

Chapter 1

New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 13 and 16 August 2018 (consideration of 1 bill from this period has been deferred);¹
 - legislative instruments registered on the Federal Register of Legislation between 19 and 20 June 2018;² and
 - bills and legislative instruments previously deferred.
- 1.2 The committee has concluded its consideration of the Migration (IMMI 18/015: English Language Tests and Evidence Exemptions for Subclass 500 (Student Visa) Instrument 2018 [F2018L00713], which was previously deferred.

Instruments not raising human rights concerns

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

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

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

Response required

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

Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Purpose	Seeks to make a range of amendments to the <i>Defence Act 1903</i> including to permit states and territories to request that the Commonwealth call out the Australian Defence Force (ADF) in a wider range of circumstances; enable call out orders to authorise the ADF to operate in multiple jurisdictions, as well as the offshore area; allow the ADF to be pre-authorised to respond to land and maritime threats, in addition to aviation threats; increase the requirements for the ADF to consult with state and territory police where it is operating in their jurisdictions; expand the power of the ADF to search and seize, and to control movement during an incident
Portfolio	Attorney-General
Introduced	House of Representatives, 28 June 2018
Rights	Life; liberty; freedom of movement; privacy; expression; assembly; association (see Appendix 2)
Status	Seeking additional information

Call outs of the Australian Defence Force domestically

1.6 The bill proposes to amend Part IIIAA of the *Defence Act 1903* (Defence Act) to expand the circumstances¹ in which the ADF may be called out in response to 'domestic violence'² in Australia under two types of orders:

-
- 1 Currently, there are a number of preconditions to the Australian Defence Force (ADF) being called out in response to 'domestic violence' including that the 'State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence': Defence Act section 51A.
 - 2 Section 31 of the bill defines 'domestic violence' as having the same meaning as in section 119 of the Constitution. Section 119 of the Constitution provides that 'the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. 'Domestic violence' is not defined.

Call out orders

Commonwealth interests call out order

1.7 Under the bill, the Governor-General may make a Commonwealth interests call out order if the authorising ministers are satisfied that:

- 'domestic violence', that is likely to affect Commonwealth interests, is occurring or is likely to occur; and/or
- there is a threat in the Australian offshore area³ to Commonwealth interests; and
- the powers of the ADF set out in one or more of divisions 3, 4 and/or 5 of the bill should apply (see below); and
- the ADF should be called out to protect Commonwealth interests against the domestic violence or threat or both.⁴

State or territory call out order

1.8 Under the bill the Governor-General may also make a state or territory call out order if:

- a state or territory government applies to the Commonwealth government to protect the state or territory against 'domestic violence' that is occurring or is likely to occur in the state or territory;
- the powers of the ADF set out in one or more of divisions 3, 4 and/or 5 of the bill should apply (see below); and
- the authorising ministers are satisfied that the ADF should be called out to protect the state or territory against domestic violence.⁵

1.9 In determining whether the ADF should be called out and whether either type of order should be made, the authorising ministers must consider the nature of the domestic violence, whether using the ADF would be likely to enhance the ability of states and territories to protect Commonwealth interests or to protect the state or territory and any other matter considered relevant.⁶ Under both types of order the ADF can be called out immediately or under a contingent call out order including

3 Offshore area is defined in section 31 of the bill as Australian waters; or the exclusive economic zone adjacent to the coast of Australia; or the sea over the continental shelf of Australia; and includes the airspace over these areas.

4 Proposed section 33.

5 Proposed section 35.

6 Proposed subsections 33(2) 35(2).

for reasons of urgency.⁷ Under a contingent call out order the ADF will be called out automatically if specified circumstances arise.⁸

Powers of the ADF once called out

Divisions 3 and 4 - special powers and powers for specified areas

1.10 Divisions 3 and 4⁹ of the bill confer powers on members of the ADF if the ADF is being utilised under a call out order that specifies the divisions apply. This includes powers to:

- capture or recapture a location, prevent or put an end to violence;
- take measures including the use of force against an aircraft or vessel;
- control the movement of persons by means of transport;
- erect barriers, stop any person, direct any person not to enter or leave or move within a 'specified area';
- search persons, locations, premises, transport or things for items that may be seized;
- seize any item that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order;
- detain any person that the member believes on reasonable grounds may be detained;¹⁰
- direct a person to answer a question or produce a document that is readily accessible to the person (including requiring the person to provide identification);
- direct a person to operate machinery or a facility;
- actions incidental to such powers.¹¹

1.11 It is an offence for a person to fail to comply with a direction, with a penalty of 60 penalty units.¹²

7 Proposed sections 34 and 36.

8 Proposed sections 34 and 36.

9 Division 3 of the bill confers powers on the ADF when authorised by an authorising minister or in sudden emergencies. Division 4 of the bill confers powers on the ADF within a 'specified area.' Section 51 of the bill provides that the authorising ministers may, in writing, declare an area to be a specified area in relation to a call out order.

10 Proposed section 31 defines 'person who may be detained' as a person: '(a) who is likely to pose a threat to any person's life, health or safety, or to public health or public safety; or (b) both: (i) who has committed an offence, against a law of the Commonwealth, a State or a Territory, that is related to the domestic violence or threat specified in the call out order; and (ii) whom it is necessary, as a matter of urgency, to detain'.

11 Division 3 and division 4 of the bill.

Division 5 – powers to protect declared infrastructure

1.12 Division 5 of the bill confers powers on members of the ADF if the ADF is being utilised under a call out order that specifies the division applies and the powers are to protect 'declared infrastructure'.¹³ The member may take a number of actions to prevent, or put an end to, damage or disruption or exercise a range of powers including those outlined above at [1.10].¹⁴

Division 6 - Use of force

1.13 Division 6 provides that a member of the ADF being utilised under a call out order may use reasonable and necessary force, whether the member is exercising a power under Part IIIAA of the Defence Act or not.¹⁵

1.14 Subsection 51N(3) provides that in using force against a person, a member of the ADF must not do anything that is likely to cause death or grievous bodily harm unless:

- the member believes on reasonable grounds that the use of force is:
 - necessary to protect the life of, or to prevent serious injury to, a person (including the member) (subsection 51N(3)(a)(i)); or
 - necessary to protect the declared infrastructure (subsection 51N(3)(a)(ii)); or
 - in relation to powers exercised to take authorised action under subsection 46(5)(d) or (e) (taking measures against an aircraft or vessel including destroying it), reasonable and necessary to give effect to the order under which, or under the authority of which, the member is acting (51N(3)(a)(iii)); and
- if a person against whom force is to be used is attempting to escape being detained by fleeing—the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

Civil and criminal liability for ADF members

1.15 Proposed section 51Z provides a defence of superior orders for criminal acts done by ADF members operating under call out orders in certain circumstances.

12 Proposed section 51R of the bill.

13 The authorising ministers may, in writing, declare that particular infrastructure, or a part of particular infrastructure, is declared infrastructure: section 51H of the bill.

14 Division 5, subdivision C of the bill.

15 Proposed subsection 51N(2) provides that the ADF member must not use force against persons or things in exercising a power to direct a person to answer a question or produce a document.

Additionally proposed subsection 51S(2) provides that an ADF member will not be criminally and civilly liable for a purported exercise of powers if the order, declaration or authorisation was not validly made and, if the member made the authorisation, the powers were exercised or purportedly exercised in good faith.

Compatibility of the measures with multiple rights

1.16 The call out orders engage and may limit a number of human rights including:

- the right to life;
- the right to liberty;
- the right to freedom of movement;
- the right to privacy;
- the rights to freedom of expression, association and assembly;
- the right to an effective remedy.

1.17 Each of these rights is discussed further below.

Compatibility of the measure with the right to life

1.18 The right to life imposes an obligation on Australia to protect persons from being killed by identified risks and prohibits a person being arbitrarily killed by the state. The use of force by government authorities such as the police or military resulting in a person's death can only be justified if the use of force was necessary, reasonable and proportionate in the circumstances.

1.19 As the measures authorise the use of force including lethal force once the ADF is called out, the measures engage and may limit the right to life. The statement of compatibility acknowledges that the measures engage the right to life but argues that deprivation of life in accordance with proposed section 51N(3) is not 'arbitrary'.

1.20 A measure that limits the right to life may be justifiable if it is demonstrated that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In relation to the legitimate objective of the measure, the statement of compatibility states that the:

...measure is necessary to achieve the legitimate objective of the protection of the Australian populace from acts of significant violence, such as terrorism incidents. It ensures that members of the ADF have the necessary powers to assist state and territory police responding to incidents of domestic violence in a manner that minimises risk to members of the public. Given the nature of incidents of domestic violence, such as a terrorist incident or other mass casualty attack, it is necessary to empower

ADF members to use lethal force (or force that may cause grievous bodily harm) in appropriate circumstances.¹⁶

1.21 In general terms, protecting the Australian populace from acts of significant violence would be capable of constituting a legitimate objective for the purposes of international human rights law. However, in order to establish whether this is indeed a legitimate objective in relation to this measure, further information is required as to whether there are currently pressing and substantial concerns regarding the protection of the Australian populace from acts of significant violence, which give rise to the need for the specific measure. In particular, the statement of compatibility does not fully address why current powers and state policing are insufficient to achieve the stated objective. Further, it does not address why the threshold for the call out of the ADF needs to be lowered, or the need for the powers to be so broad, in particular in relation to the use of force, once the ADF is called out.

1.22 In relation to whether the measure is rationally connected to (that, is effective to achieve) its stated objective, the statement of compatibility argues:

Each of the circumstances in which ADF members may use lethal force is connected with the protection of others' lives. For proposed subparagraph 51N(3)(a)(i), this is explicit. For proposed subparagraph 51N(3)(a)(ii), this is implicit, as infrastructure may only be the subject of a declaration under proposed section 51H if damage to it or disruption of its operations would endanger life. For proposed subparagraph 51N(3)(a)(iii), this is implicit, as the taking of measures against an aircraft or vessel (that may involve the loss of life or grievous bodily harm) would only be reasonable and necessary if that aircraft or vessel posed a significant threat (eg. by causing mass casualties).¹⁷

1.23 While the use of lethal force may be rationally connected to achieving the protection of other's lives in some circumstances, it is less clear that the scope of the proposed power will address this objective in all circumstances. For example, in relation to the power to use lethal force to protect declared infrastructure, for infrastructure to be declared the threshold is that 'damage or destruction would directly or indirectly endanger the life of, or cause serious injury to any person'.¹⁸ However, there is potentially a broad range of infrastructure¹⁹ that may fall into this category from power generation facilities to traffic lights (which may cause serious injury through their non-operation). This means the risk to human life caused by any damage or disruption to declared infrastructure may be either immediate or remote. In circumstances where the risk is more remote, use of lethal force to protect

16 Statement of compatibility (SOC) p.8.

17 SOC, p. 8.

18 See, for example, proposed section 51H.

19 Section 51 of the Defence Act provides that '**infrastructure** includes physical facilities, supply chains, information technologies and communication networks or systems.'

declared infrastructure may not be effective to achieve the stated objective. Accordingly, there are questions as to whether the measure as drafted is rationally connected to its stated objective.

1.24 As to proportionality, measures authorising the use of force must be no more extensive than is strictly necessary to achieve their stated objective. The test of proportionality that applies in relation to the deprivation of life is a strict one and also requires the use of precautionary measures by government forces to reduce risk to life when planning operations.²⁰ The use of force (including lethal force) by the ADF against people domestically is a serious and exceptional measure. While the statement of compatibility addresses the specifics of the measure and relevant safeguards, it does not explain why existing powers are insufficient to address the stated objective. As noted above, it is unclear from the statement of compatibility why reducing the threshold for the call out of the ADF and consequentially conferring coercive powers on the ADF is necessary.

1.25 While the stated objective of the measure is the 'protection of the Australian populace from acts of significant violence, such as terrorism incidents,' the proposed call out powers are not limited in this way and may be broader in scope. Specifically, while the ADF may be called out in response to 'domestic violence' which is occurring or is likely to occur, 'domestic violence' is not specifically defined.²¹ The statement of compatibility states that 'domestic violence' refers to 'conduct that is marked by great physical force'.²² However, it appears that by not specifically defining 'domestic violence' in the legislation there is a risk that 'domestic violence' could apply to a broader range of disturbances not necessarily involving great physical force (including, potentially, forms of civil disturbances, such as political protest and civil disobedience). As such, the measure as framed would appear to be overly broad with respect to its stated objective. Ultimately, if the conferral of powers on the ADF through the call out powers is not the least rights restrictive approach then the measure may not be a proportionate limitation on human rights.

1.26 In relation to the specific use of lethal force provisions, it is acknowledged that these are accompanied by some safeguards including, as set out in the statement of compatibility, that the force must be 'necessary and reasonable in all the circumstances' for identified grounds. However, while some grounds may accord with standards relating to when it might be permissible to use lethal force (for example, where it is necessary to protect the life of others or self-defence), it is less clear that the grounds relating to protecting declared infrastructure or taking

20 *McCann v United Kingdom*, ECHR (1995) No. 18984/91 [147] – [149].

21 Section 31 of the bill defines 'domestic violence' as having the same meaning as in section 119 of the Constitution. Section 119 of the Constitution does not define this concept.

22 SOC, p. 6.

measures against an aircraft or vessel under an authorisation accord with these standards.

1.27 In relation to the use of force, including lethal force where necessary, to protect declared infrastructure, the statement of compatibility argues that this is proportionate as damage to the declared infrastructure or disruption to its operations would 'directly or indirectly endanger the lives of, or cause significant injury to, other persons'.²³ However, it is unclear to what extent the threshold for declaring infrastructure requires that there be a level of specific risk of direct or indirect injury or to life through damage or disruption of the declared infrastructure.²⁴ This is of concern as there is potentially a wide range of infrastructure, damage or disruption of which may directly or indirectly lead to risk to life or injury. Further, it is unclear whether there might be less rights restrictive ways of mitigating such risk such as, for example, bringing alternative infrastructure online. Accordingly, it is unclear from the statement of compatibility that, in every case, the degree of risk associated with damage or disruption to such infrastructure would necessarily be such as to warrant the potential use of lethal force.

1.28 In relation to the use of force when taking measures against an aircraft or vessel, the statement of compatibility explains that the ADF cannot use force likely to cause death, or grievous bodily harm, unless they believe on reasonable grounds it is necessary for the purposes of giving effect to an order under which they are acting.²⁵ However, the statement of compatibility acknowledges that deprivation of life under these powers may be considerable:

There will be some circumstances where the use of lethal force would require a decision to destroy an aircraft or vessel, which may be carrying large numbers of innocent people, in order to save the lives of other people. There may be other circumstances where only the person causing or threatening the domestic violence may be killed or injured.²⁶

1.29 The statement of compatibility points to some safeguards in relation to taking such lethal measures. For example, the authorising minister must not authorise taking measures against a craft or vessel unless the minister is satisfied that it is reasonable and necessary or that it would be reasonable and necessary in relation to a contingent call out order if the circumstances specified in the contingent order arose.²⁷ However, measures may also be taken where the ADF member believes on reasonable grounds that there is insufficient time to obtain the

23 SOC, p. 9.

24 See, proposed subsection 51H(2)(b).

25 SOC, p. 9.

26 SOC, p. 9.

27 SOC, p. 9; section 46(3).

authorisation from the minister because a sudden and extraordinary emergency exists.²⁸ In such circumstances, the ADF member is still required to consider whether using lethal force is reasonable and necessary to give effect to a superior's order. However, it is unclear to what extent there is a requirement for the ADF member to expressly consider whether a use of lethal force is absolutely necessary to protect the lives of others (as opposed to necessary to give effect to a superior's order.) This raises concerns that the measure may not be a proportionate limitation on the right to life.

1.30 The situation described in [1.28], where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, raises particular concerns regarding proportionality. Bearing in mind the fundamental nature of the right to life, and the fact that it may be difficult to assess the degree of risk to others which provides the justification for such action, it is not clear, in the absence of further information, that this is a proportionate limit on the right to life under international human rights law.²⁹

1.31 It is also noted that the powers would permit lethal force to be used when a person is attempting to escape or flee if the ADF believes on reasonable grounds that a person cannot be apprehended in any other way. The statement of compatibility explains that this is accompanied by relevant safeguards, including that one of the grounds for the use of lethal force has been met and if practicable the person has been called upon to surrender. However, given that some of the grounds for the use of lethal force appear to be overly broad, use of lethal force in circumstances where a person is fleeing or attempting to escape may also raise concerns.

Committee comment

1.32 The preceding analysis raises questions about the compatibility of the measure with the right to life.

1.33 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective);**

28 SOC, p. 9.

29 For example, the German Constitutional court considered that section 14 of the German *Air Safety Act* (Luftsicherheitsgesetz), which provided for direct action by the military against a hijacked civilian aircraft, was incompatible with the right to life in the German Constitution in a number of circumstances: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] (30 June 2005) 2 BvR 1772/02; BVerfG (15 February 2006) 1 BvR 357/05.

- **how the measure is effective to achieve (that is, rationally connected to that objective (in each of the circumstances where use of lethal force is permissible); and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and is the least rights restrictive approach; whether there are sufficient safeguards; whether what amounts to 'domestic violence' could be explicitly defined; in relation to the situation described in [1.28], where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, whether the measure is proportionate).**

Compatibility of the measure with the right to liberty

1.34 The right to liberty includes the right not to be subject to arbitrary detention which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances. As the measures allow for the detention of individuals in a number of circumstances, they engage and limit the right to liberty.³⁰ This limitation is acknowledged in the statement of compatibility which argues it is permissible on the basis that it is 'reasonable, necessary and proportionate'.³¹

1.35 The statement of compatibility sets out the objective of the measure as 'responding to, and protecting the Australian populace from, acts of significant violence, including terrorism'.³² As noted above, while generally this may be capable of constituting a legitimate objective, further information is required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective.

1.36 The detention of a person in circumstances where they pose a threat to any person's life, health or safety, or public health or safety, or where they have committed an offence related to the domestic violence, is likely to be rationally connected to the stated objective.³³

1.37 In relation to the proportionality of the measure, as set out above at [1.25], further information is required to determine whether providing the ADF access to such powers is necessary. In relation to the specific detention power, the statement of compatibility sets out a number of relevant safeguards including the specific context of a call out order and the requirement that a member of the ADF must believe on reasonable grounds that the person poses a relevant threat or has committed a relevant offence in circumstances where it is necessary to detain them

30 'Person who may be detained' is defined in proposed section 31 as a person

31 SOC p. 11.

32 SOC p. 11.

33 SOC p. 11.

as a matter of urgency. Further, the statement of compatibility explains that detention under a call out order must be for the purpose of placing the person in the custody of the police force at the earliest practicable time.³⁴ These are relevant safeguards that assist with the proportionality of the measure.

1.38 However, it is noted that a deprivation of liberty is a serious matter and generally where a deprivation of liberty occurs in a regular policing context it is accompanied by considerable safeguards. This may include timeframes for a person to be charged, released or brought before a bail authority or court. It is unclear from the information provided in the statement of compatibility to what extent these usual safeguards apply following the handover of a person to the police. Further, noting that there would appear to be more extensive safeguards in these other contexts, it is unclear from the information provided that the measure represents the least rights restrictive approach.

Committee comment

1.39 The preceding analysis raises questions about the compatibility of the measure with the right to liberty.

1.40 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including what safeguards apply once a person is handed over to police; prior to a handover to police whether there are sufficient safeguards; and whether the measure is the least rights restrictive approach).**

Compatibility of the measure with the right to freedom of movement

1.41 The right to freedom of movement includes the right of people to move freely within Australia and to access public places. The right to freedom of movement may be subject to permissible limitations in particular circumstances.

1.42 By providing the ADF powers to erect barriers, to stop individuals and vehicles and to require people to move on from particular areas, the measures engage and limit the right to freedom of movement. This right was not addressed in the statement of compatibility and so no assessment is provided as to whether the measures constitute a permissible limitation on this right.

34 SOC, p. 12.

Committee comment

1.43 The preceding analysis raises questions about the compatibility of the measure with the right to freedom of movement. This right was not addressed in the statement of compatibility.

1.44 The committee therefore seeks the advice of the Attorney-General as to:

- whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);
- how the measure is effective to achieve (that is, rationally connected to) that objective; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

Compatibility of the measure with the right to privacy

1.45 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.³⁵ A number of measures in the bill engage and limit the right to privacy including:

- powers to search locations, things, means of transport; and
- powers to direct a person to answer a question or produce a document which is reasonably accessible to the person (including identification).³⁶

1.46 The statement of compatibility acknowledges that these measures engage and limit the right to privacy but argues that the limitation is permissible.³⁷ The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective.

1.47 The statement of compatibility sets out the objective of the measure as outlined above. While generally this may be capable of constituting a legitimate objective, further information is required as to its importance in the context of the specific measure and why current powers are insufficient to achieve the objective.

1.48 As to whether the measures are rationally connected to that objective, the statement of compatibility outlines some information as to how incidental search powers may be effective to achieve the stated objective. However, there are concerns in relation to the proportionality of the limitation. As set out above at

35 Article 17, ICCPR.

36 SOC, p. 13.

37 SOC, p. 13.

[1.25], there are a number of questions as to whether providing the ADF access to such powers is necessary. Further, these powers are coercive and highly invasive in nature. For example, in relation to a specified area, everyone in that area may be subject to stop, search, questioning and seizure powers. While there are some restrictions on what can be searched for, there is no requirement that the ADF member have a reasonable suspicion in relation to the search or the individual.

1.49 There are further questions about whether the powers are more extensive than is strictly necessary to achieve their stated objective. These powers are in addition to existing police powers under Commonwealth criminal law, including a range of powers to assist in the collection of evidence of a crime.³⁸ They are also in addition to stop, search and seize powers contained in Part IAA Division 3A of the *Crimes Act 1914*.

Committee comment

1.50 The preceding analysis raises questions about the compatibility of the measure with the right to privacy.

1.51 The committee therefore seeks the advice of the Attorney-General as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).**

Compatibility of the measure with the right to freedom of expression, association and assembly

1.52 The rights to freedom of expression, association and assembly, including the right to strike, are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁹

1.53 These rights are potentially engaged in a number of ways by the measure. First, given the breadth of the powers of the ADF operating under a call out order, there are questions as to whether the powers could be used to, for example, move

38 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 25-28.

39 ICCPR articles 19, 21, 22; ICESCR article 8.

on protesters from a particular area. Secondly, as noted above, subject to some other conditions, a precondition for the call out powers being invoked is that they are in response to 'domestic violence.' It is unclear the breadth of this definition and whether it may capture a broader range of conduct than is necessary to achieve the stated objective of the legislation. As noted above, while the statement of compatibility explains that 'domestic violence' is marked by great physical force, the term is not so defined in the bill. In this respect, proposed subsections 33(4), 34(4), 35(4) and 36(4) provide that 'the Reserves must not be called out or utilised in connection with an industrial dispute'. While this is a relevant safeguard, by implication it appears that the permanent ADF could be called out in relation to industrial disputes. Further, proposed subsection 39(3) provides that the chief of the ADF must not stop or restrict any protest, dissent or assembly or industrial action, except if there is a reasonable likelihood of the death or serious injury of persons or serious damage to property. While this also acts as a potential safeguard, also by implication, it is unclear the extent to which call out orders could be made in relation to strikes, protests or acts of civil disobedience. As these rights were not addressed in the statement of compatibility, no assessment is provided as to whether the measures are compatible with the rights to freedom of assembly, expression and association including the right to strike.

Committee comment

1.54 The preceding analysis raises questions as to whether the measures are compatible with the right to freedom of assembly, expression and association. These rights were not addressed in the statement of compatibility.

1.55 The committee therefore seeks the advice of the Attorney-General as to:

- **whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:**
 - **the extent to which 'domestic violence' could capture political protests or industrial action;**
 - **whether 'domestic violence' could be defined in the bill and appropriately circumscribed;**
 - **whether there are adequate and effective safeguards in place.**

Compatibility of the measure with the right to an effective remedy

1.56 The right to an effective remedy requires states parties to ensure access to an effective remedy for violations of human rights. This may take a variety of forms,

such as prosecutions of suspected perpetrators or compensation to victims of abuse. Proposed section 51Z engages this right as it provides a defence of superior orders for criminal acts done by ADF members in certain circumstances.⁴⁰ If the conduct in question also constitutes a breach of human rights, this could potentially raise concerns about the availability of an effective remedy for victims in these circumstances. However, the right to an effective remedy was not addressed in the statement of compatibility and accordingly no assessment was provided as to the compatibility of the measure with this right.

Committee comment

1.57 The preceding analysis raises questions as to the compatibility of the measure with the right to an effective remedy. This right was not addressed in the statement of compatibility.

1.58 The committee therefore seeks the advice of the Attorney-General as to the compatibility of the measure with the right to an effective remedy.

40 See, also proposed subsection 51S(2).

Modern Slavery Bill 2018

Purpose	Seeks to require certain large businesses and government entities to make annual reports (Modern Slavery Statements) on actions to address modern slavery risks in their operations and supply chains. Also seeks to require the minister to publish Modern Slavery Statements in an online register
Portfolio	Home Affairs
Introduced	House of Representatives, 28 June 2018
Rights	Multiple rights (see Appendix 2)
Status	Seeking additional information

Modern slavery reporting requirements

1.59 The bill seeks to require certain government and non-government entities (reporting entities)¹ to provide an annual report (Modern Slavery Statement) to the minister. The Modern Slavery Statement would be required to identify the reporting entity, and to describe:

- the reporting entity's structure, operations and supply chains;
- the risks of modern slavery practices² in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls;
- the actions taken by the reporting entity and any entity that the reporting entity owns, to assess and address those risks, including due diligence and remediation processes;
- how the reporting entity assesses the effectiveness of such actions;

1 Proposed section 4 provides that 'reporting entities' include: entities with a consolidated revenue of at least \$100 million for the reporting period that are Australian entities or that carry on business in Australia; the Commonwealth; corporate Commonwealth entities and Commonwealth companies with a consolidated revenue of at least \$100 million for the reporting period; and entities that have volunteered to comply with the modern slavery reporting requirements.

2 'Modern slavery' is defined in proposed section 4 as conduct which would constitute: an offence under Division 270 or 271 of the *Criminal Code* (those Divisions create offences relating to slavery and human trafficking); an offence under either of those Divisions if the conduct took place in Australia; trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the worst forms of child labour, as defined in Article 3 of the ILO Convention.

- consultation undertaken with entities that the reporting entity owns, and entities with which the reporting entity has prepared a joint statement; and
- any other relevant information.³

1.60 The bill also seeks to require the minister to register all Modern Slavery Statements given in accordance with the requirements in the bill in an online register.⁴ Where a Modern Slavery Statement does not comply with the requirements in the bill, the minister would still be able to register the statement, although they would not be required to do so.⁵

1.61 Additionally, the bill seeks to permit other entities (so long as they are Australian entities or carry on business in Australia) to comply with the reporting requirements in the bill on a voluntary basis. An entity would be able to volunteer to comply with the reporting requirements by giving written notice to the minister.⁶

Compatibility of the measure with multiple rights

1.62 By requiring reporting entities to prepare Modern Slavery Statements, and requiring the minister to make those statements publicly available, the bill engages positively with (promotes) multiple rights. These include:

- the right to freedom from slavery and forced labour;⁷
- the right to freedom from torture and other cruel, inhuman or degrading treatment;⁸
- the right to work and the right to just and favourable conditions of work;⁹
- the rights of women to protection from exploitation, violence and abuse;¹⁰
- the rights of children to protection from exploitation, violence and abuse;¹¹
- the right to freedom of movement;¹² and

3 Proposed section 16.

4 Proposed section 19(1).

5 Proposed section 19(2).

6 Proposed section 6.

7 Article 8 of the International Covenant on Civil and Political Rights (ICCPR).

8 Article 7 of the ICCPR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9 Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

10 Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women.

11 Article 20 of the ICCPR; Article 19 of the Convention on the Rights of the Child.

12 Article 12 of the ICCPR.

- the right to health¹³ (see **Appendix 2**).

1.63 The key right promoted by the bill is the right to freedom from slavery and forced labour, protected under Article 8 of the International Covenant on Civil and Political Rights (ICCPR).

1.64 Article 8 of the ICCPR provides that no one shall be held in slavery or servitude and that no one shall be required to perform forced or compulsory labour. The right to freedom from slavery and forced labour is an absolute right, meaning that it cannot lawfully be limited in any circumstances. The prohibition on slavery and servitude is a prohibition on 'owning' another person or exploiting or dominating another and subjecting them to 'slavery-like' conditions.

1.65 The right to be free from forced or compulsory labour prohibits requiring a person to undertake work which he or she has not voluntarily consented to, but does so because of threats made, either physical or psychological. This does not include lawful work required of prisoners or those in the military; work required during an emergency threatening the community; or other work or service that is a part of normal civic obligation (for example, jury service).

1.66 In the context of the right to freedom from slavery and forced labour, states' obligations include duties not to subject anyone to such treatment itself, to prohibit slavery and related practices in domestic law, to ensure there are adequate laws and measures in place to prevent private individuals or companies from subjecting people to such treatment (such as laws and measures in place to prevent trafficking), to ensure that allegations of forced labour are investigated, and to ensure that victims of modern slavery have access to adequate and effective redress.¹⁴ Jurisprudence from the European Court of Human Rights (ECHR) indicates that these obligations extend to ensuring adequate measures are in place to regulate businesses that may be used as a cover for human trafficking.¹⁵

1.67 While Australia has a number of measures in place that prohibit slavery and related practices,¹⁶ as well as programs that provide support for victims of modern

13 Article 12 of ICESCR.

14 See, for example, UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant* (2004), [6]-[8]. See also United Nations, *Guiding Principles on Business and Human Rights* (2011).

15 See e.g. *Rantsev v Cyprus and Russia*, European Court of Human Rights (ECHR) Application No. 25965/04, 7 January 2010, [284], in relation to article 4 of the European Convention on Human Rights, which is the substantive equivalent to article 8 of the ICCPR.

16 For example, Divisions 270 and 271 of the *Criminal Code* set out a number of offences relating to slavery, forced labour, servitude and human trafficking. These offences are punishable by custodial penalties of between 4 and 25 years' imprisonment.

slavery,¹⁷ there is currently no mechanism that requires Australian companies to report on modern slavery in business operations and supply chains. The measures introduced by the bill would therefore address a gap in Australia's capacity to identify, investigate and respond to instances of modern slavery. Accordingly, the bill promotes the right to be free from slavery and forced labour.

1.68 It should be noted that legislation designed to combat modern slavery in some other jurisdictions includes measures that go further in fulfilling the absolute obligation in relation to the right to freedom from slavery and forced labour.¹⁸ In this respect, there may be further mechanisms to fulfil Australia's obligations in relation to the right to freedom from slavery and forced labour including, for example, by strengthening the enforcement of requirements relating to Modern Slavery Statements, or including express requirements for reporting entities to conduct due diligence with respect to their supply chains. Nevertheless, the bill clearly promotes the right to freedom from slavery and forced labour, and is to be welcomed from a human rights perspective.

Committee comment

1.69 The committee draws the positive human rights implications of the Modern Slavery Bill 2018 to the attention of the minister and parliament.

1.70 The committee welcomes the proposed reporting requirements, which promote the right to freedom from slavery and forced labour.

Compatibility of the measure with the right to privacy

1.71 The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and disclosure of personal information (see Appendix 2).

1.72 As outlined above at [1.59]–[1.61], the bill would require reporting entities to give annual Modern Slavery Statements to the minister, and would require the minister to publish these statements online. It appears that the information in a Modern Slavery Statement would generally relate to businesses, rather than to individuals. However, as noted in the statement of compatibility:

- in certain circumstances, an individual's personal information may be so closely connected with information about their business that information about that business can constitute personal information; and

17 For example, the Support for Trafficked People Program (Support Program)—administered by the Department of Social Services and delivered by the Red Cross. The Support Program provides case management support, counselling, accommodation, and financial assistance to victims of modern slavery. See, <https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>.

18 *Modern Slavery Act 2015* (UK) sections 8-9, 40, 45, 47.

- there is a 'very small' risk that a Modern Slavery Statement could identify victims or potential victims of modern slavery.¹⁹

1.73 In those circumstances, the measures engage and limit the right to privacy, as they may result in the disclosure of personal information, and could identify a victim or potential victim—thereby compromising their right to privacy and reputation. The identification of a victim of modern slavery may also expose that person to additional abuse or exploitation.

1.74 The statement of compatibility recognises that the right to privacy is engaged and limited by the bill. However, the statement of compatibility further states that the limitation is reasonable and necessary as the disclosure of certain information is required to achieve the legitimate objectives of the bill.²⁰

1.75 The objective of the bill is described in the statement of compatibility as 'strengthen[ing] Australia's approach to modern slavery by equipping and enabling Australia's business community to respond effectively to modern slavery and develop and maintain responsible and transparent supply chains'.²¹ This is likely to be a legitimate objective for the purposes of international human rights law. Requiring particular entities to identify and report on risks of modern slavery within their supply chains, and requiring that this information be published on an online register, also appears to be rationally connected to that objective.

1.76 The statement of compatibility states that the collection and retention of information relevant to the bill is carefully regulated, with only limited information required to be disclosed.²² The statement of compatibility also sets out a number of safeguards that are intended to ensure Modern Slavery Statements do not disclose information that would identify victims or potential victims of modern slavery. These include:

- the reporting criteria do not mandate the provision of any information that would identify victims or potential victims of modern slavery;
- detailed guidance will be issued prior to the commencement of the bill, which will underscore the importance of ensuring victims of modern slavery are not identified;
- the legislation will be publicly accessible and accompanied by detailed guidance so that affected persons have adequate information about how the bill may limit their right to privacy;

19 SOC, p. 31.

20 SOC, p. 31.

21 SOC, p. 31.

22 SOC, p. 31.

- information may only be collected by the minister or by delegates, and the information that may be collected is clearly prescribed and limited to that which is most important to achieving the objectives of the bill.²³

1.77 These safeguards are important and relevant to the proportionality of the measures. However, they appear to rely largely on the discretion and diligence of reporting entities. In this respect, it is noted that the requirements for the content of Modern Slavery Statements²⁴ are broadly worded. There also do not appear to be any statutory prohibitions in the bill on including personal information, or other information that could identify a victim or potential victim of modern slavery, in Modern Slavery Statements. There would therefore appear to be other, less rights-restrictive approaches available, such as an express requirement that a Modern Slavery Statement not contain personal or other identifying information.

1.78 The bill also does not appear to prohibit the minister from publishing a statement that contains information of this kind. It is also unclear the extent to which the minister may be able to redact any information from a Modern Slavery Statement, or request that the reporting entity cause the statement to be redacted, in order to protect personal or sensitive information from being publicly disclosed. Further information in this respect would assist in determining whether there are adequate safeguards in place to protect the right to privacy.

Committee comment

1.79 The preceding analysis indicates that the measures may engage and limit the right to privacy.

1.80 The committee therefore seeks the advice of the minister as to whether the measures are a reasonable and proportionate means of achieving the stated objective (including any safeguards in place against the disclosure of personal information, or information that could identify the victim or potential victim of modern slavery).

23 SOC, p. 32.

24 Proposed section 16.

Advice only

1.81 The committee draws the following bills and instruments to the attention of the relevant minister or legislation proponent on an advice only basis. The committee does not require a response to these comments.

Migration (IMMI 18/019: Fast Track Applicant Class) Instrument 2018 [F2018L00672]

Purpose	Specifies a class of persons who are fast track applicants
Portfolio	Home Affairs
Authorising legislation	<i>Migration Act 1958</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Non-refoulement; fair hearing; effective remedy; best interests of the child (see Appendix 2)
Status	Advice only

Background

1.82 The committee has previously reported on the human rights compatibility of the 'fast track assessment process' for asylum seekers, which was introduced by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.¹ The bill passed both Houses of Parliament on 5 December 2014 and received Royal Assent on 15 December 2014, and became the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Migration and Maritime Powers Act).

1.83 The Migration and Maritime Powers Act established a new fast track assessment process for 'fast track applicants', defined as protection visa applicants who entered Australia as unauthorised maritime arrivals on or after 13 August 2012. The minister also has the power to extend this process to other groups of asylum seekers.

1.84 'Fast track applicants' who are refused a protection visa ('fast track decision') do not have access to the Migration and Refugee Division of the Administrative Appeals Tribunal (formerly the Refugee Review Tribunal), but instead have access to a statutory body, the Immigration Assessment Authority (IAA), to review protection claims.

1 See, for example, Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 4 of 2017* (9 May 2017) pp. 101-106.

1.85 Reviews of decisions by the IAA under the 'fast track' system are conducted on the papers rather than at a hearing before the IAA, and the IAA are unable to consider new information at the review stage unless there are exceptional circumstances.² Fast track applicants also have access to judicial review of protection visa decisions. The committee previously concluded that the fast-track process may be incompatible with a number of human rights.³

Specifying a class of persons as fast track applicants

1.86 The instrument specifies a class of persons who are included in the definition of 'fast track applicant'. The instrument provides that a person is a 'fast track applicant' if the person is an unauthorised maritime arrival, the person has made a protection claim, and:

- (c) the person had their protection claim considered, or reconsidered, through an administrative process that occurred in relation to the [Migration] Act or [Migration] Regulations, including (but not limited to) the following processes:
 - (i) Refugee Status Assessment;
 - (ii) Protection Obligations Evaluation;
 - (iii) Independent Merits Review;
 - (iv) Independent Protection Assessment;
 - (v) International Treaties Obligation Assessment; and
- (d) the person has been assessed as not engaging Australia's protection obligations; and
- (e) the person applied to the High Court or Federal Circuit Court to review the assessment and one of the following occurred:
 - (i) the Court made a declaration that the assessment was not made according to law;
 - (ii) the Minister withdrew from the court proceedings before the Court made a decision.⁴

1.87 The instrument also provides that children of a person described as 'fast track applicants' will also be fast track applicants.⁵

2 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 179.

3 See, Parliamentary Joint Committee on Human Rights; *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 179. See, also, *Report 4 of 2017* (9 May 2017) pp. 99-106; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 12 of 2017* (28 November 2017) pp. 89-92.

4 Section 6 of the Instrument.

5 Section 6(2) of the Instrument.

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

1.88 The obligation of non-refoulement requires that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.⁶ Non-refoulement obligations are absolute and may not be subject to any limitations.

1.89 Compliance with the obligation of non-refoulement requires that sufficient procedural and substantive safeguards are in place to ensure a person is not removed in contravention of this obligation, given the irreversible nature of the harm that may result. Effective, independent and impartial review by a court or tribunal of decisions to deport or remove a person in accordance with the right to an effective remedy, is integral to giving effect to non-refoulement obligations.⁷

1.90 The effect of the instrument is that persons falling within the amended definition of 'fast track applicant' must pursue the re-assessment of their protection claims through the fast track assessment process.⁸ Determining certain persons to be 'fast track applicants' such that their claims are assessed through the fast track process therefore engages Australia's non-refoulement obligations and the right to an effective remedy because of the limitations on independent and effective review of fast track decisions.

1.91 The statement of compatibility also acknowledges that Australia's non-refoulement obligations are engaged.⁹ However, it states that the instrument does not affect the substance of Australia's adherence to its non-refoulement obligations for several reasons. First, the statement of compatibility states that there is no express requirement in the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture (CAT) for any particular process or procedure for the assessment of non-refoulement obligations, and that it is for each

6 Australia's obligations arise under article 33 of the Refugee Convention in respect of refugees, and also under articles 6(1) and 7 of the International Covenant on Civil and Political Rights (ICCPR), article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

7 ICCPR, article 2(3). See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament* (11 February 2014) p. 45; *Fourth Report of the 44th Parliament* (18 March 2014) p. 51; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187.

8 The Statement of compatibility (SOC) explains that at present, these persons are barred from making an application for protection visa as a result of section 46A(1) of the Migration Act.

9 SOC, p.2.

state to establish the most appropriate procedures for processing claims and review mechanisms.¹⁰ The statement of compatibility further states that:

All fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory process while ensuring priority is given to identifying applications that present legitimate claims and in turn, persons who require Australia's protection. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of *non-refoulement* obligations. Fast track applicants are afforded a different form of merits review to persons who are not fast track applicants. It is the Government's view that it is reasonable and proportionate for this cohort of UMAs, who have already been through a number of processes to assess their claims, to have their claims re-assessed in a process which has a more limited form of merits review. This limited form of merits review is intended to be efficient, quick, cost-effective and to uphold the overall integrity of Australia's protection status determination process, as well as being competent, independent and impartial. Fast track applicants also have access to judicial review of their protection visa decisions.¹¹

1.92 As to the review of decisions by the IAA, as noted above and in previous analysis the merits review conducted by the IAA is limited as it is conducted on the information provided by the applicant to the department and will not involve an interview. Further, the IAA is only able to reaffirm the decision or remit it to the department for further consideration rather than substitute the correct or preferable decision.¹² Previous human rights analysis has considered that this limited form of review 'is substantially apart from other forms of merits review in Australia', and raises significant questions as to the effectiveness of the process in light of Australia's non-refoulement obligations.¹³

1.93 As to the absence of any external merits review, previous human rights analysis has noted that while there is no express requirement for merits review in the articles of the relevant conventions or jurisprudence relating to obligations of non-refoulement, analysis of how the obligation applies, and may be fulfilled, in the Australian domestic legal context indicates that the availability of merits review of

10 SOC, pp. 2-3.

11 SOC, p.3

12 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 184; see Immigration Assessment Authority, *What you need to know about the Immigration Assessment Authority* (2018) <http://www.iaa.gov.au/IAA/media/IAA/Files/Fact%20Sheets/What-you-need-to-know-about-the-IAA.pdf>.

13 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) p. 185; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

such decisions would likely be required to comply with Australia's obligations under international law.¹⁴

1.94 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions.¹⁵ The purpose of an 'effective' review is to 'avoid irreparable harm to the individual'.¹⁶ In the current context, as noted, external merits review is unavailable but judicial review is available. Judicial review in Australia is governed by the *Administrative Decisions (Judicial Review) Act 1977* and the common law,¹⁷ and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. There are therefore serious concerns as to whether judicial review in the Australian context would be sufficient to be 'effective review' for the purposes of Australia's non-refoulement obligations.

1.95 Further, while the statement of compatibility states that it is 'reasonable and proportionate' for the persons affected by this instrument to go through the fast track process because they have already been through a number of processes, this is not a sufficient explanation in the context of the obligation of non-refoulement. This is because the obligation is absolute, and so considerations of reasonableness and proportionality do not apply. Further, the fact that fast track applicants (as defined in the instrument) have previously pursued their claims through the fast track process and judicial review does not lessen the need for any re-assessment to comply with Australia's non-refoulement obligations.

1.96 Accordingly, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' because it is only available on a number of restricted grounds of review. This is particularly in light of the purpose of 'effective' review of non-refoulement decisions under international law to avoid irreparable harm to the individual. Previous human rights analysis has therefore concluded that the fast track

14 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

15 See *Agiza v Sweden*, Communication No.233/2003, Committee against Torture (2005) [13.7]; *Josu Arkauz Arana v France*, Communication No.63/1997, Committee against Torture (2000); *Alzery v Sweden*, Communication No.1416/2005, Human Rights Committee (2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

16 *Alzery v Sweden*, Communication No.1416/2005, Human Rights Committee (2006) [11.8].

17 See section 75(v) of the *Constitution* and section 39B of the *Judiciary Act*.

assessment process is likely to be incompatible with Australia's non-refoulement obligations.¹⁸

Committee comment

1.97 The obligation of non-refoulement is absolute and may not be subject to any limitations.

1.98 The instrument, by applying the fast track assessment process to particular applicants, provides for a very limited form of merits review of non-refoulement decisions.

1.99 Accordingly, consistent with the committee's previous conclusions, the preceding analysis indicates that the measure is likely to be incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture to ensure independent, effective and impartial review, including merits review, of non-refoulement decisions.

Compatibility of the measure with the right to a fair hearing and the obligation to consider the best interests of the child

1.100 The right to a fair trial and fair hearing is protected by article 14 of the ICCPR and applies to both criminal and civil proceedings, including where rights and obligations are determined (*suit at law*). The measures may engage and limit this right due to the restricted scope that is provided for review of the refusal to grant a protection visa. As noted above, such decisions will be reviewed by the IAA process and will not be subject to external merits review.

1.101 Further, articles 3 and 10 of the Convention on the Rights of the Child requires that, in all actions concerning children, the best interests of the child are a primary consideration. The statement of compatibility acknowledges that this right is engaged by the measures, as section 6(2) of the instrument prescribes that children of fast track applicants (as defined in the instrument) are also fast track applicants.

1.102 The statement of compatibility acknowledges that article 14 is engaged by the instrument.¹⁹ However, it states that the measures are compatible with this right for the following reason:

As previously outlined, the UNHCR recognises that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met. There are sufficient safeguards in place to ensure all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process. Bringing this class of persons into the fast track process will not

18 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187.

19 SOC, p.4.

affect their ability to seek asylum, or their ability to access judicial review of a refusal decision, nor will it prevent grant of a protection visa for applicants satisfying the criteria for a visa.²⁰

1.103 The previous human rights analysis noted that the review process provided by the IAA is quite limited and may not ensure the right to a fair hearing or that the best interests of the child are taken into account as a primary consideration. This is because nothing expressly requires the IAA to give a referred applicant any material that was before the primary decision maker. There is also no right for an applicant to comment on the material before the IAA. These provisions therefore diminish procedural fairness and the applicant's prospects of correcting factual errors or wrong assumptions in the primary decision at the review stage.

1.104 In addition, the previous analysis noted that reviewers are not statutory appointments but employees under the *Public Service Act 1999*. This affects the independence of such a review and therefore the impartiality of such a review. While judicial review is still available in the Australian context, judicial review is limited to the lawfulness of a decision and does not consider its merit (that is, whether the decision was the correct or preferable decision). Accordingly, the committee previously concluded that the fast track assessment process may be incompatible with the right to a fair hearing.²¹

Committee comment

1.105 Consistent with the committee's previous conclusions, the preceding analysis indicates that the measure may be incompatible with the right to a fair hearing and the obligation to consider the best interests of the child.

20 SOC, p.5.

21 Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 174-187; *Report 12 of 2017* (28 November 2017) pp. 89- 92.

Various Social Security Determinations¹

Purpose	Prescribes various measures inserted into the <i>Social Security Act 1991</i> and <i>Social Security (Administration) Act 1999</i> by the Welfare Reform Act 2018 to implement the new targeted compliance framework
Portfolio	Social Services
Authorising legislation	<i>Social Security Act 1991</i>
Last day to disallow	15 days after tabling ([F2018L00777] and [F2018L00779] tabled in the House of Representatives 18 June, tabled in the Senate 19 June 2018; [F2018L00783] tabled in the House of Representatives 19 June, tabled in the Senate on 20 June; [F2018L00795] tabled in the House of Representatives 20 June, tabled in the Senate 21 June 2018)
Rights	Equality and non-discrimination; social security; adequate standard of living (see Appendix 2)
Status	Advice only

Background

1.106 The *Social Security (Welfare Reform) Act 2018* (Welfare Reform Act) inserted a number of new measures into the *Social Security Act 1991* (Social Security Act) and *Social Security (Administration) Act 1999* (Social Security (Administration) Act). The committee previously considered these measures in its human rights assessment of the Welfare Reform Act in *Report 8 of 2017* and *Report 11 of 2017*.²

1.107 The determinations prescribe certain matters for the purposes of the measures introduced by the Welfare Reform Act.

-
- 1 Social Security (Declared Program Participant) Determination 2018 [F2018L00777] (Declared Program Participant Determination); Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779] (Reasonable Excuse Determination); Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00783] Legislation Amendment and Repeal (Reasonable Excuse) Determination; Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1) [F2018L00795] (Non-Compliance Determination).
 - 2 Parliamentary Joint Committee on Human Rights, *Report 8 of 2017* (15 August 2017) pp. 46-77; *Report 11 of 2017* (17 October 2017) pp. 138-203.

Reasonable excuse: drug and alcohol misuse and dependency

1.108 The Social Security (Administration Act), as amended by the Welfare Reform Act, provides that where a recipient of certain social security payments fails to meet a 'mutual obligation requirement',³ the secretary must determine that the person's participation payment⁴ is suspended for a period.⁵ Additionally, if the secretary is satisfied that the person has persistently committed mutual obligation failures,⁶ and does not have a 'reasonable excuse'⁷ for the relevant failure, the person's payment may be reduced or cancelled.⁸ The secretary also has the power to make a legislative instrument setting out matters that must and must not be taken into account when deciding whether a person has a 'reasonable excuse' for committing a participation failure.⁹

1.109 The Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018 [F2018L00779] (Reasonable Excuse Determination) sets out the matters which the secretary must and must not take into account when deciding whether a person has a 'reasonable excuse' for committing a mutual obligation failure.¹⁰

1.110 Section 5 prescribes the matters to which the Secretary must have regard in deciding whether a person has a 'reasonable excuse', and includes drug and alcohol

-
- 3 A mutual obligation failure is a failure to comply with obligations relating to participation payments, such as attending appointments, undertaking activities, or taking action to gain employment: see section 42AA of the Social Security (Administration) Act.
 - 4 A 'participation payment' refers to Newstart Allowance, and, in some cases, Youth Allowance, Parenting Payment or special benefit: Social Security (Administration) Act, section 42AA.
 - 5 Sections 42AF, 42AG, 42AL of the Social Security (Administration) Act. A person may be eligible for back pay once the person's suspension period ends: section 42AL(4).
 - 6 See further below 'Penalties for persistent mutual obligation failures'.
 - 7 Sections 42AI and 42AJ the Social Security (Administration) Act.
 - 8 Section 42AF of the Social Security (Administration) Act.
 - 9 See sections 42AI, 42AF and 42AR of the Social Security (Administration) Act. There is a separate compliance framework for persons who are 'declared program participants', who are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Act: see Division 3A of Part 3 of the Act. The Declared Program Participant Determination specifies that a participant in the Community Development Program is a 'declared program participant'.
 - 10 Legislation and Amendment Repeal (Reasonable Excuse) Determination amends the Social Security (Reasonable Excuse – Participation Obligations (DEEWR) Determination 2009 (No. 1) and repeals the Social Security (Reasonable Excuse – Participation Payment Obligation (FaHCSIA) Determination 2009 (No. 1), 'to ensure that the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments': Legislation and Amendment Repeal Determination, explanatory statement, p. 3.

dependency.¹¹ The secretary also retains discretion to consider other factors which may directly prevent a person from complying with their obligations regarding a participation payment.

1.111 Section 6 prescribes the matters which the secretary must not take into account in deciding whether a person has a reasonable excuse for failing to comply with their obligations. Relevantly, section 6(4) provides that the secretary must not take into account drug or alcohol misuse or dependency, if the person (other than a declared program participant) has previously relied on this as a reasonable excuse,¹² and has refused to participate in treatment to which they have been referred.¹³ The second component is subject to a number of exceptions, relating to:

- the availability of appropriate treatment;¹⁴
- the availability of the prospective participant;¹⁵ and
- whether the prospective participant has previously completed the same or substantially similar treatment and, in the opinion of a suitably qualified medical professional, would not benefit from further treatment of the same kind.¹⁶

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

1.112 The previous human rights analysis of the Welfare Reform Act considered that narrowing the circumstances in which a person may rely upon their drug and

11 Other matters include whether the person had access to safe, secure and adequate housing, or was using emergency accommodation or a refuge at the time of the failure (section 5(2)(a)); the literacy and language skills of the person (section 5(2)(b)); whether the person had an illness, injury, impairment or disability (section 5(2)(c)); a cognitive, neurological, psychiatric or psychological impairment or mental illness of the person (section 5(2)(d)); whether the person had unforeseen family or caring responsibilities (section 5(2)(f)); whether the person was subjected to criminal violence (including domestic violence and sexual assault) (section 5(2)(g)); whether the person was adversely affected by the death of an immediate family member or close relative (section 5(2)(h)) and whether the person was working or attending a job interview at the time of the failure (sections 5(2)(i), (j)).

12 Reasonable Excuse Determination, section 6(4)(a)-(b). Section 6(4) does not apply to 'declared program participants'.

13 Reasonable Excuse Determination, section 6(4)(c)-(d). Section 6(4) does not apply to 'declared program participants'.

14 Reasonable Excuse Determination, section 6(4)(e), (g). Section 6(4) does not apply to 'declared program participants'.

15 Reasonable Excuse Determination, section 6(4)(f). Section 6(4) does not apply to 'declared program participants'.

16 Reasonable Excuse Determination, section 6(4)(h). Section 6(4) does not apply to 'declared program participants'.

alcohol misuse or dependency as a reasonable excuse engaged a number of human rights. While the previous human rights analysis considered that the measure appeared to be compatible with some of these rights,¹⁷ it concluded that it was likely to be incompatible with the rights to social security and an adequate standard of living.¹⁸ This was because:

The inability of a person to cite their drug or alcohol dependency as a 'reasonable excuse' may have significant negative financial consequences on a person through the suspension or cancellation of their social security, or through financial penalties. It is unlikely that this potentially significant financial consequence, which may impair a person's ability to afford basic necessities, will be considered proportionate to the legitimate objectives of the measure as a matter of international human rights law.¹⁹

1.113 By prescribing the circumstances when drug and alcohol dependency must and must not be taken into account and limiting the circumstances in which drug and alcohol dependency may be a 'reasonable excuse', the Reasonable Excuse Determination gives effect to this measure. The Determination does not include any additional measures to address the concerns raised in the initial human rights analysis.

Committee comment

1.114 The Reasonable Excuse Determination gives effect to a measure in the Welfare Reform Act that narrows the circumstances in which a person's drug and alcohol dependency may be taken into account as a 'reasonable excuse' for committing a participation failure.

1.115 Consistent with the committee's previous conclusions in *Report 11 of 2017*, the measures in the determination are likely to be incompatible with the right to social security and the right to an adequate standard of living.

Penalties for persistent mutual obligation failures

1.116 As noted above, section 42AF of the Social Security (Administration) Act (introduced by the Welfare Reform Act) provides that the secretary must reduce or cancel a person's participation payment (other than a declared program participant)

17 The previous human rights analysis of the Welfare Reform Act concluded that the measure also engaged the right to equality and non-discrimination; however, it considered that the measure appeared to include adequate safeguards to protect the rights of people with disabilities related to alcohol or drugs (*Report 11 of 2017* (17 October 2011) p. 176). The Reasonable Excuse Determination is consistent with the proposed safeguards described by the legislative proponent in this respect.

18 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2011) p. 174.

19 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2011) p. 179.

if the secretary is satisfied that a person has persistently committed a mutual obligation failure and does not have a reasonable excuse for the failure.²⁰

1.117 The Non-Compliance Determination sets out the circumstances in which the Secretary must or must not be satisfied that a person has persistently committed mutual obligation failures.²¹ It also sets out the matters about which the secretary must be satisfied to reduce or cancel a person's participation payment.²² The Reasonable Excuse Determination, discussed above, sets out the matters which the secretary must and must not take into account in deciding whether a person has a reasonable excuse for committing mutual obligation failures.²³

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

1.118 The previous human rights analysis of the Welfare Reform Act raised concerns about the compatibility of section 42AF with the rights to social security and an adequate standard of living.²⁴ The previous analysis noted that the prescription of what does and does not constitute a persistent mutual obligation failure by way of legislative instrument could 'assist to ensure that a non-payment penalty is only applied to objective criteria', which in turn could 'assist with the proportionality' of the measure.²⁵ However, the previous analysis considered that, without a requirement in the relevant instruments that the secretary must be satisfied of a person's capacity to meet their basic necessities prior to imposing a penalty, the measure would be likely to be incompatible with the right to social security and an adequate standard of living.²⁶

1.119 The committee concluded that the measure in section 42AF of the Welfare Reform Bill was likely to be incompatible with the right to social security, noting that there could be circumstances in which a person whose participation payment has been reduced or cancelled due to persistent mutual obligation failures without a reasonable excuse would be unable to meet their basic necessities.²⁷

20 Social Security (Administration) Act, section 43AF.

21 Section 5(1)-(4) of the Non-Compliance Determination set out the circumstances in which a person has persistently committed mutual obligation failures. Sections 5(5) and (6) set out the circumstances in which a person has not persistently committed mutual obligation failures.

22 Non-Compliance Determination, section 6.

23 Inserted by the Welfare Reform Act, schedule 14, item 7; schedule 15, item 1.

24 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 190.

25 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 193

26 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 193.

27 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 194.

1.120 Neither the Non-Compliance Determination nor the Reasonable Excuse Determination requires the secretary to have regard to whether a person would be able to meet basic necessities in determining whether a person's payment must be reduced or cancelled. Further, there do not appear to be any additional safeguards which would apply to allow a person to otherwise meet basic necessities. Accordingly, the determinations do not alter the committee's conclusions on the compatibility of the penalties for persistent mutual obligation failures in *Report 11 of 2017*.²⁸

Committee comment

1.121 The Non-Compliance Determination and the Reasonable Excuse Determination do not require the secretary to be satisfied of a person's capacity to meet their basic necessities in determining that they have committed persistent mutual obligation failures without a reasonable excuse under section 42AF of the Welfare Reform Act.

1.122 Consistent with the committee's previous conclusions in *Report 11 of 2017*, the measures in these determinations are therefore likely to be incompatible with the right to social security and the right to an adequate standard of living.

28 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, p. 194.

Bills not raising human rights concerns

1.123 Of the bills introduced into the Parliament between 13 and 16 August, the following did not raise human rights concerns (this may be because the bill does not engage or promotes human rights, and/or permissibly limits human rights):

- Customs Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Customs Tariff Amendment (Pacific Agreement on Closer Economic Relations Plus Implementation) Bill 2018;
- Farm Household Support Amendment (Temporary Measures) Bill 2018;
- Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Reporting of Gas Reserves) Bill 2018;
- Social Services Legislation Amendment (Student Reform) Bill 2018; and
- Tobacco Plain Packaging Amendment Bill 2018.