

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 10 and 13 September 2018 (consideration of 3 bills from this period has been deferred);¹
 - legislative instruments registered on the Federal Register of Legislation between 26 July and 22 August 2018;² and
 - bills and legislative instruments previously deferred.

Instruments not raising human rights concerns

1.2 The committee has examined the legislative instruments registered in the period identified above, as listed on the Federal Register of Legislation. Instruments raising human rights concerns are identified in this chapter.

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

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

2 The committee examines legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. See, <https://www.legislation.gov.au/>.

Response required

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

Australian Federal Police Regulations 2018 [F2018L01121]

Purpose	Prescribes a number of matters relating to the operation of the Australian Federal Police (AFP), including relating to disposal of property
Portfolio	Home Affairs
Authorising legislation	<i>Australian Federal Police Act 1979</i>
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 20 August 2018)
Rights	Freedom of expression (see Appendix 2)
Status	Seeking additional information

Immediate disposal of 'offensive' property

1.5 Section 76(1)(b) of the regulations provides that the AFP Commissioner (commissioner) may direct immediate disposal (except by sale or gift) of property that the commissioner is reasonably satisfied is property that is offensive in nature.

Compatibility of the measure with the right to freedom of expression

1.6 Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) requires the state not to arbitrarily interfere with freedom of expression, including restrictions on political debate.³ The right protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression, such as images and objects of art.⁴ This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the ICCPR.⁵

1.7 The explanatory memorandum explains that property that is 'offensive' in nature is not defined in the regulations but may include, for example, 'racist materials, pornography in various formats, or material that depicts violent or sexual

3 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [28].

4 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [12].

5 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11].

activity'.⁶ By allowing the commissioner to direct the immediate disposal of property that the commissioner is satisfied is 'offensive' in nature, the measure may engage and limit this right.

1.8 The statement of compatibility does not acknowledge that the right to freedom of expression may be engaged and limited by the regulations and so does not provide an assessment as to whether any limitation is justifiable under international human rights law.

1.9 The right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and be a proportionate means of achieving that objective.

1.10 Based on the information provided in the explanatory memorandum as to the type of information that may be considered 'offensive', the measure would appear to pursue the objective of protecting public morals which is likely to be legitimate for the purposes of international human rights law. To that extent the measure also appears to be rationally connected to that objective.

1.11 However, the statement of compatibility has not provided sufficient information to determine whether the measure is a proportionate limitation on the right to freedom of expression. For example, it is not clear the basis on which the commissioner may be 'reasonably satisfied' that property is offensive (for example, whether this is subject to guidelines or other, legislative, safeguards), and the safeguards in place to protect a person's freedom of expression. Further information from the minister would assist in determining whether any limitation on the right to freedom of expression is proportionate.

Committee comment

1.12 The preceding analysis indicates that the commissioner's power to direct immediate disposal of property that is 'offensive' may engage and limit the right to freedom of expression.

1.13 The committee therefore seeks the advice of the minister on the compatibility of the measure with this right. In particular, the committee seeks the advice of the minister as to whether the measure is a proportionate limitation (including information as to relevant safeguards to protect freedom of expression).

6 Explanatory Memorandum (EM), p. 46.

Social Security Legislation Amendment (Community Development Program) Bill 2018

Purpose	Seeks to extend the targeted compliance framework in the <i>Social Security Administration Act</i> to Community Development Programme regions
Portfolio	Indigenous Affairs
Introduced	Senate, 23 August 2018
Rights	Social security and an adequate standard of living; work; equality and non-discrimination (see Appendix 2)
Status	Seeking additional information

Background

1.14 The *Social Security Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act) amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to create a new compliance framework, the targeted compliance framework (TCF). The TCF applies to income support recipients subject to participation requirements,¹ except for declared program participants.² Participants in the Community Development Programme (CDP) are not currently subject to the TCF,³ as the CDP is a declared program.⁴ CDP participants are currently subject to compliance arrangements under Division 3A of Part 3 of the Social Security Administration Act.⁵

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- 1 Income support payments made to job seekers have 'participation' requirements or 'activity test' requirements, which require the job seeker to seek work or participate in some other labour force preparation activity as a condition of payment. Participation requirements include attending participation interviews, signing a participation plan with a compulsory work-focused activity, and undertaking the compulsory work-focused activity: see Department of Social Services, *Guide to Social Security* (2016) [1.1.P.75]. The CDP supports participants receiving a participation payment in meeting their activity test or participation requirements through Newstart Allowance, Youth Allowance (other), Parenting Payment (subject to participation requirements), Social Benefit (nominated visa holders) and the Disability Support Pension: see Explanatory Memorandum (EM) p. 3 [3].
 - 2 Social Security Administration Act, section 42AB. 'Declared program participants' are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Act: see Division 3A of Part 3 of that Act.
 - 3 Social Security Administration Act, section 42AB.
 - 4 *Social Security (Declared Program Participant) Determination 2018*, section 5.
 - 5 Social Security Administration Act, section 42B.

1.15 The CDP is the Australian Government's employment and community development service for remote Australia. The CDP seeks to support job seekers in remote Australia to build skills, address barriers and contribute to their communities through a range of activities. It is 'designed around the unique social and labour market conditions in remote Australia' with the objective of 'increasing employment and breaking the cycle of welfare dependency'.⁶ Under the current CDP, job seekers with activity requirements are expected to complete up to 25 hours per week of work-like activities that benefit their community.

1.16 The committee previously considered the TCF in its human rights assessment of the bill that became the Welfare Reform Act.⁷ Under the TCF, a job seeker can have their payments suspended for non-compliance with a mutual obligation, such as failing to attend a job interview or appointment (mutual obligation failure),⁸ or for refusing suitable employment (work refusal failure).⁹ Payments may be cancelled if a job seeker commits persistent mutual obligation failures without reasonable excuse, or commits a work refusal failure without a reasonable excuse, or voluntarily leaves a job or is terminated for misconduct (unemployment failure).¹⁰

Payment cancellation for work refusal failure without a reasonable excuse, and unemployment failure

1.17 The bill seeks to extend the TCF to CDP participants. Currently, a CDP participant is subject to a non-payment period of eight weeks for refusing or failing to accept suitable work without a reasonable excuse,¹¹ or for an unemployment failure resulting from a voluntary act or misconduct.¹² The secretary has discretion to waive this non-payment period if it would cause 'severe financial hardship'.¹³ As a result of the TCF applying to CDP participants, the non-payment period is reduced to four weeks (six weeks if the person has received a relocation assistance to take up a

6 Department of Prime Minister and Cabinet, *The Community Development Programme (CDP)* (2018) <https://www.pmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>

7 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) 46-77; *Report 11 of 2018* (17 October 2017) pp. 138-203.

8 Social Security Administration Act, sections 42AC, 42AF and 42AL.

9 Social Security Administration Act, sections 42AD, 42AG and 42AL.

10 Social Security Administration Act, sections 42AH and 42AO.

11 Social Security Administration Act, sections 42N and 42P(2).

12 Social Security Administration Act, section 42S.

13 Social Security Administration Act, section 42NC.

job).¹⁴ However, the measure would also remove the discretion for the secretary to waive the non-payment penalty on the basis of severe financial hardship.¹⁵

1.18 The bill also provides that a designated program participant (being a CDP participant) does not commit a work refusal failure if the person refuses or fails to accept an offer of subsidised employment,¹⁶ nor does a person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.¹⁷ As these exceptions only apply in relation to subsidised jobs, these safeguards do not apply to persons who refuse or fail to accept an offer for unsubsidised employment or who voluntarily leave or are dismissed from unsubsidised jobs.

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

1.19 Article 9 of the International Covenant on Economic and Social Rights (ICESCR) recognises the right of everyone to social security. 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, particularly the right to an adequate standard of living and the right to health.¹⁸ The right to an adequate standard of living, enshrined in article 11, requires Australia to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.¹⁹

14 Social Security Administration Act, section 42AP(5).

15 See section 27, which seeks to repeal Division 3A of Part 3 of the Social Security Administration Act 1999, which includes section 42NC that allows the Secretary to not impose a non-payment period if it would cause 'severe financial hardship'.

16 The bill seeks to insert a new section 42AEA to the Social Security Administration Act 1999 to define 'subsidised employment' to mean 'employment in respect of which a subsidy of a kind determined in an instrument [made by the secretary] is payable, or has been paid, by the Commonwealth': section 26.

17 See section 25 of the bill.

18 See UN Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security* (2008) [28].

19 ICESCR article 11(1).

1.20 The committee has considered measures similar to the TCF on a number of occasions.²⁰ The committee's previous analysis in relation to the Welfare Reform Bill (now Act) stated that while the TCF reduces the non-payment penalty from eight weeks to four weeks for a work refusal failure or dismissal due to misconduct, the eight week non-payment penalty was subject to a waiver in situations of severe financial hardship. By contrast no waiver from the four week non-payment penalty would be available under the TCF. Accordingly, the committee concluded that the financial penalty is likely to be incompatible with the right to social security insofar as there may be circumstances where a person is unable to meet basic necessities during the four week non-payment period. As such, the extension of the TCF to a new class of vulnerable persons raises similar concerns.

1.21 The statement of compatibility does not provide an assessment of whether these measures are compatible with the right to social security and an adequate standard of living.

1.22 Limitations on the right to social security and an adequate standard of living are permissible where the limitation is in pursuit of a legitimate objective, and is rationally connected and proportionate to that objective. The statement of compatibility does not specifically identify the objective of imposing penalties for refusing unsubsidised work, or for leaving or being dismissed for misconduct from unsubsidised work, but states generally that:

...the measures will... ensure compliance action applies to CDP participants who continue to be wilfully non-compliant... [t]his counters the risk of long-term unemployment and welfare dependency to the individual, communities and Australian society general.²¹

1.23 While reducing long-term unemployment and welfare dependency may be capable of constituting a legitimate objective, no evidence is provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to achieve this objective. It is especially unclear in circumstances where the statement of compatibility notes, 'participants [in remote areas] face higher barriers, fewer opportunities, higher level of dependence on welfare and lower levels of literacy and numeracy',²² and the statement of

20 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) [2.465]-[2.467]; *Report 8 of 2017* (15 August 2017) p. 71 [1.335], [1.346]. See also 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) pp. 66-70; *Thirty-Second Report of the 44th Parliament, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015* (1 December 2015) pp. 92-100; *Thirty-Third Report of the 44th Parliament, Social Security Legislation Amendment (Community Development Program) Bill 2015* (2 February 2016) pp. 7-12.

21 SOC, p. 19.

22 SOC, p. 22.

compatibility to the Welfare Reform Bill (now Act) explained that the rationale for not applying the TCF to CDP participants was to 'reflect the unique labour market conditions that job seekers face in remote Australia'.²³

1.24 In relation to whether the measure is rationally connected to its stated objective, it is unclear how limiting the availability of a waiver on the grounds of severe financial hardship would achieve the stated objective of the measures. The statement of compatibility does not specifically address how suspending and cancelling welfare payments without the ability of the secretary to grant a waiver for severe financial hardship is effective to reduce welfare dependency and long-term unemployment in remote Australia, noting in particular the earlier rationale for applying a different compliance framework in this context.

1.25 As to the proportionality of the measure, it is relevant 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. Removing the ability for the secretary to waive the non-payment period on the grounds of financial hardship in effect removes the ability to consider the merits of an individual case such as, for example, whether a person may be unable to afford basic necessities during the four week non-payment period.²⁴ This may be of particular concern in CDP regions noting the statement of compatibility states that participants in remote Australia face higher levels of dependency on welfare than in non-remote Australia.²⁵ As noted above, while the four week period is a reduction from the eight week non-payment penalty that can be imposed under the current compliance framework, four weeks is still a considerable period of time for a person dependent on welfare to be without welfare payments. It is unclear how a person will afford basic necessities

23 SOC, *Social Security Legislation Amendment (Welfare Reform) Bill 2017*, p. 162.

24 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) pp. 189 [2.467].

25 SOC pp. 21-23. Government statistics indicate the proportion of Indigenous people whose main source of income is welfare increases with remoteness: Australian Institute of Health and Welfare, 'Australia's Welfare – 7.5: Income and employment for Indigenous Australians' (2017) *Australian Government* <https://www.aihw.gov.au/getmedia/2f327206-c315-43a7-b666-4fe24f9c12f/aihw-australias-welfare-2017-chapter7-5.pdf.aspx>.

during this period.²⁶ In such a case, the committee has previously concluded that this type of measure would likely be incompatible with the right to social security.²⁷

1.26 Also relevant to proportionality is the extent of any interference with rights in practice. The above analysis proceeds on the assumption that subsidised jobs do not represent the only jobs available to CDP participants in remote Australia. However, if the only jobs available to CDP participants in remote areas are subsidised jobs, then this measure may be less likely, in practice, to interfere with the right to social security, given the exception from penalty for failures in relation to subsidised jobs. Further information from the minister as to whether the labour market in CDP regions will be comprised mostly or entirely by subsidised jobs would be useful for the purposes of this analysis.

Committee comment

1.27 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.28 The committee seeks the advice of the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living, in particular:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, such as retaining the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under section 42NC of the Social Security Administration Act; and the extent to which, in practice, subsidised jobs represent the only jobs which may be offered to CDP participants in particular areas of remote Australia).**

26 A recent inquiry on the CDP heard evidence that the impact of payment suspension and cancellation meant CDP participants were going without food and basic necessities: Senate Standing Committee on Finance and Public Administration References Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Programme (CDP)* (December 2017) [4.12], [4.47], [4.50], [4.51], [4.53].

27 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) p. 189 [2.467].

Penalties for persistent non-compliance with mutual obligations

1.29 The application of the TCF to CDP participants means that income support recipients, other than holders of subsidised jobs,²⁸ will be subject to escalating reductions in their income support payments for persistent non-compliance with mutual obligations.²⁹

1.30 The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* (persistent non-compliance determination) outlines the matters to be taken into account when determining if a person has committed persistent mutual obligation failures.³⁰ Relevantly, among the matters the secretary must take into account are the findings of the most recent comprehensive compliance assessment in respect of the person, and whether, during the assessment period (6 months) the person has committed three or more mutual obligation failures.³¹ The secretary must not take into account failures outside the person's control, but only failures that occurred intentionally, recklessly or negligently.³² The secretary also retains discretion to take into account other matters in determining whether a person failed to comply with his or her obligations.³³

1.31 For the first failure constituting persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.³⁴ For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.³⁵ For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a four week non-payment period, starting from the date

28 Holders of subsidised jobs will not be required to comply with mutual obligation requirements: section 21 of the bill.

29 See [1.2] above for an explanation of the types of requirements that constitute mutual obligations.

30 Section 42M(4) of the Social Security Administration Act provides that the minister must, by legislative instrument, determine matters that the secretary must take into account in deciding whether a person persistently failed to comply with his or her obligations in relation to a participation payment.

31 *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* section 5(1).

32 Social Security Administration Act, section 42M(1).

33 Social Security Administration Act, section 42M(2).

34 Social Security Administration Act, section 42AN(3)(a).

35 Social Security Administration Act, section 42AN(3)(b).

of cancellation, will apply if the job seeker reapplies for payment.³⁶ As noted above, there will be no waivers for non-payment periods.

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

1.32 As the measure operates to cancel income support payments, it engages the right to social security and an adequate standard of living. As noted above, while the objective of 'reducing long-term unemployment and welfare dependency' may be capable of constituting a legitimate objective, the statement of compatibility does not explain how reducing and ultimately cancelling welfare payments alone, without possibility of waiver for severe financial hardship, is effective in achieving this objective. Nor does it explain why the current compliance framework, which includes the possibility of waiver in circumstances of severe financial hardship, is ineffective.

1.33 In relation to the proportionality of the measure, it is relevant that the *Social Security (Administration Act) 1999* and the persistent non-compliance determination indicate that the secretary must not take into account failures that are outside the person's control, that only failures that occurred intentionally, recklessly or negligently are to be taken into account, and that the secretary has latitude to take into account other matters when determining whether mutual obligation failures are 'persistent'. This provides some degree of safeguard for participants who were unable to comply with requirements for reasons outside their control. However, there are still questions as to whether it is proportionate to impose a non-payment penalty for 'reckless' or 'negligent' behaviour in meeting mutual obligations (such as attending an appointment or a job interview) in circumstances where compliance with mutual obligations is made more difficult by the conditions of remote Australia, such as issues regarding transportation and communication, drug and alcohol dependency, and lower levels of literacy and numeracy.³⁷

1.34 In relation to the removal of the possibility of waiver of the four week non-payment penalty in cases of financial hardship this is, as noted above, likely to render the measure incompatible with the rights to social security and an adequate standard of living where it renders persons unable to afford basic necessities. Further information from the minister as to why it is not possible to retain the secretary's discretion to waive non-payment periods in cases of severe financial hardship and how it is expected persons will meet basic necessities during a non-payment period would assist with this analysis.

36 See Social Security Administration Act, section 42AP.

37 See EM, p. 22.

Committee comment

1.35 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.36 The committee seeks the advice of the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living, in particular:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available, such as retaining the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under section 42NC of the Social Security Administration Act).

Payment suspension for a mutual obligation failure

1.37 Applying the TCF to CDP participants means that CDP participants who are not engaged in subsidised employment are liable to payment suspension for a mutual obligation failure unless they have a reasonable excuse.³⁸ The suspension period may last up to four weeks but ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day.³⁹ If the job seeker fails to comply with the reconnection requirement within four weeks, their social security participation payment will be cancelled.⁴⁰

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

1.38 The suspension of social security payments for mutual obligation failures may limit the right to social security and the right to an adequate standard of living.⁴¹

38 Social Security (Administration) Act, sections 42AC and 42AL. Section 12 of the bill creates an exception from the requirement to comply with mutual obligations for subsidised employment holders.

39 Social Security (Administration) Act, section 42AL(3).

40 Social Security (Administration) Act, section 42AM(3)-(4).

41 See the committee's analysis of the TCF in relation to the Welfare Reform Act 2018 in Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2017) pp. 138-203.

As noted above, this right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and is a proportionate way of achieving that objective.

1.39 Assuming the objective of the measure is 'reducing welfare dependency and long-term unemployment' (identified above at [1.10]), the concerns discussed above as to whether this constitutes a legitimate objective and whether the measures are rationally connected to that objective, are equally relevant in relation to this measure.

1.40 As to proportionality, the existence of safeguards is relevant to the proportionality of the measure. A relevant safeguard in the TCF includes that suspension does not apply if the person has a 'reasonable excuse'. The committee has previously concluded that, apart from certain measures in the Welfare Reform Bill (now Act) which narrowed circumstances in which a person could rely on drug and alcohol dependency as a 'reasonable excuse',⁴² the range of circumstances which were identified by the minister as constituting a 'reasonable excuse' meant that the measure may be compatible with the right to social security.⁴³

1.41 However, at the time of the committee's previous conclusion, the TCF did not apply to participants in designated programs, such as the CDP.⁴⁴ Given the bill seeks to extend the TCF to CDP participants, the circumstances constituting 'reasonable excuse' require re-examination to determine if they function as adequate safeguards. Currently, the matters that the secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure are:

- (a) the person did not have access to safe, secure and adequate housing, or was using emergency accommodation or a refuge, at the time of the failure;
- (b) the literacy and language skills of the person;
- (c) an illness, injury, impairment or disability of the person;

42 In relation to this aspect of the measure, the committee considered that narrowing the circumstances in which a person may rely upon their drug and alcohol misuse or dependency as a reasonable excuse may raise concerns as to compatibility with the right to social security and an adequate standard of living, given the potentially serious financial repercussions of payment suspension. See also the committee's assessment of the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* in Parliamentary Joint Committee on Human Rights, *Report 8 of 2018* (21 August 2018) pp. 30-35. However, as noted earlier, this aspect of the measure did not apply to CDP participants: Explanatory Statement, *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018*, p. 2.

43 Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (17 October 2017) pp. 138-203, 186 [2.450].

44 Explanatory Memorandum, Social Services Legislation Amendment (Welfare Reform) Bill 2017, pp. 88, 92.

- (d) a cognitive, neurological, psychiatric or psychological impairment or mental illness of the person;
- (e) a drug or alcohol dependency of the person;
- (f) unforeseen family or caring responsibilities of the person;
- (g) the person was subjected to criminal violence (including domestic violence and sexual assault);
- (h) the person was adversely affected by the death of an immediate family member or close relative;
- (i) the person was undertaking paid work at the time of the failure;
- (j) the person was attending a job interview at the time of the failure.⁴⁵

1.42 It is acknowledged that several of these requirements would operate as important safeguards to protect the rights to social security and adequate standard of living. However, it is not clear whether or not the matters required to be taken into account by the secretary provide a sufficient safeguard in relation to the unique conditions of remote Australia, for example, challenges involved in covering long distances and limited transport options.⁴⁶ While the instrument does not limit the discretion of a decision-maker to take into account any factor that may provide a reasonable excuse, discretion in and of itself may not constitute a sufficient safeguard under international law, as it falls short of statutory protection. Further information from the minister as to whether and how the reasonable excuse provisions will take into account the unique conditions of remote Australia would therefore assist in determining the proportionality of the measure.

1.43 It is noted that the statement of compatibility states that 'some... mutual obligations requirements will be different to participants in non-remote areas as these obligations have been designed to take into account the unique nature of remote labour markets'.⁴⁷ No further detail is provided in the statement of compatibility, explanatory memorandum or second reading speech as to how mutual obligation requirements for CDP areas will differ from non-remote areas. In any case, these differences appear to concern the content of the mutual obligations requirements, rather than what constitutes a 'reasonable excuse' under the legislation. Mutual obligation requirements are made by way of administrative

45 *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018*, section 5.

46 See Senate Standing Committee on Finance and Public Administration References Committee, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)*, December 2017 [7.8]. The committee recommends that CDP participants have obligations that are no more onerous than those of other income support recipients, taking into account special circumstances such as remote locations and cultural obligations.

47 SOC, p. 19.

arrangement between the employment services provider and the job seeker, potentially subject to change at any time. It is not clear whether adapting mutual obligation requirements to the 'unique nature of remote labour markets' will function as a sufficient safeguard given it is not enshrined in legislation. Further information from the minister as to how mutual obligation requirements will differ in remote Australia would assist in determining whether the measure has adequate safeguards.

Committee comment

1.44 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the rights to social security and an adequate standard of living.

1.45 The Committee therefore seeks the advice of the minister as to:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of the stated objective (including how mutual obligation requirements will differ in remote Australia from non-remote Australia and whether appropriate safeguards exist in relation to what constitutes a reasonable excuse in the context of remote Australia).**

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

1.46 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Under article 26 of the ICCPR, if a state adopts social security legislation, it must do so in a non-discriminatory manner.⁴⁸

1.47 Under the ICCPR, a measure will amount to discrimination where it has either the purpose ('direct' discrimination) or effect ('indirect' discrimination) of treating individuals differently on the basis of a personal attribute (such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status).⁴⁹ 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

48 See *Sprenger v The Netherlands*, Communication No 395/1990, CCPR/C/44/D/395/1990 (1992) [7.2].

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

particular personal attribute or other status.⁵⁰ 'Place of residence' within a country has been held to qualify as a prohibited ground of discrimination under 'other status'.⁵¹

1.48 In relation to this measure, there is a concern that it will have a disproportionate impact on Aboriginal and Torres Strait Islander people and those living in remote Australia. It therefore raises concerns from the perspective of discrimination on the basis of race or place of residence. The statement of compatibility notes that 'more than 80 per cent of CDP participants identify as Aboriginal and Torres Strait Islander people.'⁵² Accordingly, by extending the TCF to CDP participants, the suspension and cancellation of welfare payments that may occur as a result is likely to have a disproportionate impact on Aboriginal and Torres Strait Islander people and job seekers living in remote Australia.

1.49 The statement of compatibility acknowledges that the right to equality and non-discrimination is potentially engaged by the bill, but its analysis is limited to justifying why exceptions from some the aspects of the TCF in relation to subsidised employment⁵³ constitute 'legitimate differential treatment'.⁵⁴ The statement of compatibility does not appear to consider the possible differential impact of ensuring 'all activity tested job seekers across Australia will be subject to the same compliance framework, no matter where they live'⁵⁵ on remote jobseekers and Aboriginal and Torres Strait Islander people in the CDP (other than those offered or employed in subsidised jobs).

1.50 Where a measure impacts on particular group disproportionately it establishes *prima facie* that there may be indirect discrimination. However, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective,

50 *Althammer v Austria*, Human Rights Committee, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

51 See *Lindgren et al v Sweden*, Communication Nos 298/1988 and 299/1988, CCPR/C/40/D/298/1988 (1991).

52 SOC, p. 21.

53 Namely, that a person does not commit a mutual obligation failure if the person is in subsidised employment (section 21); a person does not commit a work refusal failure for refusing an offer of subsidised employment (section 23); and a person does not commit an unemployment failure if a person voluntarily leaves a subsidised job or is dismissed from a subsidised job for misconduct. Otherwise, mutual obligation failures, work refusal failures and unemployment failures carry penalties from suspension to cancellation of income support payments.

54 SOC, p. 21.

55 SOC, p. 32.

is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.⁵⁶

1.51 As noted above, no evidence is provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to address the stated objective of the bill of reducing welfare dependence and long-term unemployment in remote Australia. This raises questions as to whether the differential treatment, being the disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia, is based on reasonable and objective criteria. Further information from the minister to justify the rationale for the differential effect on Aboriginal and Torres Strait Islander people and job seekers living in remote Australia will assist in determining whether the measure is compatible with the right to equality and non-discrimination.

Committee comment

1.52 The preceding analysis raises questions as to whether the measure is compatible with the right to equality and non-discrimination.

1.53 The committee seeks the advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

- **whether the disproportionate impact the measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia constitutes differential treatment for the purposes of international human rights law;**
- **whether the differential treatment is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the differential treatment is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the differential treatment is a proportionate means of achieving the stated objective.**

Inability to access subsidised jobs for six months

1.54 Section 25 of the bill provides that a CDP participant who voluntarily leaves subsidised employment or is dismissed for misconduct will not be subject to an unemployment failure for the purposes of the TCF. However, the explanatory memorandum states in relation to section 25 that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the job seeker will be

56 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; *Althammer v Austria*, Human Rights Committee, Communication No 998/01, CCPR/C/78/D/998/2001 (2003) [10.2].

prevented from taking up a place in subsidised employment for six months.⁵⁷ This is not reflected in section 25 or elsewhere in the text of the bill.

Compatibility of the measure with the right to work

1.55 The right to work is enshrined in article 6 of the ICESCR and includes the right of 'everyone to the opportunity to gain his [or her] living by work which he [or she] freely chooses or accepts'. It provides that, for full realisation of that right, steps should be taken by a state including 'technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and productive employment'.⁵⁸ An aspect of the right is not to be unfairly deprived of employment.⁵⁹ The right to work may be subject to permissible limitations which are provided by law and not arbitrary. In order for a limitation not to be arbitrary, it must be prescribed by law, pursue a legitimate objective, and be rationally connected to and proportionate to achieving that objective.

1.56 The statement of compatibility states that this right is engaged and promoted by the bill, as it provides that CDP participants may choose to decline an offer of subsidised employment, without penalty.⁶⁰

1.57 However, it is not clear which provision of the bill gives effect to the statement in the explanatory memorandum that if a participant voluntarily leaves a job or is dismissed due to misconduct, the job seeker will be prevented from taking up a place in subsidised employment for six months.

1.58 If the bill is proposed to have this effect, this could limit the right to work if the labour market in CDP regions is comprised mostly or entirely of subsidised jobs, as a CDP participant may be effectively excluded from the opportunity to gain their living through work for six months. Further information from the minister as to the proposed operation of the provision would assist in determining the extent to which this proposed effect of the measure limits the right to work.

Committee comment

1.59 The preceding analysis raises questions as to whether the proposed exclusion on participants that have left or been dismissed from subsidised employment from accessing further subsidised employment for six months constitutes a permissible limitation on the right to work.

1.60 The committee seeks the advice of the minister as to the compatibility of the measure with the right to work. In particular, the committee seeks the advice of the minister as to:

57 EM, pp. 5, 12.

58 International Covenant on Economic and Social Rights, article 6(2).

59 UN Economic and Social Council, *General Comment 18: The right to work* (2006) [6].

60 SOC, p. 20.

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- **whether the proposed exclusion on participants that have left or been dismissed from subsidised employment from accessing further subsidised employment for six months is prescribed by law;**
 - **an evidence-based explanation of the legitimate objective being pursued (including how it addresses a pressing or substantial concern);**
 - **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
 - **whether the limitation is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available and the existence of any safeguards).**

Bills not raising human rights concerns

1.61 Of the bills introduced into the Parliament between 10 and 13 September, 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):

- Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018;
- Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018;
- Shipping Registration Amendment Bill 2018;
- Social Services Legislation Amendment (Ending the Poverty Trap) Bill 2018;
and
- Treasury Laws Amendment (Supporting Australian Farmers) Bill 2018.