# 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**.

## Export Control Bill 2017

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| **Purpose** | Amends the framework for regulating the export of goods, including agricultural products and food, from Australian territory |
| **Portfolio** | Agriculture and Water Resources |
| **Introduced** | Senate, 7 December 2017 |
| **Rights** | Privacy; freedom of association; work (see **Appendix 2**) |
| **Previous report** | 3 of 2018 |
| **Status** | Concluded examination |

### Background

2.3 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Agriculture and Water Resources by 11 April 2018.[1]

2.4 The minister's response to the committee's inquiries was received on 30 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

### Requirement to be a 'fit and proper person'

2.5 The bill would impose conditions on the export of some types of goods, including requiring that: a person holds an export licence; an establishment or premises is registered for export operations; and the export is in accordance with an approved export arrangement. Under the bill, the secretary[2] may refuse or suspend a licence, registration or an arrangement if the applicant or a person who participates

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 12-15.

2 The 'secretary' is the Secretary of the Department of the minister who will administer the Export Control Act 2017 if the bill passes the parliament and receives Royal Assent: Explanatory memorandum (EM) p. 6.

or would participate in managing or controlling the export business is not a 'fit and proper person'.[3] Subsection 372(2) of the bill provides that in determining whether the person is a 'fit and proper person' the secretary must have regard to a range of matters including whether the person or an associate of that person:

- has been convicted of an offence or ordered to pay a pecuniary penalty under particular legislation;[4]
- has provided false, misleading or incomplete information in an application and/or to the secretary; or
- had an application, registration or licence revoked, suspended or refused.[5]

2.6 In determining whether the person is a 'fit and proper person' the secretary may also have regard to:

- whether the person has been convicted or ordered to pay a penalty under any other Australian law;
- the interests of the industry or business that relate to the person's export business; or
- any other relevant matter.[6]

2.7 Section 373 further provides that the rules may prescribe kinds of persons who are required to be 'fit and proper persons' for the purposes of the bill.

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3 See, for example, sections (a) sections 112, 117, 123, 127 and 138 (decisions in relation to registered establishments); (b) sections 151, 156, 165, 171 and 179 (decisions in relation to 8 approved arrangements); (c) sections 191, 196, 201, 205 and 212 (decisions in relation to export licences).

4 The legislation is the bill; the *Biosecurity Act 2015*; another Act prescribed by the rules; the *Criminal Code* or the *Crimes Act 1914* to the extend it relates to the *Biosecurity Act 2015* or another Act prescribed by the rules: see section 372(2) of the rules.

5 'Associate' is defined in section 13 of the bill as including (a) a person who is or was a consultant, adviser, partner, representative on retainer, employer or employee of: (i) the first person; or (ii) any corporation of which the first person is an officer or employee or in which the first person holds shares; (b) a spouse, de facto partner, child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of the first person; (c) a child, parent, grandparent, grandchild, sibling, aunt, uncle, niece, nephew or cousin of a spouse or de facto partner of the first person; (d) any other person not mentioned in paragraph (a), (b) or (c) who is or was: directly or indirectly concerned in; or in a position to control or influence the conduct of; a business or undertaking of: the first person; or a corporation of which the first person is an officer or employee, or in which the first person holds shares; (e) a corporation: of which the first person, or any of the other persons mentioned in paragraphs (a), (b), (c) and (d), is an officer or employee; or in which the first person, or any of those other persons, holds shares; (f) if the first person is a body corporate—another body corporate that is a related body corporate (within the meaning of the *Corporations Act 2001*) of the first person.

6 Subsection 373(3).

***Compatibility of the measure with the right to work, the right to freedom of association and the right to equality and non-discrimination***

2.8 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner.[7] The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.[8]

2.9 The initial human rights analysis stated that by providing that in order to engage in certain export related activities a person must be 'fit and proper', the measure may engage and limit the right to work, the right to equality and non-discrimination and the right to freedom of association. This is because a person may be unable to engage in export related business due to, for example, their conduct or the conduct of an associate. It was noted that the 'fit and proper person' test may encompass a broad range of conduct which also extends to the conduct of the person's associates. In this respect, the 'fit and proper person' test may also penalise a person for associating with certain individuals. The right to work, the right to equality and non-discrimination and the right to freedom of association may be subject to permissible limitations provided that such measures pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

2.10 In relation to the application of the 'fit and proper person' test, the statement of compatibility states that the measure pursues 'the legitimate objective of ensuring that persons who have been approved to export goods from Australian territory are persons who are trustworthy… [as] the government needs to be certain that the persons responsible for export operations will not abuse the trust placed in them'.[9] Given the particular regulatory context, the initial analysis stated that this is likely to be a legitimate objective for the purposes of international human rights law.

2.11 The measure would also appear to be rationally connected to this objective. The statement of compatibility explains that the reason why the measure extends to a person's business associates is that:

> Business associates and others may have influence over the primary person such that they may be able to compel them to undertake illegal activities on their behalf, through inducement or other means. Putting a fit and proper person test in place will notify the Department of any associates of the primary person who may pose a risk and allow them to

7 Pursuant to article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

8 Article 22 of the International Covenant on Civil and Political Rights.

9 Statement of compatibility (SOC), p. 451.

take action to ensure Australia's agricultural exports are not compromised.[10]

2.12 In relation to the measure's application, the statement of compatibility notes that the requirements will only extend to persons who are voluntarily seeking to benefit from the export of goods from Australian territory. This is a relevant factor in respect of whether the measure is a proportionate limitation on human rights.

2.13 Further in relation to the proportionality of the limitation, the statement of compatibility notes that section 372 provides an exhaustive list of factors to be taken into account by the secretary in determining whether the person is a 'fit and proper' person, that associates are limited to those defined in section 13 of the bill and that the secretary's decision is reviewable.[11] While these factors are relevant, it was noted that the secretary's discretion to determine that a person is not a fit and proper person is still potentially very broad and may allow the secretary to take account of, for example, types of criminal conviction that may be less serious and 'any other matter' which the secretary considers relevant. It was unclear from the information provided why each such category of factor needs to be taken into account to achieve the legitimate objective of the measure. Further, while 'associates' are restricted to those set out in section 13, this list is still substantial and includes family members, advisers, employees and business contacts. This raises a concern that the limitation may not be the least rights restrictive approach.

2.14 Finally, who is required to be a 'fit and proper person' will be able to be set out in delegated legislation. This raises a related concern as to whether the classes of person subject to the requirement are sufficiently circumscribed.

2.15 The committee therefore sought the advice of the minister as to whether:

- the limitation is a reasonable and proportionate measure for the achievement of its stated objective (including whether the measure is sufficiently circumscribed, the breadth of the secretary's discretion and the availability of relevant safeguards); and
- consideration could be given to: amending section 372 to restrict the range of factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person'; restricting the list of 'associates' in section 13; and setting out who is required to be a fit and proper person in primary legislation rather than in delegated legislation.

## Minister's response

2.16 The minister's response provides some further information in relation to the importance of the measure and the role of the fit and proper person test:

10 SOC, p. 451.

11 SOC, pp. 454-455.

> A fit and proper person test can be used to consider a person or company's history of compliance with Commonwealth legislation and then deny them approval to register an establishment, or to suspend, revoke or alter the conditions on an existing approved arrangement. This ensures that persons or companies seeking these approvals are suitable entities to be responsible for the appropriate management of relevant risks. For example, an approved arrangement may set out the ways in which an exporter will meet legislative and importing country requirements in relation to a kind of prescribed goods. It is important that such persons are considered fit and proper to be able to conduct these activities and that there is no reason to believe that the person will not operate within the scope of their approval or adhere to any conditions or requirements that are placed on it.

2.17 In relation to the proportionality of the limitation, the minister's response provides the following information:

> Clause 372 of the Bill will provide the Secretary with the ability to apply a fit and proper person test in circumstances provided for by the Bill or prescribed by the Rules. Persons will be required to notify the Secretary if they have been convicted of certain specified offences, or ordered to pay a pecuniary penalty in relation to certain specified contraventions (clause 374 of the Bill). When determining whether a person is a fit and proper person, the Secretary may consider the nature of the offences resulting in the conviction or pecuniary penalty, the interest of the industry, or industries, relating to the person's export business and any other relevant matter. Whilst these factors, along with a person's associates, will be taken into account by the Secretary when applying the fit and proper persons test, these matters do not, in and of themselves, automatically give rise to a negative finding. Rather, it will be up to the Secretary to consider whether a person is fit and proper as a result of these matters.
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> The consideration as to whether a person is a fit and proper person forms part of the decision in relation to an application under the Bill (e.g. to register an establishment), and is a reviewable decision under the Bill. This is reflective of administrative law principles.

2.18 The nature of the assessment and the availability of review are relevant to the proportionality of the measure. In relation to the breadth of the factors that the secretary may consider as adversely affecting whether a person is a 'fit and proper person', the minister's response states:

> Enabling the Secretary to take into account a broad range of matters is important when considering whether a person is a fit and proper person because such a person might be involved in the export of a wide range of goods, with varying degrees of risk. The matters provided for in the Bill seek to reflect the broad range of matters in the current framework that can be taken into account by the Secretary to ensure that he or she may have regard to any relevant matter. This ensures that the integrity of the regulatory framework is not compromised by limiting conduct that can be

> considered in this context. As the agricultural export sector is regularly changing and evolving, this is reasonable and proportionate and ensures that the current level of market access can be maintained and possibly even increased in future.

2.19 In relation to the breadth of the definition of 'associates', the minister's response explains that:

> The associates' test is designed to ensure that an applicant for a regulatory control under the Bill (e.g. a registered establishment) is a suitable person to be responsible for managing relevant risks, in light of the potential consequences of non-compliance. It is appropriate for associates to be included in the consideration so as to ensure that the conduct of all types of entities may be taken into account where the Secretary considers it appropriate to do so.

2.20 The minister's response explains why it is appropriate to define who constitutes a 'fit and proper person':

> It is appropriate for the rules to be able to provide who can be a fit and proper person. The Bill and the rules will allow the Australian Government to respond in an appropriate and timely manner to any changes to importing country requirements or to implement any necessary policy or regulatory reforms in the future. The rules will be able to prohibit the export of certain kinds of goods (called prescribed goods) unless they meet the conditions set out in the Rules. The requirements for prescribed goods must be appropriately tailored to ensure that only the necessary level of regulatory burden is imposed on exporters and this includes the imposition of the fit and proper person test which should only be imposed where it is required (e.g. as a result of an importing country requirement). The rules are a legislative instrument and therefore will be subject to Parliamentary scrutiny through the disallowance process, and sunsetting in accordance with the *Legislation Act 2003*.

2.21 On balance, in light of the information provided, the measure may be capable of constituting a proportionate limitation on human rights. It is noted, however, that much may depend on the content of the rules and how the measure is applied in practice. In this respect, from the point of view of effective parliamentary scrutiny, it is problematic that the detail of the delegated legislation is not publicly available when parliament is considering the bill. Specifically, the rules will need to ensure that the 'fit and proper person test' is applied in a manner compatible with human rights. Should the bill be passed, the committee will assess the rules for compatibility with human rights.

## Committee response

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

**2.23 Subject to the content of the rules, the committee considers that the measure may be compatible with human rights. If the bill is passed, the committee will consider the human rights implications of the rules once they are received. The committee also notes that it is preferable for details of proposed rules to be available for consideration in conjunction with the related bill prior to its passage.**

# Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018

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| **Purpose** | Amends the *Higher Education Support Act 2003* including to: provide a new minimum repayment income of $44,999 for the compulsory repayment of Higher Education Loan Program (HELP) debts; replace the current repayment thresholds and introduce additional repayment thresholds; index HELP repayment thresholds to the consumer price index instead of average weekly earnings; and introduce, from 1 January 2019, a combined lifetime limit on the amount a student can borrow under HELP of $150,000 for students studying medicine, dentistry and veterinary science courses, and $104,440 for other students |
| **Portfolio** | Education and Training |
| **Introduced** | House of representatives, 14 February 2018 |
| **Rights** | Education; equality and non-discrimination (see **Appendix 2**) |
| **Previous report** | 3 of 2018 |
| **Status** | Concluded examination |

## Background

2.24 The committee first reported on the Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018 (the bill) in its *Report 3 of 2018*, and requested a response from the Minister for Education and Training by 11 April 2018.[1]

2.25 The minister's response to the committee's inquiries was received on 16 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.26 The committee has commented on proposed reforms to the funding of higher education and reforms to the Higher Education Loan Program (HELP) on a number of occasions.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 30-40.

2 Parliamentary Joint Committee on Human Rights, *Twelfth Report of the 44th Parliament* (24 September 2014) pp. 8-13; *Eighteenth Report of the 44th Parliament* (10 February 2015) pp. 43-64; *Twenty-second Report of the 44th Parliament* (13 May 2015) pp. 163-174; *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

2.27 Most recently, the committee considered the Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017 (2017 bill) in its *Report 5 of 2017* and *Report 7 of 2017*.[3] The current 'Student Loan Sustainability' bill[4] (2018 bill) reintroduces a number of the measures contained in the 2017 bill.

## Lowering repayment threshold for HELP debts and changes to indexation

2.28 Schedule 1 of the 2018 bill lowers the current minimum repayment income for HELP loans to $44,999 per annum (currently, the repayment threshold is $55,874).[5] It also introduces additional repayment thresholds and rates (1 percent at $45,000 and increasing to 10 percent on salaries over $131,989 per annum).[6] The equivalent measure contained in the 2017 bill sought to lower the repayment threshold to $41,999 per annum.[7]

2.29 From 1 July 2019 repayment thresholds including the minimum repayment amount will be indexed using the Consumer Price Index (CPI) rather than Average Weekly Earnings (AWE).[8] This is a reintroduced measure which is contained in the 2017 bill.

### *Compatibility of the measures with the right to education*

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

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

2.31 Australia has obligations to progressively introduce free higher education by every appropriate means and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education.[9] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate

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3 Parliamentary Joint Committee on Human Rights, *Report 5 of 2017* (14 June 2017) pp. 22-30 and *Report 7 of 2017* (8 August 2017) pp. 41-60.

4 Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018.

5 Statement of compatibility (SOC) p. 4; Schedule 1, item 2.

6 Schedule 1, item 2.

7 See schedule 3 of the 2017 bill.

8 Explanatory Memorandum (EM) p. 1.

9 See, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

objective, are rationally connected to that objective and are a proportionate way to achieve that objective.[10]

2.32 The Australian system of higher education allows students to defer the costs of their education under a HELP loan until they start earning a salary above a certain threshold. The initial human rights analysis stated that the proposed lowering of the repayment threshold engages and may limit the right to education as it imposes payment obligations on those who earn lower incomes. This appears to be contrary to the requirement under article 13 of the ICESCR to ensure that higher education is equally accessible and progressively free. Similarly, a change to indexation also engages and may limit the right to education to the extent it increases the amount to be paid, relative to earnings. In this respect, the United Nations (UN) Committee on Economic, Social and Cultural Rights has raised serious concerns about access to education in the context of the operation of student loan schemes internationally.[11]

2.33 The committee previously corresponded with the minister about the compatibility of the measures in the 2017 bill which sought to lower the repayment threshold with the right to education. The repayment threshold in the 2018 bill is slightly higher than the amount in the 2017 bill, but the measures raise substantively identical issues in relation to the right to education. While the statement of compatibility to the 2018 bill identifies that these measures engage the right to education, it does not include the level of detail previously provided by the minister in his response to the 2017 bill.

2.34 In the context of this measure, the committee has previously concluded that lowering the repayment threshold may be compatible with the right to education. This was based on the information that was previously provided by the minister in response to the committee's request for information. However, in the absence of any detail from the minister in the statement of compatibility to the 2018 bill, further information was required in order for the committee to conclude its assessment of the reintroduced measure.

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10 See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (8 December 1999) [44]-[45].

11 For example, the UN Committee on Economic, Social and Cultural Rights raised concerns about access to education in relation to the operation of the student loans scheme in the United Kingdom which shares similar elements to the Australian HELP scheme: UN Committee on Economic, Social and Cultural Rights , Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/1/Add.79 (5 June 2002) [22]; UN Committee on Economic, Social and Cultural Rights, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (12 July 2009) [44]; UNESCR, Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6 (14 July 2016) [65]-[66].

2.35 Nevertheless, the statement of compatibility argues that the measures are compatible with the right to education as they do not increase the overall cost to students or prevent access to higher education:

> Access to higher education will be maintained through the continued availability of HELP loans. As individuals will commence repayment sooner, it may create the belief that costs are increasing for students, thereby reducing access to higher education. By lowering the repayment threshold, and altering the indexation of the threshold to grow in line with CPI, this measure makes the overall scheme more affordable for Government in the long-term, and does not result in an overall increase in costs for students.[12]

2.36 However, the initial analysis stated that this does not fully address whether the changes to indexation and the repayment threshold may act as a disincentive for access to education or, more generally, how such measures impact upon Australia's obligations of progressive realisation.

2.37 Additionally, there may be a category of low income earners who, due to earning below the repayment threshold, may never have had to repay the entire amount of their HELP-debt. If such low income earners now have to repay HELP-loans due to a change in thresholds, there are questions as to whether this could be an indirect reduction in freely accessible higher education for these classes of individuals.

2.38 Should the measure constitute a limitation on the right to education, it was unclear from the information provided whether this limitation is permissible as a matter of international human rights law. The statement of compatibility identifies the objective of the measure as 'ensuring the long term viability of the HELP scheme'.[13] However, it does not provide an evidence-based explanation of how this constitutes a legitimate objective for the purposes of international human rights law. In this respect, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, as set out above, a limitation must be rationally connected to, and a proportionate way to achieve, its stated objective in order to be permissible under international human rights law.

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

- whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees (including for their degree overall and as a proportion of their wages);

12 SOC, p. 5.

13 SOC, p. 4.

- whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education;
- whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education;
- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

## Minister's response

2.40 The minister's response argues that the proposed lowering of the repayment threshold to $45,000 and changes to indexation engage but do not limit the right to education.

2.41 In relation to whether the proposed changes to the repayment threshold and indexation could have an adverse impact on access to education, the minister's response states that there should be no effect on access to higher education and eligible students will remain able to defer their student contribution amounts or tuition fees via a HELP loan. The minister's response additionally provides the following information as to why the measures will not have an adverse impact:

> The new HELP repayment threshold arrangements do not restrict accessibility and affordability of higher education. The Higher Education Loan Program (HELP) will continue to ensure that eligible Australian students are able to fully defer the cost of their higher education through income-contingent loans. The HELP scheme has, and will continue to be, critical for ensuring high-quality university education is accessible to all Australians, enabling admission on the basis of merit as opposed to wealth.
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> International evidence suggests that the availability of a strong student loan scheme reduces or eliminates any effects of price increases on accessibility. A 2014 report prepared for the European Commission (the Usher report) explored the impacts of changes to cost-sharing arrangements on higher education students and institutions across nine countries. The Usher report found that there was no trend of declining enrolments after a fee increase, and that in cases where students were able to access financial support, in the form of loans or scholarships, the impact of a fee increase on university applications was negligible.
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> In addition, Professor Bruce Chapman from the Australian National University has argued that "the evidence is now overwhelming that

> changes to the level of the charge, or other aspects of HECS-HELP, such as the first threshold of repayment, have no discernible effects on student behaviour or choices."
>
> While the minimum HELP repayment threshold will be reduced, the one per cent repayment rate at this minimum threshold will ensure the scheme remains affordable for those who incur a HELP debt, and that there are no adverse impacts on access to higher education.

2.42 Accordingly, this information indicates that the measure is consistent with maintaining access to higher education. In relation to whether the proposed change in indexing from AWE to CPI means that students would pay more or less for their university degrees, the minister's response explains that the proposed change:

> …does not affect university fees or HELP debts incurred by students - it only affects the repayment thresholds themselves.
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> ...this change may lead to students paying slightly less in nominal terms for their degree over their lifetime compared with what they would pay under the current arrangements. This is due to the reduced indexation of debt. If the HELP repayment thresholds are indexed by CPI, some debtors are likely to make higher per year repayments. In such cases debts are being paid down more quickly, there is less debt to index at a given time and therefore total indexation is lower. The lower amount of indexation on debts would lead to the individual repaying a slightly lower amount of total debt over their lifetime, all else being equal.

2.43 This information indicates that this aspect of the measure does not amount to a backward step in the progressive realisation of the right to education. As to whether requiring some classes of low income earners to repay HELP-debts could constitute an indirect reduction in the amount of government funding of higher education, the response acknowledges that:

> …the new minimum threshold of $45,000 in 2018-19 will result in more debtors falling within a repayment scope, which means some people, who would not repay any of their debt under current arrangements, may pay part or all of their debt under the proposed arrangements.

2.44 However, in relation to whether this constitutes a backward step in the progressive introduction of free education, the minister's response explains that there are some relevant safeguards in place:

> …relevant to the rights-based integrity of the measure, under the *Higher Education Support Act 2003*, where a person's financial and family circumstances result in them either being exempt or receiving a reduction in their Medicare Levy, they are not required to make compulsory HELP repayments for that income year. For example, in 2016-17 a single person with one dependent child with an income below $49,871 was exempt from HELP repayments in that income year. The income level rises with each additional dependent.

2.45 The response further argues that overall government university funding has increased 15 per cent between 2010 and 2015. Accordingly, while the measure may adversely affect some groups of low income earners, the measure may not constitute a backward step in progressively realising free higher education given the information provided that the funding of higher education has increased and about the existence of some safeguards.

2.46 If the measure was to constitute a backward step or limitation on progressively free higher education, the minister's response also provides some information as to whether this would be permissible in the circumstances. The minister's response explains how the objective of 'ensuring the long term viability of the HELP scheme' addresses a substantial concern and how the measure is effective to achieve that objective:

> The existing HELP thresholds have been in place for a number of years and do not take into account the changes in access to HELP that have occurred in recent years. HELP lending has grown rapidly with the expansion of the demand driven system, and the amount of HECS-HELP loans accessed has increased from over $2.2 billion in 2009 to over $4.3 billion in 2016. In addition, the expansion of HELP to the Vocational Education and Training (VET) sector in 2008 led to increases in VET FEE-HELP loans from over $25 million in 2009 to over $1.4 billion in 2016.
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> HELP expenses, which consist mainly of debt not expected to be repaid and the deferral subsidy resulting from the concessional interest rate applied to the loans compared with costs of borrowing by the Commonwealth for on-lending, are estimated at $1.8 billion in 2017-18. The fair value of the HELP debts was estimated to be $35.9 billion as at 30 June 2017.
>
> In this context, there is a strong need for the Government to improve the sustainability of the HELP scheme. The changes to HELP repayment thresholds and indexation contained in the Bill will result in approximately 124,000 additional HELP debtors making repayments in 2018-19. The changes also involve higher repayment rates for those on higher incomes. As a result, the measure is expected to deliver savings of $345.7 million in fiscal balance terms and $245.2 million in underlying cash balance terms over the forward estimates (2017-18 to 2020-21). Therefore, the new HELP repayment threshold arrangements contribute strongly to the sustainability of the scheme, ensuring that future generations of students also benefit from access to both HELP and higher education more broadly.

2.47 While not specifically articulated in this way, the minister's response appears to indicate that unless spending is curbed then there is a risk that the HELP loan system may collapse or will have to be restricted in other ways. That is, there is a concern that, given a limited pool of government resources, mounting costs could affect the availability of the HELP loans and therefore access to education for future students. To the extent that this is the case, this would appear to constitute a

legitimate objective for the purposes of international human rights law. The measure appears to be rationally connected to that objective. As to whether the limitation is a reasonable and proportionate measure to achieve the stated objective, the response states:

> The new minimum repayment threshold is around 25 per cent above the full time minimum wage (currently around $36,100 for a full-time worker from 1 July 2017, according to Fair Work Australia). At a repayment rate of just one per cent, a person with a HELP debt will pay back less than $9 per week. Therefore, the Government considers that any limitations on the right to education constitute a reasonable, proportionate and properly tailored measure to achieve long-term improvements in sustainability of the HELP scheme.

2.48 In view of this information and the extent of any limitation on the right to education (set out above), the measure may be a proportionate limitation on this right. In this respect, whether other alternatives to the measure have been fully considered is also relevant. However, as set out above, the measure in context may not constitute a backward step in progressively realising free higher education and questions of proportionality do not therefore arise.

## Committee response

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

**2.50 The committee considers that the measure may be compatible with the right to education. However, it is noted that Australia has an ongoing obligation under international law to progressively introduce free higher education.**

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

2.51 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 2(2) of the ICESCR also prohibits discrimination specifically in relation to the human rights contained in the ICESCR such as the right to education. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[14]

14 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

2.52 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[15] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[16] 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 protected attribute.[17]

2.53 The initial analysis stated that reducing the minimum repayment income threshold for HELP debts to $44,999 may have a disproportionate impact on women and other vulnerable groups.[18] In relation to women, this is because, on average, women are more likely to earn less than men, and therefore more are likely to be affected by the reduction in the repayment threshold to cover those earning between $44,999 and $55,000.

2.54 The change in indexation may also have a disproportionate effect on women and other vulnerable groups. As women, on average, earn less over a lifetime of employment, are more likely to take time out of the workforce to care for children and are more likely to be engaged in part-time employment, they may take longer to

15 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November 1989) [1]. 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: See, for example, *Schmitz-de-Jon v Netherlands*, UN Human Rights Committee 855/99 (2001); *Gueye v France* UN Human Rights Committee 196/85 (1989); *Danning v Netherlands,* UN Human Rights Committee 180/84 (1990); *Lindgren et al v Sweden* UN Human Rights Committee 298-9/88 (1990); *Young v Australia*, UN Human Rights Committee 941/00 (2003); UN Human Rights Committee, Concluding observations on Ireland, A/55/40 (2000) [422]-[451]. See, also, UN Committee on Economic, Social and Cultural Rights, *General Comment 20, Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2 July 2009) [28]-[35].

16 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

17 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

18 See, for example, the UN Committee on Economic, Social and Cultural Rights, General Comment 20, Non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (2 July 2009) [28]-[35].

pay off their HELP debt than their male counterparts.[19] Where a person takes longer to repay a HELP debt, any changes in indexation under the HELP scheme relative to their earnings may have a more significant effect on them. This is because they may be subject to the indexation changes and repayment obligations for a longer period of time.

2.55 Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.[20] Differential treatment (including the differential effect of a measure that is neutral on its face)[21] 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.

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

> …the introduction of new HELP repayment thresholds, may be seen as limiting the right to non-discrimination due to disproportionate impacts on women and other low income groups.
>
> The Government currently carries a higher deferral subsidy from demographic groups that tend to have lower incomes. This includes women, individuals in part-time work, or individuals in low paid professions. As a result, some of these individuals, including women, may be making repayments for the first time as a result of the introduction of a lower minimum repayment threshold. Addressing this income inequality, however, is not the role of the higher education loans system.[22]

2.57 This statement is identical to the information provided in the statement of compatibility for the 2017 bill.[23] As with the 2017 bill, the statement of compatibility

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19 See, Australian Bureau of Statistics (ABS), Employee Earnings and Hours (May 2016) http://www.abs.gov.au/ausstats/abs@.nsf/0/27641437D6780D1FCA2568A9001393DF?Opendocument; ABS, Gender indicators, Australia (August 2016) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151; Workplace Gender Equality Agency, Gender pay gap statistics (March 2016) https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf (last accessed 24 May 2017); See, for example, Senate Standing Committee on Education and Employment, The Future of HECS (28 October 2014) p. 52.

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

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

22 SOC, p. 6.

23 See, SOC to the 2017 bill, p. 10.

to the 2018 bill does not provide a substantive assessment of whether the measure amounts to indirect discrimination nor does it address the concerns expressed by the committee in its consideration of the measures in the 2017 bill.

2.58 The initial analysis further noted that the argument in the statement of compatibility that a negative impact on women results from income inequality is not an adequate justification of the measure for the purposes of human rights law in circumstances where the measure has the potential to exacerbate inequality. Rather, as set out above, where there is evidence that a measure may have a disproportionate negative effect on women it shows *prima facie* that the measure itself may be discriminatory. In these circumstances, the measure may still be compatible with the right to equality and non-discrimination where the measure serves a legitimate objective, is effective to achieve that objective and is a proportionate means of achieving that objective. However, the statement of compatibility does not address whether this is the case with respect to these measures. Further, international human rights law recognises that it is fundamentally the role of government to address existing inequalities and ensure that these are not exacerbated through particular measures. In this respect, the UN Committee on Economic, Social and Cultural Rights, in its concluding observations on Australia in July 2017, recommended that Australia 'intensify its efforts to address the remaining obstacles to achieving substantive equality between men and women'.[24] As the minister's response to the 2017 bill did not fully address such issues, the committee previously advised that it was not possible to conclude that the measure was compatible with the right to equality and non-discrimination.[25]

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

- whether the measure pursues a legitimate objective for the purposes of international human rights law and whether there is reasoning or evidence that establishes that this objective addresses a pressing or substantial concern;
- how the measure 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 stated objective.

## Minister's response

2.60 The minister's response acknowledges the potential limitation that the measure imposes on the right to equality and non-discrimination. However, the

24 UN Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (11 July 2017) [22].

25 Parliamentary Joint Committee on Human Rights, *Report 7 of 2017* (8 August 2017) pp. 41-60.

response merely reiterates the minister's view that the disproportionate effect on women and other vulnerable groups is caused by 'broader and complex social and economic factors that influence participation in higher education, and subsequent labour market experience' and it is not 'within the scope of a student loan scheme to address or mitigate' such factors. As explained above at [2.58] this position misunderstands the scope of Australia's obligations under international human rights law which requires Australia to proactively address such inequalities. Further, where a measure may have a disproportionate negative effect on women or other vulnerable groups (including where it may exacerbate existing inequalities), this disproportionate negative effect needs to be justified as a matter of international human rights law.

2.61 In this respect, it is noted that much of the minister's response focuses on the level of participation by women in higher education and concludes that therefore the measure will necessarily have a disproportionate impact on them. However, as outlined in the initial analysis, the particular concern is that because women earn on average less than their male counterparts (including other university graduates), lowering the repayment threshold and the changes to indexation will have a disproportionate negative effect on them. In other words, the measure may exacerbate the existing disadvantage experienced by women (along with other vulnerable groups). This concern is not substantively addressed solely by reference to participation rates in higher education.

2.62 While the minister's response does not fully engage with the nature of Australia's obligations in relation to the right to equality and non-discrimination, it nevertheless provides some information as to whether the measure is compatible with the right. As set out above, the measures appear to pursue the legitimate objective of improving the sustainability of the HELP scheme and be rationally connected to that objective.

2.63 However, serious questions remain about whether the measures are proportionate with respect to their impact on women and other vulnerable groups. In this respect, the minister's engagement with questions of proportionality does not focus on the measure's disproportionate effect on women in terms of exacerbating the existing disadvantage they experience, due to the fact that they earn less on average than their male counterparts. The response instead focuses on the participation rates of women in higher education and argues that the measures represent 'a purely income-based change and do not target particular groups such as women'. Yet, the concept of indirect discrimination encompasses measures not intended to target particular groups, but which nevertheless have a disproportionate negative effect on these groups. The extent of impact on the particular group and whether the measure is the least rights restrictive approach are of relevance to whether the impact is proportionate. Yet, the minister's response does not fully address such issues. As a result, given the potential of the measures to exacerbate existing inequalities, it is not possible to conclude from the information provided in

the minister's response that the measures are compatible with the right to equality and non-discrimination.

## Committee response

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

**2.65 Consistent with the committee's previous conclusions and the preceding analysis, it is not possible to conclude that the measure is compatible with the right to equality and non-discrimination (indirect discrimination).**

## Restriction on how much students can borrow under HELP to cover tuition fees

2.66 Schedule 3 of the 2018 bill introduces a new combined limit on how much students can borrow under HELP to cover their tuition fees from 1 January 2019. Currently, the limit applies only to debts incurred through FEE-HELP,[26] VET FEE-HELP[27] and VET Student Loans.[28] Under the proposal, debts incurred by Commonwealth supported students under HECS-HELP[29] will also be included in the lending limit. This means that all eligible domestic students will be subject to a single combined lending limit for their tuition fees. The lifetime limit will be $150,000 for students studying medicine, dentistry and veterinary science courses and $104,440 for other students. Loan limits will be indexed according to CPI.[30] The loan limit will not be retrospective with respect to HECS-HELP.[31]

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26 FEE−HELP is a loan scheme that assists eligible fee paying students to pay all or part of their tuition fees. It is for domestic undergraduate and postgraduate students who do not have a Commonwealth supported place.

27 VET Student Loans commenced on 1 January 2017, replacing the VET FEE-HELP scheme, which ceased for new students on 31 December 2016.

28 The VET Student Loans program is an income contingent loan offered by the Australian Government that helps eligible students pay for some vocational education and training (VET) diploma level or above courses.

29 A commonwealth supported student place is part subsidised by the Australian government through the government paying part of the fees for the place directly to the university. Students are also required to contribute towards the study and pay the remainder of the fee called the 'student contribution amount' for each unit they are enrolled in at the higher education institution. HECS−HELP is a loan scheme for eligible students enrolled in Commonwealth supported places to pay their student contribution amounts.

30 Explanatory memorandum (EM), p. 22.

31 SOC, p. 6.

***Compatibility of the measure with the right to education***

2.67 As set out above, article 13 of the ICESCR protects the right to education including ensuring that higher education is equally accessible, on the basis of capacity and through the progressive introduction of free higher education.

2.68 The initial analysis stated that a combined lifetime loan limit on all HELP-lending may restrict access to tertiary or further education for individuals who have reached the loan limit and who are unable to afford to pay their tuition fees upfront. Accordingly, the measure appears to be a backward step, or limitation, on the level of attainment of the right to higher education.[32] As noted above, such limitations or retrogressive measures may be permissible under international human rights law provided that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has noted that:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[33]

2.69 The statement of compatibility acknowledges that the measure engages the right to education and argues that any limitation on the right is permissible. It identifies the objective of the measure as 'ensuring access to tertiary education for those who cannot afford to pay their tuition upfront'.[34] While ensuring access to tertiary education may be capable of constituting a legitimate objective for the purposes of international human rights law, limited information is provided in the statement of compatibility as to how this constitutes a pressing or substantial concern in the specific circumstances of the measure.

2.70 Further, it was unclear from the information provided how this measure is rationally connected to (that is, effective to achieve) this objective. This is because rather than ensuring access to higher education for those who cannot afford to pay fees upfront, the measure would appear instead to restrict access to higher education for those unable to pay if they have already reached the HELP limit.

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

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

34 SOC, p. 6.

2.71 In relation to the proportionality of the limitation, the statement of compatibility states that as the loan limit is:

> …firstly, sufficient to support almost nine years of full time study as a Commonwealth supported student and, secondly, can reasonably be repaid within a borrower's lifetime, this measure is consistent with fair and shared access to education.[35]

2.72 However, this may not fully take into account all potential impacts on access to education for students, particularly in the context of lifelong learning or retraining. Additionally, while the loan amount may be sufficient to support nine years of full time study as a Commonwealth supported student, this does not appear to fully acknowledge the context of current higher education funding arrangements. Currently, in many graduate and postgraduate programs there are few commonwealth supported student places.[36] If a commonwealth supported place is unavailable, this means that students will usually have to pay higher fees in respect of such graduate and postgraduate programs. While students may be able to borrow the cost of their tuition under FEE-HELP, they will reach the lifetime loan limit sooner due to the higher costs of tuition. However, the effect of the measure will be to count both the FEE-HELP debt and any HECS-HELP debt (that students have already incurred, for example, during their undergraduate degree) for the purposes of the lifetime limit. This means that it is possible an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student followed by a full-fee paying graduate degree may reach the lifetime loan limit. Accordingly, this raised a particular concern that the measure could have a significant impact on access to higher education for some students.[37] Further, no information was provided in the statement of compatibility about the consideration of alternatives, in the context of Australia's use of its maximum available resources. Based on the information provided, it was not clear that the measure was proportionate.

2.73 The committee therefore sought the advice of the minister as to:

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35 SOC, p. 6.

36 See, Study Assist, Commonwealth Supported places, http://studyassist.gov.au/sites/studyassist/helppayingmyfees/csps/pages/commonwealth-supported-places.

37 A student who completed a four year undergraduate Bachelor of Arts degree with honours as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $43,016. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the University of Melbourne the cost of this three year program would be approximately $124,385. These two programs of study would push the student over the proposed total lifetime HELP-loan limit: see, Melbourne University JD, Fees and Scholarships, http://law.unimelb.edu.au/study/jd#fees-and-scholarships; Macquarie University, Courses, Bachelor of Arts, https://courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-arts.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including in the context of lifelong learning or a future need for retraining);
- whether alternatives to the measure have been fully considered; and
- how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, on the basis of capacity, by every appropriate means, and by the progressive introduction of free education.

## Minister's response

2.74 The minister's response states that the objective of the measure is 'to improve the sustainability of the HELP scheme while retaining sufficient flexibility for students in furtherance of the core value of promoting the enjoyment of the right to education'. It provides some general information as to the costs of the loans.

2.75 While not articulated in this way, the minister's response appears to indicate that, given a limited pool of government resources, mounting costs could affect the availability of the HELP loans and therefore access to education for future students. To the extent that this is the case, as noted above, this would appear to constitute a legitimate objective for the purposes of international human rights law. It would also appear to be rationally connected to that objective.

2.76 The minister's response provides some information which goes to the proportionality of the limitation. The minister's response states that the loan limit will impact on a small number of students (as at 30 June 2017, only around 0.5 per cent of all HELP debtors had a debt greater than $100,000). Additionally, the government has moved amendments to the bill to provide that the HELP-loan limit will not operate as a lifetime limit where the student has made voluntary or compulsory repayments. Under the amendments a student will have a FEE-HELP balance, equal to the current FEE-HELP limit, and will become ineligible for further FEE-HELP where their balance is zero. This balance may be increased by the student making repayments of their HELP debts.[38] In relation to this amendment, the minister's response states that:

> …mak[ing] the lifetime limit a renewable loan limit enables interested students to pursue lifelong learning. It provides scope for individuals

38 Revised Explanatory Memorandum (EM) p. 25.

> whose HELP debt repayments for an income year have replenished their HELP loan balance to re-borrow those funds.
>
> This will enable them to pursue further study in order to retrain, change careers, or further specialise in their current profession - giving them lifelong access to education.

2.77 Accordingly, the amendment addresses a number of the concerns raised in the initial analysis about the proportionality of the measure in the context of lifelong learning. The renewable loan limit clearly provides much more scope for lifelong learning than was previously the case.

2.78 However, while noting the minister's advice that there are relatively few HECS-debtors who have reached the limit, there is still a concern about access to educational opportunities for some students under the revised measure. For example, an Australian student who completes, for example, an undergraduate bachelor degree as a commonwealth supported student and immediately commences a full-fee paying graduate degree without working full time may reach the loan limit.[39] If such a student is unable to afford to pay the fees upfront, they may need to defer their course of study until they have paid down their HECS-loan (which could take many years). There is accordingly a risk that the measure may restrict access to education for some individuals in circumstances where it is not proportionate to do so in the context of Australia's obligations under this right. In this respect, it is noted that the minister's response has not explained whether alternatives to the measure have been fully considered.

2.79 In relation to how the measure complies with Australia's obligation to use the maximum of its available resources to ensure higher education is accessible to all, and by the progressive introduction of free education, the minister's response states:

> The Government believes that [the measure] is fair and justifiable by reference to the totality of rights provided for in the ICESCR and in the context of the full use of the government's maximum available resources, that those who benefit from access to higher education contribute towards the cost of the scheme, but also recognises that those who repay their debts should be able to access the loan scheme in the future.

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39 For example, a student who completed a four year undergraduate degree with a bachelor of planning as a Commonwealth supported student at, for example, Macquarie University might graduate with a HECS-HELP debt of approximately $36,740. If the student decided to undertake a graduate law degree such as a Juris Doctor as a full-fee paying student at, for example, the Australian National University the cost of this three year program would be approximately $101,664. These two programs of study would push the student over the proposed total HELP-loan limit: see, Australian National University Juris Doctor https://programsandcourses.anu.edu.au/program/MJD; Macquarie University, Courses, Bachelor of Arts, http://www.courses.mq.edu.au/2018/domestic/undergraduate/bachelor-of-economics.

> Providing for a renewable loan limit substantially addresses the concern of numerous stakeholders that the loan limit changes could result in inequities in access to higher education.

2.80 This provides some useful context in relation to the minister's view of the measure in the context of Australia's maximum available resources including the role of student contributions. It is clear that this measure does not further Australia's obligation to progressively introduce free higher education.

## Committee response

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

**2.82 The amendment made to the measure addresses some concerns in relation to access to education. In the context of this amendment, the preceding analysis indicates that the measure may be compatible with the right to education in a range of circumstances. However, there is a risk in its operation that it could potentially restrict access to higher education for some individuals in circumstances where it may not be proportionate to do so. It is further noted that Australia has an ongoing obligation under international law to progressively introduce free higher education.**

# Legislation (Deferral of Sunsetting—Australian Crime Commission Regulations) Certificate 2017 [F2017L01709]

| | |
|---|---|
| **Purpose** | Defers the date of automatic repeal ('sunsetting') of the Australian Crime Commission Regulations 2002 by 12 months, from 1 April 2018 to 1 April 2019 |
| **Portfolio** | Attorney-General |
| **Authorising legislation** | *Legislation Act 2003* |
| **Last day to disallow** | Exempt from disallowance[1] |
| **Rights** | Privacy; liberty; effective remedy; fair trial and fair hearing; prohibition against torture, cruel, inhuman or degrading treatment or punishment (see **Appendix 2**) |
| **Previous report** | 3 of 2018 |
| **Status** | Concluded examination |

## Background

2.83 The committee first reported on this instrument in its *Report 3 of 2018*, and requested a response from the Attorney-General by 11 April 2018.[2]

2.84 A response from the Minister for Law Enforcement and Cyber Security was received on 27 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.85 The Australian Crime Commission Regulations 2002 (ACC regulations) were scheduled to sunset, that is, be automatically repealed, on 1 April 2018. This certificate defers the sunsetting date for 12 months, to 1 April 2019.[3]

1 Under section 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the certificate is not required to be accompanied by a statement of compatibility because it is exempt from disallowance. The committee nevertheless scrutinises exempt instruments because section 7 of the same Act requires it to examine all instruments for compatibility with human rights.

2 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 57-64.

3 Under section 50 of the *Legislation Act 2003* (Legislation Act), all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration. Instruments made before 1 January 2005 (when the sunsetting regime was introduced) sunset on a staggered basis, in accordance with the schedule in subsection 50(2). Section 51 of the Legislation Act provides that the Attorney-General may defer the sunsetting of a legislative instrument by up to 12 months, subject to certain conditions.

2.86 While the certificate of deferral does not amend the current ACC regulations, the certificate has the effect of continuing their operation for a further 12 months. Accordingly, the committee is obliged to provide an assessment as to the compatibility of the certificate with human rights. This includes an assessment of the potential impact of the extension of the operation of the ACC regulations.

2.87 While the Attorney-General is not required to provide a statement of compatibility for this instrument,[4] where a legislative instrument engages human rights, including by continuing the effect of measures that engage rights, it is good practice for an assessment to be provided as to human rights compatibility.

## Conferral of powers under state laws

2.88 Section 55A of the *Australian Crime Commission Act 2002* (ACC Act) provides Commonwealth legislative authority for the conferral by the states[5] of certain duties, functions or powers on the Australian Criminal Intelligence Commission (ACIC),[6] members of its board or staff, or a judge of the Federal Court or Federal Circuit Court. These may include duties, functions or powers of a kind specified in relevant regulations.

2.89 Section 8A and schedules 3, 4 and 5 of the ACC regulations prescribe provisions of state and territory laws for the purpose of section 55A. These include:

- under subsection 8A(1), duties, functions or powers provided in 19 provisions of state and territory Acts and regulations, specified in schedule 4, which may be conferred on the Commission; and
- under subsection 8A(2), duties, functions or powers provided in 305 provisions of state and territory Acts and regulations, specified in schedule 3, which may be conferred on the Commission's CEO, a member of its staff, the Chair or a member of its Board.

2.90 In each instance, the relevant duties, powers or functions may be conferred on the ACIC, members of its board or staff or federal judges for the purposes of, or in relation to, the investigation of a matter or the undertaking of an intelligence

4 See footnote 1 above.

5 'State' is defined in section 4 of the ACC Act to include the Australian Capital Territory and the Northern Territory.

6 In 2016 the Australian Crime Commission and CrimTrac were merged to form the Australian Criminal Intelligence Commission (ACIC). Pursuant to subsection 7(1A) of the ACC Act and section 3A of the Regulations, the ACIC is the body which now exercises the powers and functions of the ACC under the ACC Act and Regulations.

operation relating to a relevant criminal activity,[7] in so far as the relevant crime is, or includes, an offence or offences against a state law, whether or not that offence or those offences have a federal aspect.

***Compatibility of the measure with multiple human rights***

2.91 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. This includes informational privacy, the right to personal authority and physical and psychological integrity, and prohibitions on unlawful and arbitrary state surveillance or interference with a person's home or workplace.

2.92 The right to liberty of the person is a procedural guarantee not to be arbitrarily and unlawfully deprived of liberty.

2.93 The right to a fair trial and a fair hearing encompasses notions of the fair administration of justice and prohibits investigatory techniques that incite individuals to commit a criminal offence.[8]

2.94 Australia is also required to ensure that those whose human rights are violated have access to an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

2.95 The initial human rights analysis stated that it appears that some of the provisions set out in schedules 3 and 4 to the ACC regulations, allowing the conferral of powers under state laws on the Commission, its board or staff, engage the right to privacy, the right to liberty, the right to a fair trial and a fair hearing, or the right to an effective remedy, and may engage other human rights. These include provisions relating to criminal intelligence operations, use of assumed identities by law enforcement personnel, use of surveillance devices, witness protection, and spent convictions.

2.96 For example, schedule 3 allows the conferral of powers on the CEO or staff of the ACIC under a number of provisions of the New South Wales *Law Enforcement (Controlled Operations) Act 1997* (NSW Act). This includes the power under section 13 of the NSW Act to engage in 'controlled activities' when part of an

7 Under section 4 of the ACC Act, 'relevant criminal activity' is defined as 'any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory'. 'Relevant crime' means serious and organised crime, or indigenous violence or child abuse.

8 See, *Ramanauskas v Lithuania*, European Court of Human Rights (ECHR) Application No. 74420/01, 5 February 2008, [55]. The ECHR has consistently held that entrapment violates article 6 of the European Convention on Human Rights, which is equivalent to article 14 of the ICCPR.

authorised 'controlled operation',[9] which may be conferred on any member of staff of the ACIC. Controlled activities are activities which, but for section 16 of the NSW Act, would be unlawful. Section 16 provides that any activity engaged in by a participant in an authorised operation, and in accordance with the authority for the operation, is not unlawful and does not constitute an offence or corrupt conduct despite any other Act or law.

2.97 As such, where that power is conferred, it would allow any member of the ACIC's staff, given the authority, to commit an otherwise unlawful act. Schedule 3 also permits the conferral on the CEO of the ACIC of the power, under subsection 14(1) of the NSW Act, to grant (or refuse) retrospective authority for controlled activities.

2.98 The initial analysis noted that while there appear to be some safeguards in relation to the controlled operations,[10] by allowing a broad range of activities that would otherwise be unlawful, these provisions could have a significant impact on various rights, including (but not restricted to) the right to liberty, the right to a fair trial and a fair hearing, the right to privacy and the right not to be subject to torture, cruel, inhuman or degrading treatment or punishment. The provisions may also prevent a person from seeking an effective remedy where his or her rights have been violated, insofar as a participant in a controlled operation is granted protection from criminal liability.

2.99 Another example is the prescription of powers under South Australia's *Listening and Surveillance Devices Act 1972* (SA Act).[11] Schedule 3 of the ACC regulations enables the conferral of powers on a staff or board member of the ACIC under section 7 of the SA Act to use listening devices to overhear, record, monitor or listen to private conversations without the consent of the parties, and in certain circumstances to disclose the information derived from their use. Powers are also able to be conferred under section 9 of the SA Act including, in subsection 9(2), powers to break into, enter and search any premises; stop, detain and search a vehicle; and detain and search any person; where an officer suspects on reasonable

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9 Section 4 of the NSW Act defines a 'controlled operation' as an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct, arresting any person involved in criminal activity or corrupt conduct, frustrating criminal activity or corrupt conduct, or carrying out an activity reasonably necessary to facilitate one of the above purposes; and involving a controlled activity.

10 Section 7 of the NSW Act provides that controlled operations must not be authorised where they would involve inducing or encouraging a person to engage in criminal activity or corrupt conduct that they would not otherwise be expected to engage in; engaging in conduct likely to seriously endanger the health or safety of any person or result in serious loss or damage to property; or the commission of a sexual offence.

11 Schedule 3 also prescribes powers relating to surveillance devices under the *Surveillance Devices Act 1999* (Victoria), *Surveillance Devices Act 1998* (Western Australia) and *Surveillance Devices Act [2007]* (Northern Territory).

grounds that an unauthorised listening device is being held. Use of these powers would engage and limit the right to privacy of individuals subject to searches or surveillance, including respect for the privacy of a person's home, workplace and correspondence. The provision for the detention of persons also engages and limits the right to liberty.

2.100 It was noted that some of the powers prescribed in schedule 3 of the ACC regulations appear to be accompanied by certain duties which may act as safeguards on the use and scope of the power. However, there is no obligation in the ACC regulations requiring that where powers are conferred, the corresponding duties must be conferred along with them. It is unclear whether very broad powers could be conferred on the ACIC or its staff, without the safeguards contained in the original state or territory legislation.

2.101 In schedule 4, several powers are prescribed relating to the receipt or disclosure of information, which may include personal information. These include powers to receive information under subsection 11(1) of the First Home Owner Grants Regulation 2000 (WA), subsection 37(d) of the *Gambling and Racing Control Act 1999* (ACT), and subsection 97(d) of the *Taxation Administration Act 1999* (ACT); and the power to disclose information about spent convictions under subsection 17(3) of the *Spent Convictions Act 2000* (ACT). Once again, these powers engage and limit the right to informational privacy.

2.102 Limitations on human rights may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

2.103 However, no information is provided in the explanatory statement to the certificate about the human rights engaged by (the continued operation of) subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it is not possible to conclude that the instrument is compatible with human rights.

2.104 The committee therefore sought the advice of the Attorney-General as to:

- the human rights engaged by subsections 8A(1) and (2) and schedules 3 and 4 of the ACC regulations;
- where these measures engage and limit human rights:
    - whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
    - how the measures are effective to achieve (that is, rationally connected to) a legitimate objective; and

- whether the limitations are reasonable and proportionate to achieve that objective; and

- whether it would be feasible to amend the ACC regulations, when remade, to require that any state powers conferred on the ACIC or its personnel which limit human rights will only be exercisable where accompanied by the conferral of the corresponding duties and safeguards in the relevant state law.

## Minister's response

2.105 In relation to the committee's inquiries, the minister's response states:

> I note the Committee's comments on the Legislation (Deferral of Sunsetting — Australian Crime Commission Regulations) Certificate 2017.
>
> In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses whether the identified measures engage and limit human rights, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law. As part of the re-making process, I will consider any necessary amendments to ensure the ACC Regulations remain fit-for-purpose and contain appropriate safeguards to protect human rights.

2.106 The committee welcomes the minister's commitment to considering the human rights issues raised by the ACC regulations when re-making the regulations, and will consider the human rights implications of the re-made regulations when they are received.

## Committee response

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

**2.108 The committee welcomes the minister's commitment to ensure that the re-made ACC regulations will contain appropriate safeguards to protect human rights, and recommends the minister consider the preceding analysis when preparing the statement of compatibility for the new ACC regulations.**

**2.109 The committee will consider the human rights implications of the re-made ACC regulations when they are received.**

## Collection and use of 'national policing information'

2.110 Subsection 4(1) of the ACC Act defines 'national policing information' as information that is collected by the Australian Federal Police, a state police force, or a body prescribed by the regulations, and is of a kind prescribed by the regulations.

2.111 Section 2A of the ACC regulations prescribes eight bodies (listed in schedule 1A) that collect 'national policing information', and prescribes the kind of national

policing information collected as information held under, or relating to the administration of, 24 specified databases or electronic systems.

2.112 Section 9A of the ACC regulations prescribes six organisations to which national policing information may be disclosed by the CEO of the ACIC, without requiring the approval of the board, in addition to those specified in the ACC Act.[12]

***Compatibility of the measure with the right to privacy***

2.113 As set out above, the right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information about one's private life.

2.114 As national policing information is likely to include private, confidential and personal information, its collection, use and disclosure by the ACIC engages and limits the right to privacy.

2.115 The committee previously examined the human rights implications of this measure in relation to the right to privacy in its *Report 7 of 2016* and *Report 8 of 2016*.[13] The committee sought advice as to whether the limitation was a reasonable and proportionate measure for the achievement of its stated objective, and in particular, whether there were sufficient safeguards in place to protect the right to privacy, noting in particular that the ACIC is not subject to the *Privacy Act 1988* (Privacy Act).

2.116 In response, the then Minister for Justice agreed that the collection and disclosure of national policing information engages and limits the right to privacy, but stated that the limitation was reasonable and proportionate to achieving the objective of enabling the ACIC to fulfil its functions. The minister advised that the ACC Act provided sufficient safeguards to protect the right to privacy, and that the ACIC also had technical and administrative mechanisms in place to ensure that national policing information is collected, used and stored securely.

2.117 The minister noted that while the ACIC is not subject to the Privacy Act, the ACIC is experienced in the appropriate handling of sensitive information, and has safeguards and accessibility mechanisms specifically designed for the sensitive

12 Section 59AA of the ACC Act provides for the disclosure of information in the ACIC's possession by its CEO. Subsection 59AA(1B) provides that where that information is national policing information, the CEO must obtain the approval of the board before disclosing it, except to specified bodies, including bodies prescribed by the regulations.

13 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 30-32; *Report 8 of 2016* (9 November 2016) pp. 72-74. The Australian Crime Commission Amendment (National Policing Information) Regulation 2016 [F2016L00712], and the Australian Crime Commission Amendment (National Policing Information) Regulation 2016 which were examined in those reports introduced the provisions relating to national policing information into the ACC regulations.

nature of its operations. The minister advised that the ACIC was in the process of preparing an information handling protocol addressing the way it would treat personal information.

2.118 On this basis, the previous human rights analysis in the committee's report stated that the legislative and administrative safeguards outlined in the minister's response were likely to improve the proportionality of the limitation on the right to privacy resulting from the collection, use and disclosure of national policing information, and may ensure that the measure would only impose proportionate limitations on this right. Nonetheless, the committee considered it difficult to reach a conclusion that the measure was compatible with human rights without the detail of the information handling protocol being available. The committee requested that a copy of the information handling protocol be provided to the committee once it was finalised.

2.119 However, the committee has not to date received a copy of that document, and it does not appear to be publicly available. No information is provided in the explanatory statement to this certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure.

2.120 The committee therefore requested an update from the Attorney-General regarding the preparation of an information handling protocol by the ACIC, and reiterated its request that a copy of this document be provided to the committee.

## Minister's response

2.121 The minister's response reiterates that he will prepare a statement of compatibility for the re-made ACC regulations which identify how the measures engage and limit the right to privacy. In relation to the delay in providing the information handling protocol by the ACIC, the minister's response provides the following information:

> …the Attorney-General's Department, the Australian Crime Commission (ACC) and CrimTrac provided a joint submission to the Senate Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Australian Crime Commission Amendment (National Policing Information) Bill 2015 and the Australian Crime Commission (National Policing Information Charges) Bill 2015* in February 2016. On 10 March 2016, the [Legal and Constitutional Affairs] Committee published its final report which recommended that the Bills be passed and noted that:
>
> > *the department and relevant agencies intend to develop and publish an information handling protocol in consultation with the OAIC to address in more detail the information handling procedures and protections that would apply, and the assurance provided that the principles in this document would be consistent with the Australian Privacy Principles.*
>
> The Australian Criminal Intelligence Commission (ACIC) has advised that the development of an information handling protocol is well advanced and

> consultation will occur with the Office of the Australian Information Commissioner shortly.
>
> The finalisation of this protocol has been delayed due to the need to address the implications of two major changes in administrative arrangements affecting the ACIC. First, as a merged agency, the ACIC has faced significant legal issues in seeking to amalgamate and consolidate the functions and services formerly provided by the ACC and CrimTrac. These issues particularly concern the handling of information. Secondly, the establishment of the Home Affairs portfolio has raised additional legal and policy issues that need to be taken into account in developing the protocol.

## Committee response

**2.122 The committee thanks the minister for his response.**

**2.123 The committee notes the information from the minister as to the reason for the delay in finalising the information handling protocol.**

**2.124 The committee reiterates its request that, once finalised, a copy of the information handling protocol by ACIC be provided to the committee in order for the committee to conclude its analysis on the compatibility of the ACC regulations with the right to privacy.**

## Disclosure of 'ACC information'

2.125 Sections 9 and 10 and schedules 6 and 7 of the ACC regulations prescribe 5 international organisations, 98 Australian bodies corporate and 38 classes of body corporate to whom ACC information (defined by section 4 of the Act as information that is in the ACIC's possession) may be disclosed, in accordance with sections 59AA and 59AB of the Act.

### *Compatibility of the measure with the right to privacy*

2.126 As noted above, the right to privacy includes respect for informational privacy. As ACC information is likely to include private, confidential and personal information, its disclosure by the ACIC engages and limits the right to privacy.

2.127 Limitations on the right to privacy may be permissible where the measure pursues a legitimate objective, is effective to achieve (that is, rationally connected to) that objective, and is a proportionate means of achieving that objective.

2.128 However, no information is provided in the explanatory statement to the certificate of deferral about the engagement of the right to privacy by the (continued operation of) this measure. As stated above, while a statement of compatibility is not required for this instrument, where a legislative instrument engages human rights, including by continuing the effect of measures that appear to engage rights, it is good practice for an assessment to be provided as to their human rights compatibility. In the absence of further information, it was not possible to conclude that the limitations on the right to privacy are justifiable.

2.129 The committee therefore requested advice as to:

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

## Minister's response

2.130 In response to the committee's inquiries in this regard, the minister's response states:

> In re-making the Australian Crime Commission Regulations prior to the sunsetting date of 1 April 2019, I will develop a statement of human rights compatibility, which canvasses how the identified measures engage and limit the right to privacy, and whether these measures represent a reasonable and proportionate means of achieving a legitimate objective for the purposes of human rights law.

2.131 The committee welcomes the minister's commitment to considering the privacy issues raised by this aspect of the ACC regulations when re-making the regulations, and will consider the human rights implications of the re-made regulations when they are received.

## Committee response

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

**2.133 The committee welcomes the minister's commitment to ensure that the re-made ACC regulations will contain appropriate safeguards to protect human rights, and recommends the minister consider the preceding analysis when preparing the statement of compatibility for the new ACC regulations.**

**2.134 The committee will consider the human rights implications of the re-made ACC regulations when they are received.**

# My Health Records (National Application) Rules 2017 [F2017L01558]

| | |
|---|---|
| **Purpose** | Provides for the nationwide implementation of the My Health Record system on an opt-out basis |
| **Portfolio** | Health |
| **Authorising legislation** | *My Health Records Act 2012* |
| **Last day to disallow** | Tabled in the House of Representatives on 4 December 2017; tabled in the Senate on 5 December 2017. Last day to disallow: 26 March 2018 (Senate) |
| **Right** | Privacy (see **Appendix 2**) |
| **Previous report** | 1 of 2018 |
| **Status** | Concluded examination |

## Background

2.135 The committee first reported on this instrument in its *Report 1 of 2018*, and requested a response from the Minister for Health by 21 February 2018.[1]

2.136 The minister's response to the committee's inquiries was received on 26 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.137 The My Health Record system, previously referred to as the personally controlled electronic health record (PCEHR), is an electronic summary of an individual's health records. The system currently operates on an opt-in basis, meaning that persons register to obtain a My Health Record.

2.138 The *Health Legislation Amendment (eHealth) Act 2015* (the Act) enables trials to be undertaken in defined locations on an opt-out basis, with an individual's health records automatically uploaded onto the My Health Record system unless that individual takes steps to request that their information not be uploaded. The Act also allows the opt-out process to be applied nationwide following the trial. The committee previously assessed this legislation in its *Twenty-ninth Report of the 44th Parliament* and *Thirty-second report of the 44th Parliament*.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 45-49.

2 Parliamentary Joint Committee on Human Rights, *Twenty-ninth Report of the 44th Parliament* (13 October 2015) pp. 9-24 and *Thirty-second report of the 44th Parliament* (1 December 2015) pp. 64-86.

## Automatic inclusion of health information on the My Health Record system

2.139 The instrument provides for the implementation of the My Health Record system nationwide on an opt-out basis. Under the scheme, a My Health Record will automatically be created for all healthcare recipients,[3] unless they choose to opt-out.

2.140 Under the instrument, all people with an Individual Healthcare Identifier (IHI), which includes all people enrolled in Medicare or with a Department of Veterans' Affairs file number, will be provided the opportunity to opt-out during a three-month 'opt-out period' before their record is automatically created.[4] Healthcare recipients can also choose to cancel or suspend their registration at any time after their My Health Record is created.[5]

### *Compatibility of the measure with the right to privacy*

2.141 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. By enabling the uploading of the personal health records of all healthcare recipients onto the My Health Record system, the instrument engages and limits the right to privacy. In this respect, My Health Records may contain extensive health information such as records of 'medical consultations, blood tests and x-ray reports and prescriptions filled'.[6]

2.142 The statement of compatibility acknowledges that the instrument engages and limits the right to privacy but concludes that any limitation is necessary, reasonable and proportionate to achieving the objective of improving healthcare for

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3 Under the *My Health Records Act 2012*, 'healthcare recipient' is defined as 'an individual who has received, receives, or may receive, healthcare'.

4 The three-month period will begin on a date to be specified by the minister. See, explanatory statement (ES) pp. 4-5.

5 ES, p. 5.

6 According to the Department of Health Website, the information stored on My Health Record can include: 'Clinical documents about your health – added by healthcare providers including: Shared Health Summary; Hospital discharge summaries; Pathology and diagnostic imaging reports; Prescribed and dispensed medication; Specialist and referral documents; Medicare and PBS information stored by the Department of Human Services, Medicare and RPBS information stored by the Department of Veterans' Affairs; Organ Donor decisions; Immunisations that are included in the Australian Immunisation Register. This may include childhood immunisations and other immunisations given to you by a healthcare provider; Personal health notes written by you or an authorised representative including: Contact numbers and emergency contact details; Current medications; Allergy information and any previous adverse reactions; Indigenous status; Veteran or ADF status; living will or advance care planning documents". Department of Health, My Health Record, https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/find-out-more?OpenDocument&cat=Managing%20your%20My%20Health%20Record.

Australians. The statement of compatibility also states that the measure promotes the right to health by 'improving the sharing of health information between treating healthcare providers, leading to quicker and safer treatment decisions and reducing repetition of information for patients and duplication of tests'.[7] The initial human rights analysis stated that the broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international human rights law. It may also be accepted that the sharing of health information between health practitioners through the My Health Record system may help enable more efficient and informed treatment of patients, therefore contributing to improved healthcare. The measure would therefore appear to be rationally connected to the objective.

2.143 In order to be a proportionate limitation on the right to privacy, a limitation should only be as extensive as is strictly necessary to achieve its objective. In this respect, there were concerns as to whether the measure is the least rights restrictive way to achieve the stated objective for the purposes of international human rights law. In particular, the blanket application of the system nationwide on an opt-out basis may be overly broad. It was noted that opt-in arrangements, where an individual expressly consents to having their health information uploaded to the online register, appear to constitute a less rights restrictive alternative. The statement of compatibility explains that the current arrangements are not effective to encourage broader participation, 'creating a barrier to achieving the full benefits of the system for individuals'.[8]

2.144 While increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it was not clear whether a less rights restrictive approach to increasing the number of people using the system may be reasonably available. This may include, for example, measures promoting public awareness of and participation in the system in its current opt-in form or encouraging individuals with complex or serious health needs to opt-in. Further, the initial analysis stated that information as to why, and the extent to which, the current opt-in system has not succeeded and is not a reasonably available alternative on an ongoing basis would assist in assessing whether the limitation on the right to privacy is proportionate. It is also possible that some people may not have opted-in to the My Heath Record system on the basis of reasonable concerns about their privacy. Further, it was unclear that automatically uploading key aspects of the medical records of all health care recipients is necessary to improve health outcomes for each individual. For example, it was unclear whether individuals who do not have ongoing or complex health needs will benefit from the proposed system.

7 ES, statement of compatibility (SOC), p. 8.

8 ES, SOC, p. 8.

2.145 Another relevant consideration in determining the proportionality of the measure is whether there are adequate safeguards in place to ensure that the limitation on the right to privacy is no more extensive than is strictly necessary. The statement of compatibility sets out a range of measures aimed at safeguarding informational privacy, including that individuals can: restrict access to certain information, including Medicare information; effectively remove certain documents from the system; request their healthcare provider not upload certain information; monitor login activity in relation to their My Health Record; and cancel their registration at any time.[9] These points appear to provide individuals some measure of control over their electronic record. However, based on the information provided, it was unclear as to the process for individuals to opt-out or control what is accessible through the My Health Record.

2.146 The initial analysis stated that other aspects of the system may not be sufficiently circumscribed, including in relation to the retention of data. The explanatory memorandum for the Health Legislation Amendment (eHealth) Bill 2015 explains that, when an individual cancels their existing My Health Record, information compiled on the individual up to that point will be retained, but cannot be accessed by any entity.[10] This apparently open-ended practice of retention raises further questions as to whether the limitation on the right to privacy is the least rights restrictive alternative to meet its objective.

2.147 The statement of compatibility also explains that healthcare recipients will have a 'reasonable period of time' to opt-out of the system, which is a three month window beginning from a future date to be specified by the minister.[11] The explanatory statement explains that:

> [i]n order to opt-out, a person must give notice to the System Operator in a particular manner. In practice, a person will be able to give this notice in a number of ways and at a time or period specified by the Minister, depending on their circumstances.

2.148 However, no specific information is set out in the explanatory materials as to how a person opts-out in practice. Of particular concern is how the process would cater for people with communication difficulties or those without internet access.

2.149 A related question concerned how individuals will be made aware of the national opt-out arrangements and other relevant information about the My Health Record system. The importance of this aspect of the proposed rollout was noted in the final evaluation report of participation trials in the My Health Record system, commissioned by the Department of Health and conducted by Siggins Miller

9 ES, SOC, p. 10.

10 Health Legislation Amendment (eHealth) Bill 2015, explanatory memorandum, p. 95.

11 ES, SOC, p. 9.

Consultants in 2016, which emphasised 'the need for any future national change and adoption strategy to include a much bigger emphasis on awareness and education'.[12] The statement of compatibility states that:

> [c]omprehensive information and communication activities are being planned to ensure all affected individuals, including parents, guardians and carers, are aware of the opt-out arrangements, what they need to do to participate, how to adjust privacy controls associated with their My Health Record, or opt-out if they choose.[13]

2.150 However, no further information is provided as to what these communication initiatives will entail and how they will be effective to ensure all individuals are made aware of the My Health Record system including their ability to opt-out or control disclosure of information via the system. It was further noted that, as health recipients subject to the scheme will include a range of individuals with specific needs, including children[14] and persons with disabilities, any information and communication activities about the system would likely need to be appropriately tailored.

2.151 The committee therefore sought the advice of the minister as to whether the measure is reasonable and proportionate to achieve the stated objective and, in particular:

- whether the measure is the least rights restrictive way of achieving its stated objective (including why current opt-in arrangements could not be pursued on an ongoing basis, why it is necessary to automatically include the health record of all Australians and healthcare recipients on the My Health Record (rather than, for example, only those with complex or ongoing health conditions), and whether the retention of data after cancellation of a My Health Record account is adequately circumscribed); and
- whether there are sufficient processes and safeguards in place to ensure awareness and information in relation to the system, including the ability to opt-out or control information disclosure, will be adequately conveyed to the public, including in relation to children and persons with a disability.

## Minister's response

2.152 The minister's response restates the objectives and potential benefits of the My Health Record system. As noted above, the previous human rights analysis

12 Siggins Miller Consultants, *Evaluation of the Participation Trials for the My Health Record: Final Report* (November 2016) p. vii.

13 ES, SOC, pp. 9-10.

14 The explanatory statement states that individuals aged 14 years or older will be able to opt themselves out. Persons with parental or legal authority for another person may also opt out that other person. See ES, p. 5.

assessed that the broad objective of improving healthcare for all Australians is likely to be considered a legitimate objective for the purposes of international law.

2.153 In relation to the proportionality of the measure, the minister's response provides further information as to the breadth of health information that will be automatically uploaded to a My Health Record:

> In an opt-out setting, health information will not automatically be uploaded to a My Health Record. When a My Health Record is created, the only information that may be included is information held by Medicare, specifically two years' of Medicare and Pharmaceutical Benefits claiming information, Australian Organ Donation Register information and Australian Immunisation Register information. A consumer can choose not to include this information.
>
> Health care providers are likely to only include information in the consumer's My Health Record when the consumer has an interaction with the health system. As such, consumers who are healthy and rarely interact with the health system will have little, if any, health information in their My Health Record.

2.154 The minister's response appears to suggest that the extent of information that would be included is not extensive. However, information such as that held by Medicare and Pharmaceutical Benefits claims may reveal significant personal information about a person and, when included on the same centralised database, would appear to allow for linking and matching of that information to draw conclusions about a person's health. Notwithstanding the legitimate public health objective pursued by the measure, from the standpoint of the right to privacy the information that is to be included on the My Health Record appears to be extensive. For the reasons discussed further below, it is not clear that an individual's choice not to include this information would constitute a sufficient safeguard.

2.155 In relation to why it is considered necessary to implement an opt-out system, under which an electronic record will automatically be created for all healthcare recipients, in place of current opt-in arrangements, the minister's response provides the following information:

> In November 2013, the then Minister for Health commissioned a review of the system which confirmed some key issues that needed to be resolved so consumers and health care providers would be more likely to use the system. Among other things, the number of people with a My Health Record (then known as a personally controlled electronic health record) was too small to warrant health care providers learning how to use it or checking it for updated information. Feedback from health care providers was that they would be more inclined to use it if all of their patients had one, and feedback from the Consumers Health Forum was that the system would be more successful if it were opt-out. The review subsequently recommended the system transition to opt-out participation arrangements.

> In 2016, the Australian Government chose to undertake trials of My Health Record participation arrangements — an opt-out model was trialled in Northern Queensland and Nepean Blue Mountains, and innovative opt-in models were trialled in the Ballarat Hospital, Victoria, and several private general practices in Perth, Western Australia.
>
> The independent evaluation of these trials found 'overwhelming and almost unanimous support' by both consumers and health care providers for opt-out arrangements. For consumers, opt-out affords them the benefits of having a My Health Record without taking any action, while for health care providers, opt-out ensures the majority of their patients have a My Health Record without the administrative burden of explaining it and assisting patients to register. The opt-out trial sites recorded a significant increase in health information being uploaded and viewed by health care providers, well above that experienced in the rest of Australia, proving health care providers actively engaged with the system where the majority of their patients have a My Health Record. The trials evaluation recommended the opt-out model be implemented nationally.
>
> While the growth rate of My Health Records and their content has continued to increase, the proportion of consumers with a My Health Record still provides little incentive to health care providers to use the system.
>
> In 2017, the Government agreed to implement opt-out because it allows the My Health Record system to deliver health benefits to all Australians at least nine years sooner [than] opt-in options. In considering participation models, opt-in models offered limited benefits realisation, higher cost in some cases (as a result of consumer engagement), and the models did not effectively engage health care providers other than GPs or effectively leverage Government investment.

2.156 As stated above, while increasing the number of people using the My Health Record system may potentially assist to achieve the objective of improving health outcomes, it remains unclear whether a less rights restrictive approach to achieving this objective may be reasonably available. The minister's response indicates that opt-in arrangements would take a longer period of time to deliver benefits and would be more costly. However, while these potential challenges are acknowledged, it is noted that administrative difficulties, in and of themselves, are unlikely to be a sufficient reason not to pursue a measure that may be a less rights restrictive alternative.

2.157 Further, the response argues that it is necessary for a large volume of health records to be accessible through My Health Records in order for it to be effective. The minister's response also explains that opt-in arrangements have not effectively engaged healthcare providers who may be more inclined to use the system if all of their patients had an account. However, it is not clear whether other approaches specifically targeted at incentivising healthcare providers to use the system could be adopted or have been considered, rather than the blanket application of the system

nationwide on an opt-out basis. As acknowledged in the minister's response, the number of people registering for a My Health Record account is continuing to grow. According to statistics published on the Australian Digital Health Agency website, the number of individual registrations as at 1 April 2018 was over 5.6 million, with over 18,000 new records created each week.[15] This growth rate under current opt-in arrangements would appear to go some way to alleviating the apparent concern of healthcare providers that only a small number of individuals were using the system. Further, it is unclear why encouraging medical professionals to use the My Health Records for those patients who do have a record is not a reasonably available approach. In these circumstances, there would not appear to be any less benefit to these patients with a My Health Record than if more people had My Health Records. As such, educating medical professions about use of My Health Records would appear to be a less rights restrictive approach to achieving the legitimate objective of the measure.

2.158 In relation to whether there are sufficient processes and safeguards in place to ensure awareness of the opt-out system, the minister's response outlines that $27.75 million has been committed 'to ensure all Australians are aware of the My Health Record and their right to opt-out during the three month opt-out period, and $52.38 million to supporting education and training'. The response states that the opt-out trials of 2016 have informed the planning of a comprehensive communications strategy which will include partnerships with various organisations, the utilisation of a range of communication channels, face to face briefings around the country and the provision of information at the point of care and other community sites.

2.159 While these awareness-raising initiatives may potentially assist the scheme to operate in a proportionate manner, concerns remain that an approach that better safeguards the right to privacy, such as a similar communications strategy to support current opt-in arrangements, would be reasonably available. As stated above, opt-in arrangements under which health recipients expressly consent to creating a My Health Record would appear to constitute a less rights restrictive means of achieving the legitimate objective of the measure. It is further noted that while lack of awareness about the system may be a principal reason that more healthcare recipients have not signed on to the system, it is also possible that some people may not have opted in to the My Heath Record system on the basis of reasonable concerns about their privacy.

2.160 The minister's response also states that the communications strategy 'ensures hard-to-reach audiences have been considered, such as people with communication difficulties, and will receive enhanced support should they choose to

15 Australian Digital Health Agency, *My Health Record Statistics – at 1 April 2018,* https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/news-002.

opt-out'. However, no further detail is provided as to how communication activities will specifically cater for certain individuals with specific needs, such as children or persons with a disability. Concerns therefore remain as to whether awareness and information about the system will be adequately conveyed to members of the public with specific needs. This is of particular concern in the context of an opt-out system which will automatically generate electronic health records for all healthcare recipients that do not register their intention to opt-out within the three-month window.

2.161 The response refers to the various ways, as explained in the statement of compatibility, that individuals may 'exercise their rights to control how their information is collected, used and disclosed' through the My Health Record system. As set out at [2.145] above, measures available to individuals include: restricting access to certain information; effectively removing certain documents from the system; requesting their healthcare provider not upload certain information; monitoring login activity in relation to their My Health Record; and cancelling their registration at any time. As stated above, these measures appear to provide individuals with some degree of control over their electronic record. However, it is noted that the burden is placed on each individual to manage their electronic record and the effectiveness of these controls in safeguarding informational privacy may therefore be dependent on the adequacy of information and awareness initiatives in explaining these access controls to My Health Record users. For some individuals, such as those with low computer literacy or those without ready access to facilities (such as computers) that would enable them to manage their record, this may be a particularly substantial and potentially onerous burden.

2.162 In relation to the retention of data when a person cancels their My Health Record, the minister's response states:

> If a consumer decides to cancel their My Health Record, the System Operator (i.e. the Australian Digital Health Agency), is required by law to store certain information until 30 years after the consumer dies; however, the information is not generally available to any entity other than in specific circumstances, such as to lessen or prevent a serious threat to public safety. The requirement to retain information was implemented to:
>
> - ensure there is capacity to store a minimum critical set of health information about consumers, thus providing long-term efficacy for the purposes of health care delivery- this is critical since the system operates on the basis of distributed public and private repositories that are subject to differing jurisdictional laws;
> - provide that, if a consumer changes their mind and decides to get a My Health Record, the information that existed before they cancelled it will be available to them;
> - provide a source of information that, in a de-identified form, can be used to inform and improve health services;

- provide for medico-legal needs, such as if a clinical decision is made on the basis of My Health Record information and the decision is being legally challenged; and
- reflect Commonwealth record-keeping requirements.

2.163 The long-term retention of individuals' medical information in electronic form, particularly in instances where a person has cancelled their My Health Record, raises further concerns in relation to the right to privacy. It would appear to mean that a person who does not opt-out of the My Health Record system within the prescribed three-month period but then decides to cancel their registration would have their personal information retained on the system for the remainder of their life, notwithstanding they no longer consent to being part of that system. For example, it would appear that people who are currently children and are not opted-out during the three month period would have their medical records created and retained for the rest of their life even if they later choose to cancel. This long-term retention of personal information in circumstances where a person has sought to cancel their registration limits a person's ability to control how their personal information is used and disclosed, which raises serious concerns as to the adequacy of the safeguards in place to protect the right to privacy.

2.164 Ultimately the compatibility of this aspect of the measure with the right to privacy may depend on how data retention practices and safeguards in relation to protecting information work in practice, as well as whether individuals are provided with sufficient information about the management and retention of their medical information. Such information should include what data is stored on an ongoing basis, what entities may have access to such data, and under what circumstances and for what purpose such data may be accessed. Effective measures should also be in place to ensure that unauthorised persons or entities are not able to access the medical data of individuals.

## Committee response

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

**2.166 Notwithstanding the legitimate objective of the My Health Record scheme, the preceding analysis indicates that, based on the further information provided, the scheme in its opt-out form is likely to be incompatible with the right to privacy. This is because:**

- **the implementation of the scheme on an opt-out basis may not be a proportionate means of achieving the legitimate objective of the measure. Specifically, opt-in participation arrangements and education of health care professionals would appear to be a reasonably available less rights-restrictive alternative; and**
- **questions remain as to the adequacy of relevant safeguards, including in relation to ensuring awareness and information about the scheme, as well**

**as the long-term retention of data, including in cases where individuals cancel their My Health Record account.**

# Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

| | |
|---|---|
| **Purpose** | Amends the *Social Security Act 1991* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks for certain social security payments and concession cards; introduce a newly arrived resident's waiting period of 156 weeks for bereavement allowance, widow allowance, parenting payment and carer allowance; and make a technical amendment; amends the *Farm Household Support Act 2014* to increase the newly arrived resident's waiting period from 104 weeks to 156 weeks; amends the *A New Tax System (Family Assistance) Act 1999* and *Social Security Act 1991* to introduce a newly arrived resident's waiting period of 156 weeks for family tax benefit; and amends the *Paid Parental Leave Act 2010* to introduce a newly arrived resident's waiting period of 156 weeks for parental leave pay and dad and partner pay |
| **Portfolio** | Social Services |
| **Introduced** | House of representatives, 15 February 2018 |
| **Rights** | Social security; adequate standard of living; women's rights (see **Appendix 2**) |
| **Previous report** | 3 of 2018 |
| **Status** | Concluded examination |

## Background

2.167 The committee first reported on the bill in its *Report 3 of 2018*, and requested a response from the Minister for Social Services by 11 April 2018.[1]

2.168 The minister's response to the committee's inquiries was received on 19 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

2.169 The committee has considered the human rights implications of a waiting period for classes of newly arrived residents to access social security payments on a number of occasions.[2]

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 70-78.

2 Parliamentary Joint Committee on Human Rights, *Report 7 of 2016* (11 October 2016) pp. 2-11; *Report 8 of 2016* (9 November 2016) pp. 57-61; *Report 2 of 2017* (21 March 2017) pp. 41-43; *Report 4 of 2017* (9 May 2017) pp. 149-154.

## Newly arrived resident's waiting period for social security payments

2.170 The Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (the bill) would increase the waiting period for newly arrived residents to access a range of social security payments including bereavement allowance, widow allowance, parenting payment, carer allowance, farm household allowance, family tax benefit, parental leave pay and dad and partner pay from 104 weeks (2 years) to 156 weeks (3 years).[3] It will also extend the waiting period to access the low income Health Care Card (HCC) and Commonwealth Seniors Card from 104 weeks (2 years) to 156 weeks (3 years).

### *Compatibility of the measure with the right to social security, the right to an adequate standard of living and the right to health*

2.171 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.[4] 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 for *all* people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[5]

2.172 Australia has obligations to progressively realise these rights and also has a corresponding duty to refrain from taking retrogressive measures, or backwards steps.[6] Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.173 The initial human rights analysis stated that extending the waiting period to three years (from the current two years) further restricts access to social security (including health care cards) for newly arrived residents. Accordingly, the measure constitutes a retrogressive measure, a type of limitation, in the realisation of the right to social security, the right to an adequate standard of living and the right to health.

2.174 The statement of compatibility acknowledges that the measure engages the right to social security and states that:

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3 Explanatory memorandum (EM), p. 1.

4 See, International Covenant on Economic, Social and Cultural Rights (ICESCR) article 9; United Nations Committee on Economic, Social and Cultural Rights, General Comment 19: the right to social security, E/C.12/GC/19 (4 February 2008).

5 See, ICESCR, article 11.

6 See, ICESCR, article 2.

> Given the current fiscal environment…three years is a reasonable period to expect new permanent migrants to support themselves and their families when they first settle in Australia. This will reduce the burden placed on Australia's welfare payments system and improve its long-term sustainability.[7]

2.175 In general terms, budgetary constraints and financial sustainability have been recognised as a legitimate objective for the purpose of justifying reductions in government support that impact on the progressive realisation of economic, social and cultural rights. However, the United Nations Committee on Economic, Social and Cultural Rights has explained that any retrogressive measures:

> …require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant [ICESCR] and in the context of the full use of the maximum available resources.[8]

2.176 In this respect, the initial analysis noted that limited information has been provided in the statement of compatibility to support the characterisation of financial sustainability or budgetary constraints as a pressing or substantial concern in these specific circumstances. If this were a legitimate objective for the purposes of international human rights law, reducing government spending through this measure may be capable of being rationally connected to this stated objective.

2.177 In relation to the proportionality of the limitation, the statement of compatibility explains that there will be a range of exemptions from the waiting period. These include exemptions for humanitarian migrants, New Zealand citizens on a Special Category visa, and holders of certain temporary visas, including temporary protection visas and Safe Haven Enterprise Visas, to be able to immediately access family tax benefit payments, parental leave pay and dad and partner pay.[9] It is relevant to the proportionality of the limitation that certain classes of visa holders will be able to access a number of social security payments.

2.178 The statement of compatibility explains that there will also be a provision for migrants who become lone parents after becoming an Australian resident, to access social security payments:

> Migrants who become a lone parent after becoming an Australian resident will continue to be exempt from the waiting period for parenting payment, newstart allowance and youth allowance. Those who receive an exemption from the waiting period for one of these payments will also be exempt from the waiting period for FTB [family tax benefit]. Those who

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7 Statement of compatibility (SOC), p. 29.

8 UN Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of state party obligations, E/1991/23 (14 December 1990) [9].

9 SOC, p. 30.

> subsequently have a new child will also be able to transfer to PLP [parental leave pay] or DaPP [dad and partner pay] if they are otherwise qualified. This ensures that parents who lose the support – financial and otherwise – of a partner have access to support for themselves and their children.[10]

2.179 The statement of compatibility further explains that the availability of Special Benefit social security payments is an additional safeguard in relation to the measure:

> …migrants who experience a substantial change in circumstances after the start of their waiting period, and are in financial hardship, will continue to be exempt from the waiting period for special benefit. Special benefit is a payment of last resort that provides a safety net for people in hardship who are not otherwise eligible for other payments. Those who receive this exemption and have dependent children will also be exempt from the waiting period for FTB. Consistent with established policy (contained in the Guide to Social Security Law) this may include migrants:
>
> - who are the victim of domestic or family violence;
> - who experience a prolonged injury or illness and are unable to work, or whose partner or sponsor does;
> - whose dependent child develops a severe medical condition, disability or injury; or
> - whose sponsor or partner dies, becomes a missing person or is imprisoned leaving the migrant with no other means of support.
>
> These exemptions ensure that there continues to be a safety net available for potentially vulnerable individuals and families who are unable to support themselves despite their best plans.

2.180 As noted in the initial analysis, the Special Benefit appears to provide an important safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship. This is of considerable importance in relation to the proportionality of the limitation.

2.181 However, increasing the waiting period to access social security for newly arrived residents generally from two years to three years is still a considerable reduction in the availability of social security. In this respect, the initial analysis stated that it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

2.182 The committee therefore sought the advice of the minister as to:

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10 SOC, p. 30.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to social security payments; what level of support Special Benefit payments provide; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources, have been fully considered.

## Minister's response

2.183 The minister's response provides a range of information as to whether the measure constitutes a permissible limitation on the right to social security. In relation to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern, the minister's response states:

> It is important that Australia's welfare payments systems remains sustainable into the future and continues to provide the best possible encouragement for people to support themselves where they are able. This includes migrants settling permanently in this country.
>
> Returning the Budget to balance by living within our means remains a key element of the Government's economic plan. To achieve the Government's fiscal strategy, including a return to surplus in 2020-21, fiscally responsible decisions are required to keep spending under control.
>
> In 2016-17, Australia's expenditure on welfare payments to individuals (including social security payments, family assistance payments and paid parental leave payments) was $109.5 billion, representing around a quarter of the overall Commonwealth Budget.
>
> Given the substantial expenditure associated with the welfare payments system, maintaining the ongoing sustainability of the system is critical to the Government's fiscal strategy. The *Encouraging Self Sufficiency for Newly Arrived Migrants* measure announced in the 2017-18 Mid-Year Economic and Fiscal Outlook (MYEFO) contributes to achieving this fiscal outcome.
>
> The measure is estimated to improve the Budget bottom line by around $1.3 billion over the four years from 2017-18. There will continue to be savings beyond the forward estimates period, contributing to the ongoing sustainability of the welfare payments system.

2.184 While not put expressly in these terms, the minister appears to be arguing that unless the 'substantial expenditure' on social security is curbed then there is a

risk that the welfare system may collapse or will have to be restricted in other ways. That is, there is a concern that, given a limited pool of government resources, mounting costs could affect the availability of social security for those who require it. To the extent this is the case ensuring the sustainability of the welfare system in the context of budgetary constraints is likely to constitute a legitimate objective for the purposes of international human rights law. By improving the 'budget bottom line', the information provided also shows that the measure is likely to be rationally connected to that objective.

2.185 The minister's response provides a range of information as to the proportionality of the limitation.

2.186 In terms of the scope of the application of the measure, it explains that the waiting period will apply primarily to new migrants settling in Australia under the permanent skilled and family streams of the migration program. The response states that the eligibility criteria for grant of permanent visas through these streams reflects the Government's expectation that applicants will either support themselves or be supported by family members during their initial period in Australia. In this respect, the minister's response explains that the new waiting period will only apply to people granted a permanent visa after 1 July 2018 and states that '[t]his is designed to provide individuals and families seeking to migrate to Australia time to be aware of the new rules so that they can make an informed decision when applying for or accepting a permanent visa and make plans to support themselves during the waiting period'. The new waiting period will not apply to migrants granted permanent residency before 1 July 2018 or to those who have already served the existing waiting period. It is noted that the prospective application of the measure assists with the proportionality of the measure.

2.187 In relation to the extent of the reduction in access to social security payments, the minister's response indicates that of the non-humanitarian permanent migrants who come to Australia each year the majority did not require welfare support either during or after their waiting period. The response further states that:

> The impact of this measure will only be felt by those migrants who would have otherwise sought and received certain payments during this period. It is estimated that when the measure is fully implemented in 2020-21 around 50,000 families will be serving a waiting period for Family Tax Benefit Part A and around 30,000 will be serving a waiting period for other payments. These figures may encompass the same individuals as these payments are not mutually exclusive. The overall financial impact on affected individuals and families will depend on their circumstances and the payments they would otherwise have received.

2.188 In relation to the proportionality of the limitation, the minister's response reiterates that there is a range of exemptions to the waiting period. This includes exemptions for humanitarian migrants and their family members due to their particular vulnerabilities. More broadly, the minister's response also outlines that

there will still be a 'safety net' in place in relation to those who find themselves in need or whose circumstances change:

> People who become a lone parent after becoming an Australian resident are exempt from the [waiting period] for Parenting Payment, Newstart Allowance, Youth Allowance and Farm Household Allowance. This exemption ensures that parents, often mothers, who no longer have the support of a partner can still access financial support for themselves and their children.
>
> Migrants who experience a substantial change of circumstances and are in financial hardship will be exempt from the [waiting period] for Special Benefit which is delivered through the Department of Human Services. Special Benefit is a payment of last resort that provides support for people in financial hardship who are unable to obtain or earn a sufficient livelihood for themselves and any dependants and who are not eligible for any other income support payment.
>
> Special Benefit provides a basic level of support, usually equal to Newstart Allowance (or Youth Allowance if the person is aged under 22 years). Supplementary payments such as Rent Assistance, may also be paid in addition to these basic rates. Recipients of Special Benefit are also entitled to an automatic Health Care Card or Pensioner Concession Card, depending on their circumstances.
>
> The exemption from the [waiting period] for Special Benefit provides a safety net for those who find themselves in hardship with no other means of support for reasons beyond their control. Situations which constitute a substantial change of circumstances for the purposes of this exemption include:
>
> - experiencing domestic violence
> - losing a job organised prior to coming to Australia
> - suffering a prolonged injury or illness and being unable to work
> - having to care for a dependent child who develops a severe medical condition, disability or injury, or
> - being left with no other means of support after their sponsor or partner dies, becomes a missing person or is imprisoned.
>
> This exemption recognises that migrants who have made plans to support themselves when they arrive in Australia may experience a change of circumstances that prevents them from realising those plans.
>
> There are a number of new exemptions being introduced through this Bill in relation to the new payments that will be subject to a [waiting period] for the first time. This includes exemptions designed to ensure the new [waiting period] operates coherently with the existing exemptions outlined above:

- People with a Family Tax Benefit eligible child will be exempt from the [waiting period] for the Low-Income Health Care Card. These families would previously have qualified for a Health Care Card as part of their Family Tax Benefit. The exemption ensures that they can still receive a concession card where eligible and access associated health concessions, including discounted items under the Pharmaceutical Benefits Scheme.
- People who are receiving a social security pension or benefit or Farm Household Allowance (for example, because they are exempt from the [waiting period] for that payment) will also be exempt from the [waiting period] for family payments and Carer Allowance. This will ensure that exemptions operate consistently across welfare payments and those exempt can access both primary income support payments and supplementary assistance for dependent children and/or caring responsibilities where eligible.

Finally, New Zealand citizens on a Special Category Visa will be exempt from the [waiting period] for Family Tax Benefit, Parental Leave Pay and Dad and Partner Pay. This exemption only applies for certain payments as Special Category Visa holders are generally not eligible for other payments. This exemption ensures that New Zealand citizens in Australia will continue to access the same benefits in recognition of the particular Trans-Tasman arrangements between Australia and New Zealand. Special Category Visa holders who later move to a permanent visa will continue to be eligible for this exemption, ensuring they can continue to receive these payments while serving the [waiting period] for other payments.

The above exemptions ensure that this measure strikes a balance between promoting self-reliance for migrants and providing appropriate safeguards for those in vulnerable circumstances.

2.189 These exemptions, including the availability of the Special Benefit, are likely to act as important safeguards to ensure that those in situations of financial hardship or whose circumstances change can afford the basic necessities to maintain an adequate standard of living. These exemptions, in combination with the scope of the measure, support an assessment that it is likely to be a proportionate limitation on the right to social security and the right to an adequate standard of living. In this respect, the minister's response also argues that the measure is the least rights restrictive approach to achieve its objective to balance the budget and notes that permanent migrants will still have access to broader government funded services including health care and education.

## Committee response

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

**2.191 In light of the additional information provided and the availability of safeguards, the committee notes that the measure appears likely to be compatible with the right to social security.**

***Compatibility of the measure with the right to maternity leave***

2.192 The right to maternity leave is protected by article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[11] and includes an entitlement for parental leave with pay or comparable social security benefits for a reasonable period before and after childbirth.

2.193 The UN Committee on Economic, Social and Cultural Rights has further explained that the obligations of state parties to the ICESCR in relation to the right to maternity leave include the obligation to guarantee 'adequate maternity leave for women, paternity leave for men, and parental leave for both men and women'.[12] The initial analysis stated that by extending the waiting period for access to parental leave pay and dad and partner pay, the measure engages and limits this right.

2.194 In restricting the paid maternity leave support available to newly arrived migrants for a further year (bringing the total waiting period to three years), the measure is a retrogressive measure, a type of limitation, for the purposes of international human rights law.

2.195 As noted above, limitations on human rights may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.

2.196 The statement of compatibility acknowledges that the measure engages the right to paid maternity leave but appears to argue that this limitation is permissible. However, limited information or reasoning was provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. As noted above,

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11 The Australian government on ratification of CEDAW in 1983 made a statement and reservation that: 'The Government of Australia advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.' This statement and reservation has not been withdrawn. However, after the Commonwealth introduced the Paid Parental Leave scheme in 2011, the Australian Government committed to establishing a systematic process for the regular review of Australia's reservations to international human rights treaties: See, Attorney-General's Department, Right to Maternity Leave https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx.

12 UN Committee on Economic, Social and Cultural Rights, *General Comment 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005). See also, article 3 of ICESCR.

reducing government spending through this measure would appear to be rationally connected to this stated objective.

2.197 In relation to the proportionality of the limitation, the statement of compatibility states:

> While it is acknowledged that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, it is reasonable to expect that migrants who make the decision to have a child during their initial settlement period should also allow for the costs of supporting themselves and their children during the waiting period.
>
> The Australian welfare system is targeted so that those who most need help receive it. In order to sustain this, those who can support their children are expected to do so.[13]

2.198 However, this does not fully take into account that the timing of having children and a consequential need for paid maternity leave may not necessarily be something that is fully in the hands of potential parents. Noting that the measure applies to a range of visas, it also does not explain why newly arrived residents would necessarily be in a better position to adequately support the costs of having children than other individuals.

2.199 The statement of compatibility further explains in relation to the proportionality of the measure that there is a transitional period so that migrants who may have a baby born between 1 July 2018 and 1 January 2019 will still be able to access paid parental leave. While having a transitional period may be an important safeguard ensuring expectant parents who had planned care arrangements around the existing parental leave provisions would not be affected by the changes, it does not address broader concerns.

2.200 It was noted that increasing the waiting period to access paid parental leave from two years to three years is a considerable reduction in the availability of parental leave pay and dad and partner pay. It may have particularly significant consequences for those who have no access to other paid parental leave arrangements through their employer. In this respect, it would be useful for further information to be provided about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.

2.201 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;

13 SOC, p. 31.

- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.

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

2.202 The right to equality and non-discrimination is protected by articles 2 and 26 of the ICCPR. In addition to these general non-discrimination provisions, articles 1, 2, 3, 4 and 15 of the CEDAW further describe the content of these obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.[14]

2.203 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or on the basis of disability),[15] which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights.[16] 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 protected attribute.[17]

2.204 As women are the primary recipients of paid parental leave, increasing the waiting period for access may have a disproportionate negative effect on women who are newly arrived residents. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect

14 Article 1 of CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

15 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status: ICCPR articles 2 and 26; ICESCR article 2(2); UN Human Rights Committee, *General Comment 18*, *Non-discrimination* (10 November1989) [1]. 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.

16 UN Human Rights Committee, *General Comment 18*, Non-discrimination (1989) [7].

17 *Althammer v Austria* HRC 998/01, [10.2]. See above, for a list of 'personal attributes'.

discrimination.[18] Differential treatment (including the differential effect of a measure that is neutral on its face)[19] 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.

2.205 The statement of compatibility acknowledges that the right to equality and non-discrimination is engaged. It states that the measure pursues the objective of 'ensuring newly arrived migrants meet their own living costs…in order to keep the system sustainable into the future'.[20] As noted above, limited information or reasoning has been provided as to whether the objectives of ensuring financial sustainability or budgetary constraints address a pressing or substantial concern in these specific circumstances. Further, while the statement of compatibility points to the existence of particular exemptions which may operate as safeguards, no information is provided as to whether the measure is the least rights restrictive approach.

2.206 The committee therefore sought the advice of the minister as to:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern in the specific circumstances of the proposed legislation;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve its stated objective (including whether it is based on reasonable and objective criteria; the extent of the reduction in access to parental leave payments; the existence of relevant safeguards; and whether the measure is the least rights restrictive approach); and
- whether alternatives to reducing access to paid parental leave, in the context of Australia's use of its maximum available resources, have been fully considered.

## Minister's response in relation to the right to maternity leave and the right to equality and non-discrimination

2.207 The minister's response provides a range of information as to the compatibility of the measure with the right to paid maternity leave and the right to equality and non-discrimination. The minister's response explains that the *Paid*

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

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

20 SOC, p. 36.

*Parental Leave Act 2010* provides for the Paid Parental Leave scheme, which complements the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*. The minister's response states that under the *Fair Work Act 2009* parents to whom the waiting period applies will still have access to 12 months of unpaid parental leave without loss of employment or seniority within the workplace. However, while there will be continued access to unpaid parental leave, the effect of the measure is that those who are not entitled to employer funded benefits will not have access to paid parental leave during the waiting period.

2.208 As noted above, given that women are the primary recipients of paid parental leave, the measure will have a disproportionate negative effect on women who are newly arrived residents. In this respect, it is noted that the very purpose of the right to paid maternity leave is not targeted purely at meeting necessities but providing financial support to women (and men) following the birth of a child in order to prevent discrimination against women on the grounds of maternity.[21] Indeed, such purposes appear to be reflected in Australian domestic law as unlike other social security benefits, paid maternity leave is not subject to the same level of means testing in Australia.[22]

2.209 As set out above, the measure is likely to pursue the legitimate objective of ensuring the financial sustainability of the welfare system and be rationally connected to that objective. In relation to the proportionality of the measure, the minister's response states:

> The majority of newly arrived migrants in scope for this measure are expected to be able to provide for themselves and their family members during the [waiting period], as they are settling in Australia through the skilled and family streams of the migration program. These migrants are well placed to support themselves through work, existing resources or family support. Most are also expected to be able to make informed decisions about growing their families within the settlement period.

2.210 In relation to the groups of migrants to which the measure will apply, the minister's response explains that the government will ensure that these migrants have access to information about the scope of the measure 'to ensure they are aware of the changes and can make informed decisions about whether to apply for or accept a permanent visa'. The response also further explains that transitional arrangements are being provided so that those who may already be pregnant and have planned leave arrangements are not disadvantaged:

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21 See, *Elisabeth de Blok et al v the Netherlands*, Communication No 36/2012, UN Committee on the Elimination of All Forms of Discrimination Against Women (24 March 2014).

22 Paid parental leave is generally available under Australian law for those earning under $150,000.

> Under these arrangements, people granted a permanent or eligible temporary visa on or after 1 July 2018 will still be able to access Parental Leave Pay and Dad and Partner Pay if they have a newborn or adopt a child between 1 July 2018 and 31 December 2018 (inclusive) and they are otherwise qualified for the payment (including meeting the work test and income test).

2.211 Providing that the measures will not apply to currently expectant parents, who may have made plans on the basis of current arrangements, is relevant to the proportionality of the measure. The response further notes that the measure will not affect humanitarian migrants and their family members, acknowledging these people are often particularly vulnerable and may have less capacity to plan for their own support prior to coming to Australia.

2.212 The response also points to a specific exemption to the waiting period for Parental Leave Pay and Dad and Partner Pay 'for families with children who experience a change of circumstances and are unable to support themselves as originally planned, including those who become a lone parent after arrival and no longer have the support of their partner, and those in financial hardship'. The minister's response further explains, in relation to the impact of the measure on women that:

> …while the range of exemptions from the [waiting period] are not specifically targeted to women, some circumstances that attract an exemption for income support payments – for example, becoming a single parent or experiencing a change in circumstances such as domestic violence – are most likely to be experienced by women.
>
> These exemptions ensure that migrants in these circumstances, particularly migrant women, can still access financial support through payments, such as Parenting Payment or Special Benefit, where eligible. Those who [are] granted one of these payments under an exemption will also be exempt from the [waiting period] for the Paid Parental Leave Scheme, Family Tax Benefit and Carer Allowance. This ensures that migrants in these circumstances who have dependent children or caring responsibilities for a person with [a] disability can also access additional support where eligible. For example, a woman granted Special Benefit because she is in hardship due to a change in circumstances would also be able to receive Family Tax Benefit for any eligible children and would also be able to transfer to Parental Leave Pay if she has a new baby and meets all the requirements.
>
> The comprehensive range of exemptions and safeguards ensure migrants, particularly migrant women, retain access to payments, including Paid Parental Leave payments, where they find themselves in hardship. Given these exemptions, this measure is the least restrictive way of applying consistent rules and expectations for new migrants in order to improve the sustainability of the welfare payments system, both in the short and longer term.

2.213 The availability of such payments is relevant to the proportionality of the measure. In particular there appears to be a safety net in place in relation to basic necessities. As set out above, this addresses concerns regarding access to social security.

2.214 However, while the exemptions provide for access to paid parental leave in some circumstances, they do not fully address the concerns as to the right to paid maternity leave and the consequential impact on the right to equality and non-discrimination. In relation to the measure, the minister's response states:

> Targeting expenditure remains an essential part of balancing the distribution of available resources with the most effective measures for addressing barriers and creating opportunity. Residency waiting periods already play a fundamental role in targeting immediate access to social security payments. This measure will strengthen the existing waiting periods by applying consistent rules across welfare payments types, including social security and family payments, ensuring that migrants support themselves and their families for a reasonable period before becoming eligible for taxpayer-funded parental leave or other payments.

2.215 However, the application of these rules in the context of paid parental leave has a range of consequences that raise concerns from a human rights perspective. It means that a woman, subject to the waiting period, who earns a low income, will generally not have access to the paid parental leave scheme while a woman who earns considerably more (up to $150,000) would have access to the scheme. That is, to the extent that part of the justification for the measure is the targeting of limited resources, the measure does not appear to necessarily target those most in need. In this context, the extent of the disproportionate impact on women subject to the waiting period could be considerable, and the measure could exacerbate the disadvantage experienced by those who are already vulnerable. The purpose of the right to paid maternity leave is to prevent discrimination against women on the grounds of maternity. By restricting access to paid maternity leave the measure may ultimately exacerbate inequalities experienced by women subject to the waiting period. It is unclear that the measure represents the least rights restrictive approach. Accordingly, the measure does not appear to be a proportionate limit on the right to paid maternity leave and may also constitute unlawful discrimination against women.

## Committee response

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

**2.217 The preceding analysis indicates that the measure may be incompatible with the right to paid maternity leave and the right to equality and non-discrimination.**

# Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

| | |
|---|---|
| **Purpose** | Introduces offences prohibiting the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Also requires entities providing courier or cleaning services that have an ABN to report to the Australian Taxation Office information about transactions that involve engaging other entities to undertake those courier or cleaning services for them |
| **Portfolio** | Treasury |
| **Introduced** | House of Representatives, 7 February 2018 |
| **Rights** | Presumption of innocence, privacy (see **Appendix 2**) |
| **Previous report** | 3 of 2018 |
| **Status** | Concluded examination |

## Background

2.218 The committee first reported on the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 (the bill) in its *Report 3 of 2018*, and requested a response from the Treasurer by 11 April 2018.[1]

2.219 The Minister for Revenue and Financial Services responded to the committee's inquiries on 13 April 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

## Strict liability offences relating to the production, distribution and possession of sales suppression tools

2.220 Schedule 1 of the bill seeks to introduce offence provisions relating to the production or supply of electronic sales suppression tools[2] and the acquisition, possession or control of such tools where the person is required to keep or make

1 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 79-81.

2 'Electronic sales suppression tools' are defined in proposed section 8WAB of the bill to mean a device, software, program or other thing, a part of any such thing, or a combination of any such things or parts, that meets the following conditions: (a) it is capable of falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation of, a record that: (i) an entity is required by a taxation law to keep or make; and (ii) is, or would be, created by a system that is or includes an electronic point of sale system; (b) a reasonable person would conclude that one of its principal functions is to falsify, manipulate, hide, obfuscate, destroy, or prevent the creation of, such records.

records under an Australian taxation law.[3] A person will also commit an offence where they have incorrectly kept records using electronic sales suppression tools.[4] Each of these offences are offences of strict liability.[5]

***Compatibility of the measure with the right to the presumption of innocence***

2.221 The initial analysis explained that the proposed strict liability offences engage and limit the right to presumption of innocence[6] because they allow for the imposition of criminal liability without the need to prove fault. The statement of compatibility for the bill stated that the bill did not engage 'any of the applicable rights or freedoms',[7] but stated that 'applying strict liability to these offences covered by these amendments is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools'.[8]

2.222 The initial analysis drew the minister's attention to the committee's *Guidance Note 2* and restated the committee's usual expectation that the statement of compatibility provides an assessment of whether such limitations on the presumption of innocence are permissible such that they pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means to achieving that objective.

2.223 The committee therefore sought advice as to:

- whether the strict liability offences are aimed at achieving a legitimate objective for the purposes of human rights law;
- how this measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation on the right to be presumed innocent is proportionate to achieve the stated objective.

## Minister's response

2.224 As to whether the presumption of innocence is engaged or limited by the bill, the minister's response states:

> I believe that Schedule 1 to the Bill does not engage or limit the right to the presumption of innocence. A strict liability offence removes the

3 See sections 8WAC and 8WAD of the bill.

4 Section 8WAE of the bill.

5 See sections 8WAC(4), 8WAD(3), 8WAE(2) of the bill.

6 The right to the presumption of innocence requires that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law (see Appendix 2).

7 Statement of Compatibility (SOC), [1.109].

8 SOC, [1.104].

> requirement for a fault element to be proven before a person can be found guilty of an offence. However the prosecution must still prove all of the physical elements to the offence before a court will impose any criminal liability.

2.225 However, while it is the case that the physical elements must still be proved by the prosecution, strict liability offences do engage and limit the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault (*mens rea*).[9] Further, as noted in the initial analysis, strict liability offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits, taking into account the importance of the objective being sought, and maintain the defendant's right to a defence. In other words, they must meet the 'limitation criteria': they must pursue a legitimate objective and be rationally connected and proportionate to that objective.

2.226 While not acknowledging the limitation on the right to be presumed innocent imposed by the offences, the minister nevertheless provides information addressing these criteria. In relation to whether the measures are aimed at achieving a legitimate objective for the purposes of human rights law, the minister's response states:

> The object of Schedule 1 to the Bill is to deter the production, use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion.
>
> This is a legitimate objective for the purposes of human rights law because electronic sales suppression tools serve no legitimate function. They are specifically designed to understate income and assist in avoiding tax obligations. Such behaviour undermines the integrity of the tax system.

2.227 Ensuring the integrity of the tax system may be a legitimate objective for the purposes of international human rights law. In light of the information contained in the explanatory memorandum concerning the significant problem of the black economy and its impact on the integrity of the tax system,[10] it seems likely that addressing this problem will constitute a legitimate objective for the purposes of international human rights law.

2.228 As to how the measures are effective to achieve the stated objective, the minister's response explains that strict liability offences substantially improve the effectiveness of the prohibition on electronic sales suppression tools. In particular, the minister's response states that the strict liability offences would 'act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply' and explains that the

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9 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create strict liability offences.

10 See Explanatory Memorandum, pp.5-6.

'ability to prosecute people who facilitate the fraud earlier in the supply chain will significantly reduce the instances of fraud at the user level'. Based on the information provided, it is likely that the measure is rationally connected to the legitimate objective.

2.229 As to the proportionality of the measure, the minister explains that the strict liability offences are 'appropriate and proportionate' because an electronic sales suppression tool's principal function is to facilitate tax evasion and fraud, and there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences. The minister's response also notes that, in addition to the defence of honest and reasonable mistake, there are offence-specific defences which will operate as safeguards 'to ensure that entities who undertake certain conduct in relation to an electronic sales suppression tool are protected from committing an offence where their conduct is undertaken to prevent or deter tax evasion, or to enforce a taxation law'. Based on the information provided and the regulatory context, on balance, the strict liability offences are likely to be considered a proportionate limitation on the presumption of innocence.

## Committee response

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

**2.231 Based on the information provided and the above analysis, the committee considers the strict liability offences are likely to be compatible with the presumption of innocence.**

**Mr Ian Goodenough MP**

**Chair**