's professional standards framework. The AFP Commissioner's Order on Professional Standards (CO2) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the *Australian Federal Police Act 1979* (Cth).

2. Acronyms

AFP	Australian Federal Police
PROMIS	Police Real-time Online Management Information System
TCIDTP	Torture or cruel, inhuman or degrading treatment or punishment

3. Definitions

AFP appointee – means a Deputy Commissioner, an AFP employee, special member or special protective service officer and includes a person:

- engaged overseas under s. 69A of the *Australian Federal Police Act 1979* (Cth) (the Act) to perform duties as an AFP employee
- seconded to the AFP under s. 69D of the Act
- engaged under s. 35 of the Act as a consultant or contractor to perform services for the AFP and determined under s. 35(2) of the Act to be an AFP appointee.

(See s. 4 of the Act.)

Australian – means a person who is an Australian citizen.

Cruel, inhuman or degrading treatment or punishment – see Attachment 1.

Foreign authorities – means law enforcement, foreign security agencies, foreign intelligence agencies and/or any agent of a foreign government.

Torture – is defined in Division 274 of the Criminal Code (see the *Criminal Code Act 1995* (Cth)) and involves conduct that inflicts severe physical or mental pain or suffering on a person.

4. Guideline authority

This guideline was issued by National Manager International Operations using power under s. 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegated by the Commissioner under s. 69C of the Act.

5. Introduction

The AFP does not tolerate, participate in, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment (TCIDTP) of any individual for any purpose.

This guideline outlines the obligations for AFP appointees and the framework for dealing with foreign authorities:

- where an AFP appointee becomes aware an Australian detained offshore has been, or is likely to be, subject to TCIDTP
- where an appointee is involved in interviews of a detained person offshore in situations where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP
- in respect of disclosure of information about a person to foreign authorities where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP.

Substantial grounds for believing a person would be in danger of being subjected to TCIDTP are established in circumstances where there is a foreseeable, real and personal risk to the particular individual.

This guideline exists within broader national and international legal and policy frameworks which impose general prohibitions on TCIDTP, including in relation to accessorial forms of individual and state responsibility (e.g. aiding and abetting). This guideline is only intended to provide specific operational guidance to AFP appointees.

6. Reporting TCIDTP of Australians detained offshore

AFP appointees who in the course of carrying out AFP functions become aware

of credible information that an Australian detained by a foreign authority offshore has been, or is likely to be, subject to TCIDTP, must advise the relevant AFP post and Manager International Engagement as soon as practicable. The senior liaison officer at post, or the mission commander in countries with AFP missions, are the AFP point of contact in country. The AFP appointee should include where known:

- the full name of the detained Australian
- the location of the detained Australian
- the reason for their detention
- the name of the detaining foreign authority
- the allegations made and date of any alleged mistreatment
- the details of any other reporting of the TCIDTP (including media reporting)
- what action has been taken by the AFP or other Australian agencies
- how and by whom the TCIDTP was reported.

The AFP senior liaison officer must, as soon as practicable, report the likelihood of an Australian detained offshore being subject to TCIDTP to the Department of Foreign Affairs and Trade Head of Mission in country.

Details of the alleged TCIDTP and related AFP actions and determinations must be recorded in PROMIS as a critical decision.

7. Involvement in interviews

This guideline applies to any AFP appointee who conducts or participates in an interview offshore, whether or not Part IC of the *Crimes Act 1914* (Cth) applies.

AFP appointees considering conducting an interview where there is a substantial, real and not remote risk that a person has been, or is likely to be, subject to TCIDTP must:

- report considerations for such participation in the interview to Manager International Engagement
- record details of the request and management determinations on PROMIS as a critical decision.

AFP appointees considering attendance at, and/or involvement in, an interview conducted by another agency of a person detained offshore where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP must:

- report considerations for such attendance or involvement in the interview to Manager International Engagement, e.g.:
  - whether it is possible to mitigate the risk of TCIDTP occurring through requesting and evaluating assurances on detainee treatment
  - attaching conditions to any information to be passed governing the use to which it may be put
  - whether AFP appointee involvement in the interview would increase or

decrease the likelihood of TCIDTP occurring
- record details of the request and management determinations on PROMIS as a critical decision
- suspend any involvement in the interview until a decision is made by Manager International Engagement.

Should Manager International Engagement permit AFP appointee attendance and/or involvement in the interview, the AFP appointee should monitor the situation closely and consider withdrawing from the interview should the risk of TCIDTP arise.

Manager International Engagement must determine the level of any involvement of the AFP appointee in the interview in consultation with the senior liaison officer at post, or mission commander in countries with AFP missions, and the Department of Foreign Affairs and Trade, through the head of mission at post; and with regard to any applicable whole-of-government guidance.

8. Disclosure of information to foreign authorities

The AFP National Guideline on information management sets out the framework for all disclosures of information by the AFP. The AFP National Guideline on international police-to-police assistance in death penalty situations sets out additional considerations in situations where the death penalty may apply.

This guideline sets out the:

- additional considerations where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority and there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP
- formal approval process that applies to the release of that information, including the sending of questions or information to support the conduct of a custodial interview, as well as circumstances where an AFP appointee is physically present at an interview.

8.1 Information disclosure considerations

Where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority, AFP appointees must consider the:

- purpose for which the information is being sought by the foreign authority
- laws, practices and human rights record of the foreign authority involved (if known)
- evidence of past significant harm or past activity which may give rise to such harm
- pattern of conduct shown by the receiving country in similar cases
- consequences of lawfully disclosing information, including the likelihood that the person could be detained by a foreign authority (if the person is not already in detention)

- operational requirements
- consequences of withholding the information, including the potential impact on AFP relationships with foreign partner agencies.

Where the AFP appointee considers that there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP, formal approval for the release of the information must be obtained from Manager International Engagement.

8.2 Approval process

AFP appointees must report details of the request for information to Manager International Engagement and document, where known, information relevant to the considerations listed above.

Manager International Engagement must:

- determine whether such assistance should be provided, and any limitations or restrictions that may apply
- record the decision and reasons in PROMIS as a critical decision.

8.3 Caveats

Following approval to disclose information to a foreign authority, subject to any limitations or restrictions that may apply under s. 8.2, and the provisions of the AFP Practical Guide on applying protective markings, the AFP appointee must include a caveat on all information disclosed. The caveat must include instructions on the use of information and its releasability, as follows:

'The information contained in this document originates from the Australian Federal Police (AFP) and may be subject to disclosure restrictions under Australian law. This information may only be used for the purposes for which it was requested and provided. This information must not be disclosed to another agency or third party without the prior written consent of the AFP'.

9. Further advice

Queries about the content of this guideline should be referred to National Manager International Operations.

10. References

Legislation

- *Australian Federal Police Act 1979* (Cth)
- *Crimes Act 1914* (Cth)
- *Criminal Code Act 1995* (Cth) (including the Criminal Code).

AFP governance instruments

- AFP National Guideline on information management
- AFP National Guideline on international police-to-police assistance in death penalty situations
- AFP Practical Guide on applying protective markings.

SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-0002147

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Mr Goodenough, Ian

I refer to your letter from of 15 June 2017 to my Senior Advisor regarding the Electoral and Other Legislation Amendment Bill (the Bill). The letter refers to the *Human rights scrutiny report 5 of 2017* by the Parliamentary Joint Committee on Human Rights and seeks my advice on the matters raised.

The Committee has requested advice as to whether:

- the restriction of the right to freedom of expression is reasonable and proportionate;
- the civil penalty provisions in the Bill may be considered 'criminal' in nature for the purposes of human rights law; and
- the reverse burden offence is legitimate, effective, and reasonable and proportionate.

I have responded to each of your requests in detail below.

1) Implied freedom of expression

When considering whether the measure is proportionate, it is important to ensure first and foremost that its contribution to the promotion of civil and political rights is not disregarded. As noted in the Committee's analysis and the explanatory memorandum, the measure engages the right to freedom of expression, as the authorisation requirements amount to restrictions on anonymous political speech in limited circumstances. However, it does so to preserve and enhance Australia's system of representative government, including several of the rights in the International Covenant on Civil and Political Rights.

With respect to the Committee's specific request for advice as to whether the measure is the least rights-restrictive way of achieving its objectives, I would highlight that the measure requires a person to communicate something additional to that political matter, and that additional communication is unlikely to detract substantially from the political communication itself. For example, the measure requires candidates to identify themselves, their party affiliation and the location of their principal office in robocalls made on their behalf. It does not otherwise impact the messages in the recording.

While it is true that Schedule 1 covers a broad range of communications, this is both necessary and appropriate to achieve the purpose of the measure and capture all possible forms of communication that are relevant in achieving the object of promoting free and informed voting. To limit the requirements to specific forms of communication would severely undermine its intent. Such authorisation requirements are largely an extension of existing requirements that cover all forms of political communication, and will minimise the scope for existing transparency measures from being circumvented.

With respect to the Committee's enquiry about relevant safeguards, the obligations in Schedule 1 are targeted at persons or entities with a particular interest in the outcome of an election, that have incurred significant expenditure in making gifts to candidates or political parties, or in the public expression of views relating to an election or election issue. This appropriately targets those who might seek to exert the most influence on voters, with the key test being engagement in political finance and/or paid political advertising. This is an important safeguard which ensures volunteer-based organisations are only subject to the requirements, to the extent that they engage in political finance or expression, where this incurs significant expenditure.

The Government considers that there is a legitimate purpose for this burden on the implied freedom, as it facilitates free and informed voting at elections and referenda. On balance, the strong public interest in promoting free and informed voting at elections outweighs the slight burden placed on certain individuals and entities under Schedule 1. I therefore consider the restriction of the right to freedom of expression is reasonable and proportionate.

2) 'Criminal' nature of the civil penalty provisions under international human rights law

I understand the Committee is seeking advice on whether the civil penalty provisions introduced by the Bill may be considered to be 'criminal' for the purposes of international human rights law and, if so, whether the measures accord with criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights.

For the reasons outlined below, I am advised that the civil penalty provisions proposed in the Bill would not be considered 'criminal' for the purposes of international human rights law.

2a) Nature and purpose of the penalty

A penalty is likely to be considered criminal for the purposes of human rights law if the purpose of the penalty is to punish or deter, and if the penalty applies to the public in general. While the penalty is designed to deter persons or entities from hiding their identity in order to make false or misleading communication with voters, it is unlikely to apply to the public in general. The civil penalties introduced in the Bill are designed to regulate electoral and referendum matters. The new measures and penalties will only apply to a restricted number of people in a specific regulatory or disciplinary context, that is, those engaging in political finance or paid political advertising. Historic application to specified printed items has also been retained.

The measures are unlikely to capture the general public, and will not impact the content of political communications. The measures will increase the transparency of the source of political communication to voters, promoting free and informed voting at elections.

2b) Severity of the penalty

Civil penalties may be considered criminal for the purposes of human rights law if the penalty carries a penalty of imprisonment or a substantial pecuniary sanction. The civil penalty provision in Schedule 1 of the Bill would replace several current criminal offences associated with failure to authorise electoral communications in Part XXI of the *Commonwealth Electoral Act 1918*. The civil penalties do not have corresponding criminal provisions, and therefore do not carry a term of imprisonment.

When setting the civil pecuniary penalty amount, I considered first and foremost, that the amount must be sufficient to act as a deterrent to deliberate non-compliance. This primary objective is different to the purposes of criminal penalties, which include punishment or retribution. For example, civil pecuniary penalties should contemplate the cost of court proceedings, and should be sufficiently high as to justify the need to go to court. With this in mind, I have been advised that the civil penalty provisions should be subject to a minimum of 60 penalty units.

Secondly, I considered what amount would be fair, considering the object of the measure. In order for civil penalties to be fair, there should be a degree of proportionality between the seriousness of the contravention and the quantum of the penalty. I considered the potential gains that may be made or losses that may be caused by a person or body corporate through contravention of a civil penalty provision. Ultimately, contravening the civil penalty provision could influence the results of an election, and the effectiveness and legitimacy of Australia's system of representative government. I therefore considered that the civil penalty amount associated with the Bill needed to be substantial because of the potential harm that could be caused by non-compliance, as well as the strong incentives and significant financial resources of those who would do most harm through deliberate non-compliance.

A complicating factor in this consideration was the fact that a key target of the Bill, political parties, are not legal entities. It is therefore necessary to identify responsible individuals within political parties. The Bill does this in a fair manner by identifying those actually responsible for the failure to authorise in a particular incident, and holding them accountable for it. This is the fairest, least rights restrictive way to implement the measure.

2c) Application to individuals

The Committee has also asked whether the application of the civil penalties could be limited so as to not apply as broadly to individuals. I consider that any such limitation is not possible, as this could undermine the purpose of the proposed provisions. In order for voters to be able to weigh the arguments in political debate, it is necessary to establish a level playing field in terms of transparency amongst those with a particular interest in the outcome of an election.

2d) Criminal process rights

As I have previously stated, I consider it unlikely that the penalties could be considered 'criminal' in nature for the purposes of international human rights law. However, the Committee has asked me to specifically address whether the measure accords with criminal process rights for the following specific guarantees:

- 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
- the guarantee against retrospective criminal laws (article 15(1)).

First and foremost, the rights outlined in articles 14 and 15 would be largely preserved under the proposed measures. In relation to article 14(2), I have separately addressed the reverse burden offence below. The rights contained in article 14(7) and 15(1) would not be affected by the application of the measure.

The Electoral Commissioner is given powers under the proposed section 321F to obtain information and documents. This is an acceptable limit on the right against self-incrimination in article 14(3)(g), noting the safeguards in place under the *Privacy Act 1988* in terms of the use and disclosure of personal information. The provisions are also necessary, as it assists the Electoral Commissioner in the performance of functions and powers that protect the free, fair and informed voting at elections.

3) Reverse burden offence

Finally, the Committee has requested my advice as to why it is proposed to use what appears to the Committee to be an offence-specific defence (which reverses the evidential burden of proof), and what the justification is for doing so.

Proposed section 150.1 of the Criminal Code introduces new offences to criminalise a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body. Proposed subsection 150.1(3) clarifies that, for the purposes of the new offences, it is immaterial whether the Commonwealth body exists or it is fictitious. Proposed subsection 150.1(4) provides that, if the Commonwealth body is fictitious, these offences do not apply unless a person would reasonably believe that the Commonwealth body exists.

The Government considers that proposed subsection 150.1(4) does not create an offence-specific defence. Rather, the condition of 'unless a person would reasonably believe that the Commonwealth body exists' forms an element of the offence and the burden of proof for proving that element will sit with the prosecution. That is, there is no reversal of the onus of proof with respect to this subsection.

This conclusion is based on the wording of the provision. The provision provides that, if the Commonwealth body is fictitious, the offences do not apply unless the condition is fulfilled. The condition is therefore a condition precedent to the offence being applicable, and forms an element of the offence to be proven by the prosecution. For example, if a person falsely represents they are the Ministry for Hot Dog Appreciation – a fictitious Commonwealth body – no offence is committed unless the prosecution can prove that a member of the public would reasonably believe that the Ministry for Hot Dog Appreciation in fact exists.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

Yours sincerely

SCOTT RYAN

30 June 2017

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC17-047832

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

Dear Chair

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

This letter is in response to your letter of 21 June 2017 concerning the human rights compatibility of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, as set out in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No. 6 of 2017.*

The Committee requested additional information, further to my initial response dated 29 May 2017. My supplementary response to each of the issues raised is at Attachment A. I thank the Committee for the consideration of the Bill and I trust this addresses the outstanding issues raised by the Committee.

I note that the inquiry of the Senate Education and Employment Legislation Committee into the Bill has concluded and the Australian Government is considering recommendations made in its report, dated May 2017.

Yours sincerely

Senator the Hon Michaelia Cash
/ / 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.6 of 2017*

FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

Compatibility of the measure with criminal process rights

The Committee requests further advice as to whether:

- **the severity of the civil penalties that may be imposed on individual employees is such that the penalties may be considered criminal**
- **the increases in the maximum penalties could be limited so as to not apply, or be reduced, in respect of individual employees.**

Response

As I noted in my previous response to the Committee, I am satisfied the proposed penalties for 'serious contraventions' in the Bill may be reasonably characterised as civil, based on the criteria in *Guidance Note 2: Offence provisions, civil penalties and human rights*, December 2014.

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2, the following factors support the view that the proposed penalty regime is not criminal in nature:

- the 600 penalty unit penalty is not a criminal penalty under Australian law
- there is no criminal sanction if there was a failure to pay the penalty
- the proportionate size of the maximum penalty, given the nature of the relevant contraventions and in particular the value of typical employee underpayments where contraventions have been both deliberate and systematic.

The Explanatory Memorandum to the Bill explains that the exploitation of workers can result in significant losses to underpaid workers. These laws would also ensure that there is an even playing field for all employers regarding employment costs. Contraventions of these important entitlements undermine the workplace relations regime as a whole and deliberate contraventions demonstrate a flagrant disregard for the rule of law.

The serious contraventions regime is limited to deliberate and systematic wrongdoing, and only applies in relation to the provisions identified in section 539 (as amended by the Bill) and listed in the Explanatory Memorandum. These provisions have been chosen because they predominantly prescribe employer obligations like minimum employee entitlements, requirements for employment records or related matters like sham contracting. This is the area of concern where deliberate and systematic contraventions have emerged, and the Bill seeks to address this behaviour. Situations where an employee inadvertently or mistakenly fails to engage in a dispute resolution clause will not be captured.

Because the serious contraventions regime only applies in relation to deliberate and systematic wrongdoing, my assessment remains that the proposed regime does not engage any of the applicable human rights or freedoms and is appropriate.

The Government also considers that a maximum penalty of 600 penalty units for individuals like sole traders is appropriate given the scale of potential loss that may result from a serious contravention and in light of evidence that the current penalties are simply too low to effectively deter the most serious wrongdoing in this area.

Information-gathering powers – Compatibility of the measure with the right to privacy

The Committee requests further advice of the minister as to the proportionality of the measure including:

- **what safeguards exist in relation to the measure**
- **whether additional safeguards could be included in relation to the measure (such as external safeguards)**
- **whether the power could be further circumscribed so as to only apply to cases where there is suspected exploitation of employees**
- **why the extent of the limitation is proportionate to investigate industrial matters noting that the powers go beyond those usually available to the police.**

Response

The Bill includes extensive safeguards, which have been modelled on comparable provisions that apply to the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

The Bill's Explanatory Memorandum notes at paragraph 105 that the proposed safeguards have also been framed consistently with *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 and the Administrative Review Council Report 48, *The Coercive Information-gathering Powers of Government Agencies*. The safeguards include:

- the Fair Work Ombudsman (FWO) may only exercise the proposed new information-gathering powers if it has reasonable grounds to believe a person can help with an investigation—this imposes an objective standard, so a suspicion is not enough
- the proposed new power to issue a FWO notice may only be exercised by the Fair Work Ombudsman personally, or a delegate who is a Senior Executive (SES) or acting SES member of staff
- an interview conducted under the new powers may only be conducted by the FWO personally or by an SES or acting SES member of staff
- a FWO notice must be in writing and in the form prescribed by the regulation (if any)
- a recipient of a FWO notice has a guaranteed minimum of 14 days to comply with the notice
- a person attending a place to answer questions may be legally represented, and is entitled to be reimbursed for certain reasonable expenses, up to a prescribed amount
- there is protection from liability relating to FWO notices
- self-incriminating information, documents or answers given in response to a FWO notice cannot be used against the person who gave the evidence in any proceedings.

The overarching legal framework includes robust oversight arrangements. Central to the oversight regime are judicial review, the Commonwealth Ombudsman and the *Privacy Act 1988* (Privacy Act).

The Committee asks whether additional safeguards could be included in relation to the measure (such as external safeguards). This issue was also given consideration in the Senate Education and Employment Legislation Committee's report on the Bill, dated May 2017. The Report acknowledged concern raised regarding the expansion of the Fair Work Ombudsman's evidence-gathering powers, but found the proposed new information-gathering powers would only be used as a last resort and only for the most difficult and complex cases.

I am satisfied the proposed safeguards provide significant practical protection to examinees. The Government will however carefully consider any proposals to provide additional safeguards during the Parliamentary debate process.

The Committee also asked whether the power could be further circumscribed, and whether the extent of the limitation is proportionate to investigate industrial matters.

I do not accept the proposed information-gathering powers should be further circumscribed so as to only apply to cases where there is suspected exploitation of employees.

The *Fair Work Act 2009* (the Fair Work Act) codifies a set of rules and conduct 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians…' (section 3). It is the primary mechanism through which a variety of internationally recognised human rights are guaranteed. Each objective described in section 3 of the Fair Work Act is legitimate, and has a role to play in striking the right balance. The rationale for enhanced information-gathering powers applies equally across the Fair Work Act.

The Explanatory Memorandum explains enforcing workplace laws has become increasingly difficult, and sometimes almost impossible, without access to more effective procedures than the traditional methods such as workplace inspections and notices to produce documents. This is particularly so where there are no relevant records, or records may have been falsified.

I do not accept that the Committee's comparison of the proposed new information-gathering powers with police powers is apt, given the Fair Work Act predominately provides for civil, not criminal sanctions under Australian law. The consequences of wrongdoing under the Fair Work Act are very different from those under the general criminal law, and this important difference should be recognised.

For these reasons, and in light of the safeguards described above, I am satisfied the proposed limitation on the right to privacy is proportionate. The proposed amendments will ensure alleged contraventions of workplace laws may be properly investigated, and more effectively deter deliberate and serious non-compliance with the law. There are no less intrusive measures that could be implemented that would achieve the same outcome.

Appendix 4

Guidance Note 1 and Guidance Note 2

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

GUIDANCE NOTE 1: Drafting statements of compatibility

December 2014

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

Background

Australia's human rights obligations

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

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

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

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

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

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

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

Civil and political rights

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

Economic, social and cultural rights

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

Limiting a human right

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

Prescribed by law

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

Legitimate objective

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

Rational connection

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

Proportionality

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

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

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

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

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

Retrogressive measures

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

The committee's approach to human rights scrutiny

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

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

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

The committee's expectations for statements of compatibility

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

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

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

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

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

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

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

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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

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

Introduction

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

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

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

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

Reverse burden offences

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

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

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

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

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

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

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

Strict liability and absolute liability offences

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

The effect of applying strict liability to an element or elements of an offence therefore means that the prosecution does not need to prove fault. However, the defence of mistake of fact is available to the defendant. Similarly, the effect of applying absolute liability to an element or elements of an offence means that no fault element needs to be proved, but the defence of mistake of fact is not available.

Strict liability and absolute liability offences will not necessarily be inconsistent with the presumption of innocence where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

The committee notes that strict liability and absolute liability may apply to whole offences or to elements of offences. It is the committee's usual expectation that, where strict liability and absolute liability criminal offences or elements are introduced, legislation proponents should provide a human rights assessment of their compatibility with the presumption of innocence, in accordance with Guidance Note 1.

Mandatory minimum sentencing

Article 9 of the ICCPR protects the right to security of the person and freedom from arbitrary detention. An offence provision which requires mandatory minimum sentencing will engage and limit the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy).[4] Mandatory sentencing may lead to disproportionate or unduly harsh outcomes as it removes judicial discretion to take into account all of the relevant circumstances of a particular case in sentencing.

Mandatory sentencing is also likely to engage and limit article 14(5) of the ICCPR, which protects the right to have a sentence reviewed by a higher tribunal. This is because mandatory sentencing prevents judicial review of the severity or correctness of a minimum sentence.

The committee considers that mandatory minimum sentencing will be difficult to justify as compatible with human rights, given the substantial limitations it places on the right to freedom

[4] See, for example, A v Australia (1997) 560/1993, UN Doc. CCPR/C/59/D/560/1993, [9.4]; Concluding Observations on Australia in 2000 (2000) UN doc A/55/40, volume 1, [522] (in relation to mandatory sentencing in the Northern Territory and Western Australia).

from arbitrary detention and the right to have a sentence reviewed by a higher tribunal (due to the blanket nature of the measure). Where mandatory minimum sentencing does not require a minimum non-parole period, this will generally be insufficient, in and of itself, to preserve the requisite judicial discretion under international human rights law to take into account the particular circumstances of the offence and the offender.[5]

Civil penalty provisions

Many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court. As these penalties are pecuniary and do not include the possibility of imprisonment, they are said to be 'civil' in nature and do not constitute criminal offences under Australian law.

Given their 'civil' character, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters. These rules and procedures often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences.

However, civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as 'criminal' for the purpose of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is considered to be 'civil' under Australian domestic law.

There is a range of international and comparative jurisprudence on whether a 'civil' penalty is likely to be 'criminal' for the purpose of human rights law.[6] This criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law is set out in further detail on page 4. The following steps (one to three) may assist legislation proponents in understanding whether a provision may be characterised as 'criminal' under international human rights law.

- **Step one:** *Is the penalty classified as criminal under Australian Law?*

  If so, the penalty will be considered 'criminal' for the purpose of human rights law. If not, proceed to step two.

- **Step two:** *What is the nature and purpose of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if:

  a) the purpose of the penalty is to punish or deter; **and**

  b) the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context.)

  If the penalty does not satisfy this test, proceed to step three.

- **Step three:** *What is the severity of the penalty?*

  The penalty is likely to be considered criminal for the purposes of human rights law if the civil penalty provision carries a penalty of imprisonment or a substantial pecuniary sanction.

Note: even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

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5 This is because the mandatory minimum sentence may be seen by courts as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. Judges may feel constrained to impose, for example, what is considered the usual proportion for a non-parole period (approximately 2/3 of the head sentence).

6 The UN Human Rights Committee, while not providing further guidance, has determined that 'civil; penalties may be 'criminal' for the purpose of human rights law, see, for example, *Osiyuk v Belarus* (1311/04); Sayadi and *Vinck v Belgium* (1472/06).

When a civil penalty provision is 'criminal'

In light of the criteria described at pages 3-4 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

The committee considers that in accordance with international human rights law, the classification of the penalty as 'civil' under domestic law will not be determinative. However, if the penalty is 'criminal' under domestic law it will also be 'criminal' under international law.

b) The nature of the penalty

The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is intended to be punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at people in a specific regulatory or disciplinary context (the latter being more likely to be viewed as 'disciplinary' or regulatory rather than as 'criminal').

c) The severity of the penalty

In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation with reference to the regulatory context;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed (for example, large penalties may be less likely to be criminal in the corporate context);
- the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision relative to the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment, or other very serious implications for the individual in question.

The consequences of a conclusion that a civil penalty is 'criminal'

If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalisation. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the articles 14 and 15 of the ICCPR.

By contrast, if a civil penalty is characterised as not being 'criminal', the specific criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR. The Senate Standing Committee for the Scrutiny of Bills may also comment on whether such provisions comply with accountability standards.

As set out in Guidance Note 1, sufficiently detailed statements of compatibility are essential for the effective consideration of the human rights compatibility of bills and legislative instruments. Where

a civil penalty provision could potentially be considered 'criminal' the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in articles 14 and 15 of the ICCPR, including providing justifications for any limitations of these rights.

It will not be necessary to provide such an assessment in the statement of compatibility on every occasion where proposed legislation includes civil penalty provisions or draws on existing civil penalty regimes. For example, it will generally not be necessary to provide such an assessment where the civil penalty provision is in a corporate or consumer protection context and the penalties are small.

Criminal process rights and civil penalty provisions

The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions include the right to be presumed innocent (article 14(2)) and the right not to be tried twice for the same offence (article 14 (7)). For example:

- article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to be presumed innocent until proven guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.
- article 14(7) of the ICCPR provides that no-one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.

Other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal', and should be addressed in the statement of compatibility where appropriate.

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