Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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1 The human rights committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate Legislative Scrutiny Unit (LSU), which usually includes two principal research officers with specialised expertise in international human rights law. LSU officers regularly work across multiple scrutiny committee secretariats.

Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[2] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[3]

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

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

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

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

3 See the committee's *Short Guide to Human Rights* and *Guide to Human Rights*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[4]

4 See *Guidance Note 1 – Drafting Statements of Compatibility*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources

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Chapter 1

New and continuing matters

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

- bills introduced into the Parliament between 3 and 6 December 2018 (consideration of 2 bills from this period has been deferred);[1]
- legislative instruments registered on the Federal Register of Legislation between 9 November and 5 December 2018 (consideration of 1 legislative instrument from this period has been deferred);[2] and
- bills and legislative instruments previously deferred.

1.2 The chapter also includes reports on matters previously raised, in relation to which the committee seeks further information following consideration of a response from the legislation proponent.

1.3 The committee has concluded its consideration of 1 bill and 4 legislative instruments that were previously deferred.[3]

Instruments not raising human rights concerns

1.4 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.

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

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

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

3 These are: Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Bill 2018; Defence Determination, Conditions of Service Amendment (Flexible Service Determination) Determination 2018 (No. 40) [F2018L01553]; Health Insurance (Extended Medicare Safety Net) Amendment Determination 2019 [F2018L01502]; Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018 [F2018L01472]; and National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018 [F2018L01547].

Response required

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

Australian Citizenship Amendment (Strengthening the Citizenship Loss Provisions) Bill 2018

Purpose	Would amend the threshold for the minister to determine that a person has ceased to be an Australian citizen following conviction of a criminal offence
Portfolio	Home Affairs
Introduced	House of Representatives, 28 November 2018
Rights	Freedom of movement; fair hearing; fair trial; children; obligation to consider the best interests of the child; nationality; private life; family; public affairs; liberty; non-refoulement; equality and non-discrimination; retrospective criminal laws; double punishment; work; social security; adequate standard of living; health; education.
Status	Seeking additional information

Background

1.7 The committee previously examined the human rights implications of expanding the basis on which a dual citizen's Australian citizenship will cease in its consideration of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (2015 Act) which amended the *Australian Citizenship Act 2007* (Citizenship Act).[1]

Expanding the circumstances in which a person's Australian citizenship will cease

1.8 Currently, under section 35A of the Citizenship Act, the minister may determine, in writing, that a person will cease to be an Australian citizen on conviction in the following circumstances:

- the person is a national or citizen of a country other than Australia at the time when the minister makes the determination;

1 Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) pp. 4-46; *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 27-84. The amended Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 passed both Houses of Parliament on 3 December 2015 and received Royal Assent on 11 December 2015.

- the person has been convicted of one of certain specified offences, set out in section 35A(1)(a);
- the person has been sentenced to a period of imprisonment of at least six years;
- the minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- having regard to a range of factors, the minister is satisfied that it is not in the public interest for the person to remain an Australian citizen.[2]

Removal of requirement for a sentence of imprisonment of at least six years in respect of a 'relevant terrorism conviction'

1.9 The bill would repeal current section 35A(1) and replace it with new section 35A(1). Under the bill the minister may determine a person's citizenship will cease in respect of a 'relevant terrorism conviction' or 'relevant other conviction'.

1.10 Except for the addition of the offence of associating with a terrorist organisation, the specified offences for which citizenship may be revoked are the same as those under current section 35A(1). However, the bill would also create two categories of offences: 'relevant terrorism convictions' and 'other relevant convictions.'

1.11 In relation to a 'relevant terrorism conviction,' the bill would remove the requirement that the person has been sentenced to a period of imprisonment for at least six years.

1.12 'Relevant terrorism conviction' is defined in the bill by reference to divisions of the Criminal Code and includes:

- delivering, placing, discharging or detonating an explosive device;[3]
- treason;[4]
- treason-assisting enemy to engage in armed conflict;[5]

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2 The minister must consider public interest matters before making a determination to revoke a person's citizenship including: the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences; the degree of threat posed by the person to the Australian community; the age of the person; if the person is aged under 18—the best interests of the child as a primary consideration; the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person; Australia's international relations; and any other matters of public interest.

3 Subdivision A of Division 72 of the Criminal Code.

4 Subdivision B of Division 80, section 80.1 of the Criminal Code.

5 Subdivision B of Division 80, section 80.1AA of the Criminal Code.

- treachery;[6]
- terrorist acts;[7]
- providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;[8]
- possessing things connected with terrorist acts;[9]
- collecting or making documents likely to facilitate terrorist acts;[10]
- other acts done in preparation for, or planning, terrorist acts;[11]
- directing the activities of a terrorist organisation;[12]
- membership of a terrorist organisation;[13]
- recruiting for a terrorist organisation;[14]
- training involving a terrorist organisation;[15]
- getting funds to, from or for a terrorist organisation;[16]
- providing support to a terrorist organisation;[17]
- associating with terrorist organisations (this is a new offence in respect of which citizenship can be lost under the bill);[18]
- financing terrorism;[19]
- financing a terrorist;[20]

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6 Subdivision B of Division 80, section 80.AC of the Criminal Code.

7 Part 5.3, section 101.1 of the Criminal Code.

8 Section 101.2 of the Criminal Code.

9 Section 101.4 of the Criminal Code

10 Section 101.5 of the Criminal Code.

11 Section 101.6 of the Criminal Code.

12 Section 102.2 of the Criminal Code.

13 Section 102.3 of the Criminal Code.

14 Section 102.4 of the Criminal Code.

15 Section 102.5 of the Criminal Code.

16 Section 102.6 of the Criminal Code.

17 Section 102.7 of the Criminal Code.

18 Section 102.8 of the Criminal Code.

19 Section 103.1 of the Criminal Code.

20 Section 103.2 of the Criminal Code.

- incursions into foreign countries with intention to engage in hostile activities;[21]
- engaging in a hostile activity in a foreign country;[22]
- entering or remaining in a declared area overseas where terrorist organisations are engaged in hostile activities;[23]
- allowing use of buildings, vessels and aircraft to commit foreign incursions offences;[24]
- recruiting persons to join organisations engaged in hostile activities against foreign governments;[25]
- recruiting persons to serve in or with an armed force in a foreign country;[26] and
- preparations for incursions into foreign states for the purpose of engaging in hostile activities.[27]

1.13 For 'relevant other convictions' there would still be a requirement that the person has been sentenced to a period of imprisonment of at least six years, or to periods of imprisonment that total at least six years. 'Relevant conviction' is defined to include:

- sabotage;[28]
- planning for or planning a sabotage offence;[29]
- espionage;[30] and
- foreign interference.[31]

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21 Part 5.5, section 119.1 of the Criminal Code. See, also, *Crimes (Foreign Incursions and Recruitment) Act 1978* sections 6-7 (repealed).

22 Part 5.5, section 119.1 of the Criminal Code. See, also, *Crimes (Foreign Incursions and Recruitment) Act 1978* sections 6-7 (repealed).

23 Part 5.5, section 119.2 of the Criminal Code.

24 Part 5.5, section 119.5 of the Criminal Code.

25 Part 5.5, section 119.6 of the Criminal Code.

26 Part 5.5, section 119.7 of the Criminal Code.

27 *Crimes (Foreign Incursions and Recruitment) Act* 1978 sections 6-7 (repealed).

28 Division 82 of the Criminal Code.

29 Division 82.9 of the Criminal Code.

30 Division 91 of the Criminal Code.

31 Division 92 of the Criminal Code.

Lowering threshold as to whether a person has dual citizenship

1.14 As set out above, currently it is a precondition, under section 35A(1)(b), for cessation of citizenship on determination by the minister that a person is a dual national or citizen of another country at the time when the minister makes the determination. The bill proposes to alter this threshold requirement in section 35A(1)(b) so that, in making a determination that a person ceases to be an Australian citizen, the minister only need be satisfied that the person would not become a person who is not a national or citizen of any other country.

Scope of application

1.15 Section 35A would apply in relation to a 'relevant terrorism conviction' occurring on or after 12 December 2005. In relation to a 'relevant other conviction' the amendments would apply if the conviction occurred after 12 December 2005 and, if it occurred before 12 December 2015, the person was sentenced to a period of imprisonment of at least 10 years in respect of the conviction.

1.16 These amendments also apply to children who have been convicted of a 'relevant terrorism conviction' or 'relevant other conviction'.[32]

Compatibility of the measure with multiple rights

1.17 The committee's previous analysis identified that expanded provisions for the cessation of Australian citizenship engage and may limit the following human rights:

- right to freedom of movement;[33]
- right to a private life;[34]
- right to protection of the family;[35]
- right to take part in public affairs;[36]
- right to liberty;[37]
- obligations of non-refoulement;[38]

32 See, proposed section 35A(1); Statement of Compatibility (SOC) p. 16..

33 Article 12 of the International Covenant on Civil and Political Rights (ICCPR).

34 Article 17 of the ICCPR.

35 Articles 17 and 23 of the ICCPR and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

36 Article 25 of the ICCPR.

37 Article 9 of the ICCPR.

38 Articles 6 and 7 of the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

- right to equality and non-discrimination;[39]
- right to a fair trial and fair hearing;[40]
- prohibition against retrospective criminal laws;[41]
- prohibition against double punishment;[42] and
- rights of children.[43]

1.18 There are also a number of rights that may be indirectly engaged and limited by loss of citizenship.[44]

1.19 The proposed amendments also engage and may limit the listed rights by expanding the circumstances in which the minister may determine that a person's citizenship has ceased. It is noted that very serious consequences flow from a loss of citizenship. To fully assess the human rights implications of the bill it is necessary to consider how the proposed amendments will interact with the existing regime. While the measures engage a considerable number of human rights, the analysis below focuses on key human rights concerns.

Compatibility of the measure with the right to freedom of movement, right to liberty, right to the protection of the family

Right to freedom of movement

1.20 The right to freedom of movement is protected under article 12 of the International Covenant on Civil and Political Rights (ICCPR) and includes a right to legally and practically leave Australia, as well as the right to enter, remain in, or return to one's 'own country'. 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties such as long standing residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[45]

1.21 Expanding the circumstances in which the minister may determine that a person's citizenship has ceased engages and may limit this right. For those whose citizenship ceases when they are outside Australia, they will lose the entitlement to

39 Article 26 of the ICCPR.

40 Article 14 of the ICCPR.

41 Article 15 of the ICCPR.

42 Article 14(7) of the ICCPR.

43 Convention on the Rights of the Child (CRC).

44 For example, the right to work; the right to social security; the right to an adequate standard of living; the right to health; the right to education.

45 UN Human Rights Committee, *General Comment No.27: Article 12* (Freedom of Movement) (1999). See also *Nystrom v Australia* (1557/2007), UN Human Rights Committee (1 September 2011).

return to Australia. Additionally, if they are in a country in which they do not hold nationality, the right to leave that other country may be restricted in the absence of any valid travel documents.

1.22 For those who are present in Australia at the time their citizenship ceases, as noted in the statement of compatibility these individuals will be entitled to an ex-citizen visa.[46] While this visa may allow the person to remain in Australia, in practice, it may operate to restrict any travel from Australia. This is because a person who leaves Australia on an ex-citizen visa loses any entitlement to return to Australia.[47] Further, an ex-citizen visa may be subject to cancellation on character grounds. As acknowledged in the statement of compatibility, an ex-citizen visa would be subject to mandatory visa cancellation if the person has a substantial criminal record and is serving a sentence of imprisonment against a law of the Commonwealth.[48] A person has a 'substantial criminal record' where they have been sentenced to a term of imprisonment of 12 months or more.[49] If a person has served a period of less than 12 months the cancellation of their visa is discretionary.[50] A person whose ex-citizen visa is cancelled will become an unlawful non-citizen and be subject to mandatory immigration detention and deportation.[51] As such, this will limit a person's right to remain in their 'own country' if the person has strong ties to Australia.

Right to liberty

1.23 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty. The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. In this respect, regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary. The right to liberty applies to all forms of deprivations of liberty, including immigration detention.

1.24 Expanding the circumstances in which the minister may determine that a person's citizenship has ceased engages and may limit this right. This is because, in the context of the existing law, a person present in Australia, whose citizenship has ceased, is likely to have their ex-citizen visa cancelled on character grounds. Following cancellation of this visa the ex-citizen would be subject to mandatory

46 Statement of compatibility (SOC), p. 10.

47 See section 35 of the *Migration Act 1958* (Migration Act).

48 SOC, p. 10.

49 Migration Act, section 501(7)(c).

50 SOC, p. 10.

51 Migration Act, section 189, 198.

immigration detention pending their deportation under the Migration Act.[52] Such persons are also prohibited from applying for most other visas.[53]

The right to protection of the family

1.25 The right to protection of the family protects family members from being involuntarily and unreasonably separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore engage this right.[54] A person whose Australian citizenship ceases may be prevented from returning to, or residing in, Australia, or traveling to another country. This may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Limitations on human rights

1.26 The right to freedom of movement, the right to liberty and the right to protection of the family may be subject to permissible limitations providing the measures limiting these rights meet certain 'limitation criteria', namely, they address a legitimate objective and are rationally connected and proportionate to this objective.

1.27 The statement of compatibility does not acknowledge that the right to liberty is engaged and may be limited and so does not provide an assessment of whether the limitation is permissible. Further, while the statement of compatibility acknowledges the measures engage the right to freedom of movement and the right to protection of the family, and explains the scope of impact on these rights, it does not undertake a full assessment as to whether the limitations are permissible according to the above limitation criteria.

Legitimate objective

1.28 The statement of compatibility states the objective of the measures is to 'protect national security, public order and the rights and freedoms of others'.[55] It also provides some information as to the importance of national security as a

52 Migration Act, section 189, 198.

53 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

54 *Winata v Australia,* UN Human Rights Committee Communication No.930/2000 (26 July 2001) [7.3].

55 SOC, p. 10.

pressing concern.[56] In general terms, national security, public order and the rights and freedoms of others has been recognised as being capable of constituting a legitimate objective for the purposes of international human rights law.[57] However, in order to establish whether these indeed are legitimate objectives in relation to these measures, further information is required as to whether there are currently pressing and substantial concerns which give rise to the need for the specific measures. While the statement of compatibility provides some information about the current national security environment, it does not fully address why current laws are insufficient to achieve the stated objectives and how the measures are necessary. Without further information it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

Rational connection

1.29 The statement of compatibility provides very limited information as to how the measures are rationally connected to (that is, effective to achieve) these objectives. In this respect, the statement of compatibility does not provide evidence or reasoning that loss of citizenship following conviction will necessarily achieve, for example, national security. Accordingly, without further information it is not possible to conclude that the measures are rationally connected to the stated objectives.

Proportionality

1.30 The statement of compatibility argues that the limitations that the measures impose on human rights are proportionate.

1.31 It identifies as a relevant safeguard, in relation to the right to leave a country, that the minister must be satisfied of certain matters prior to citizenship cessation:

> …the Minister must be satisfied the person would not become a person who is not a national or citizen of any country, the person may be able to obtain a travel document from another country, or they may be issued a temporary document by Australia.[58]

1.32 However, while this may be a possibility, it does not fully address concerns in a context where the other country of nationality may refuse to issue or may cancel a passport or other travel documents and Australia may decline to issue a temporary travel document.

1.33 Further, the proposed amendment to the threshold for determining dual citizenship raises additional concerns. As noted above, currently it is a condition precedent for making a determination that a person *is*, as a matter of fact, a national

56 SOC, pp. 7-8.

57 See, ICCPR article 12(3).

58 SOC, p. 10.

or citizen of a country other than Australia. By proposing that the minister only need to be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter. This is particularly the case noting that questions of dual nationality can be highly complex.

1.34 By amending the threshold in relation to dual nationality, the bill would also restrict the scope of judicial review as to the question of a person's dual nationality. This is because, rather than being able to look at evidence and examine whether a person held dual nationality as a question of jurisdictional fact, the court would be restricted to looking at the reasonableness of the minister's satisfaction or legality of the minister's decision. This means that a court may be unable to correct an error in circumstances where it may have been reasonable for the minister to be satisfied that a person was a dual citizen but the evidence before the court shows that they are not in fact a dual citizen. This raises serious concerns as to the proportionality of the measures, particularly noting the consequences that flow from the loss of citizenship. The statement of compatibility indicates that one of the reasons for altering the threshold is for consistency with other parts of the Citizenship Act. However, it is noted that matters of administrative convenience alone are generally insufficient for the purposes of permissibly limiting human rights.

1.35 In relation to the proportionality of the limitation on the right to liberty, the consequence of visa cancellation and detention following the cessation of Australian citizenship is of particular concern in relation to individuals who may have been rendered stateless, may not be accepted by another country, or have been found to engage Australia's non-refoulement obligations. This is because it gives rise to the prospect of prolonged or indefinite detention, noting that a person will be subject to mandatory immigration detention following visa cancellation.[59] Indeed, lowering the threshold for determining dual citizenship may exacerbate this prospect. The United Nations Human Rights Committee (UNHRC) has made clear that '[t]he inability of a state to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[60] In the absence of further

59 Migration Act, section 189, 198.

60 UN Human Rights Committee, *General Comment 35: Liberty and security of person* (2014) [18]. See, also, *C v Australia* (900/1999) UN Human Rights Committee (13 November 2002) [8.2]; *Bakhtiyari et al. v. Australia* (1069/2002) UN Human Rights Committee (6 November 2003) [9.3]; *D and E v. Australia* (1050/2002) UN Human Rights Committee (9 August 2006) [7.2]; *Shafiq v. Australia* (1324/2004) UN Human Rights Committee (13 November 2006) [7.3]; *Shams et al. v. Australia,* (1255/2004) UN Human Rights Committee (11 September 2007) [7.2]; *F.J. et al. v. Australia* (2233/2013) UN Human Rights Committee (2 May 2016) [10.4].

information, it appears that the measures may be incompatible with the right to liberty.

1.36 The removal of the requirement for a sentence of at least six years for 'relevant terrorism convictions' prior to citizenship cessation raises further concerns as to the proportionality of the measures. This is because it would allow a person's citizenship to be stripped where the person has received a much lesser or even a non-custodial sentence. In circumstances where a court has determined that a person's conduct does not warrant a longer sentence, it is unclear from the information provided why stripping the person of their citizenship is necessary to achieve the stated objectives of the bill. In this respect, it is noted that 'relevant terrorism convictions' relate to a broad range of offences including offences that relate to preparation, assistance or engagement. They also cover conduct that may be reckless rather than intentional.

1.37 Indeed, some of the offences which are 'relevant terrorism convictions' themselves raise human rights concerns. For example, the committee has previously raised specific concerns that the offence of entering or remaining in declared areas is likely to be incompatible with the right to a fair trial and the presumption of innocence, the prohibition against arbitrary detention, the right to freedom of movement and the right to equality and non-discrimination.[61] The fact that individuals may be subject to a loss of citizenship for such offences even where they are not sentenced to over six years imprisonment exacerbates concerns as to the proportionality of the measures.[62]

1.38 Further, while a person's citizenship may only be lost for 'relevant other convictions' where the term of imprisonment is more than 6 years, the scope of 'relevant other convictions' still raises human rights concerns. In this respect, the offences of espionage and foreign interference are among those defined as 'relevant other convictions' under the bill. However, the committee also previously raised concerns regarding the expanded scope of those espionage and foreign interference offences and human rights.[63] The retrospective application of provisions under the bill to all persons convicted of a terrorism offence after 12 December 2005 also raises further concerns that the measures may not be the least rights restrictive approach.

1.39 In relation to the proportionality of the limitation on the right to the protection of the family, the statement of compatibility explains that a decision to

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61 See, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) pp. 34-44; *Report 4 of 2018* (8 May 2018) pp. 88-90.

62 The bill, by extending the citizenship removal power to the offence of 'associating with a terrorist organisation', also raises additional questions in this context.

63 See, Parliamentary Joint Committee on Human Rights, National Security Legislation Amendment (Espionage and Foreign Interference) Bill, *Report 3 of 2018*, (27 March 2018) pp. 244-260.

cease a person's citizenship would be discretionary and the impact on family members would be considered in the decision making process. However, ministerial discretion alone is unlikely to be sufficient for the purposes of permissibly limiting a human right. In this respect, it is noted that there appears to be nothing to prevent the cancellation of a person's citizenship notwithstanding the impact of this decision on the right to the protection of the family.

1.40 Overall, the statement of compatibility does not provide reasons as to why the criminal process of arrest and prosecution ordinarily followed for all crimes, including the most serious crimes, is not capable of protecting national security, public order and the Australian community should persons who have engaged in the specified conduct be present in or return to Australia. This raises concerns that the measures may not be necessary or the least rights restrictive approach, as required to be a proportionate limitation on human rights.

Committee comment

1.41 The preceding analysis indicates that, in the context of the existing law, expanding the circumstances in which the minister may determine that a person's citizenship has ceased engages and may limit the rights to freedom of movement, liberty and the protection of the family. It raises serious concerns as to the compatibility of the measures with these rights.

1.42 The committee therefore requests the advice of the minister as to the compatibility of the measure with the right to freedom of movement, liberty and the right to the protection of the family, including:

- **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 measures are rationally connected to (that is, effective to achieve) that objective;**
- **whether the measures are proportionate, including:**
    - **why it is necessary to lower the threshold for determining dual citizenship, remove the requirement for a sentence of six years for 'relevant terrorism convictions' and apply citizenship loss provisions to the offence of associating with a terrorist organisation;**
    - **whether less rights restrictive approaches to achieving the stated objectives are reasonably available;**
    - **whether the offences specified as 'relevant terrorism convictions' or 'relevant other convictions' could be narrowed and the extent to which these offences are sufficiently circumscribed;**

- **whether consideration could be given to additional safeguards to ensure that a person is not subject to arbitrary detention (including the availability of periodic review of whether detention is reasonable, necessary and proportionate in the individual case or preventing prolonged detention);**
- **whether consideration could be given to explicitly requiring the minister to consider the impact of the citizenship loss on the right to protection of the family and the right to freedom of movement; and**
- **the existence of any other safeguards that may be relevant to the proportionality of the measures.**

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

1.43 Australia has 'non-refoulement' obligations under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[64] Non-refoulement obligations are absolute and may not be subject to any limitations.

1.44 As noted above, persons who are present in Australia at the time their citizenship ceases will be granted an ex-citizen visa.[65] However, an ex-citizen visa may be subject to cancellation on character grounds. An ex-citizen visa would be subject to mandatory cancellation if the person has a substantial criminal record (that is, the person has been sentenced to a term of imprisonment of 12 months) and is serving a sentence of imprisonment against a law of the Commonwealth.[66] If a person has served a period of less than 12 months, the cancellation of their visa is discretionary.[67] A consequence of a person's visa being cancelled is that the person will be classified as an unlawful non-citizen and will be liable to removal from Australia as soon as reasonably practicable.[68] Such persons are also prohibited from

64 Committee against Torture, *General Comment No.4 (2017) on the implementation of article 3 in the context of article 22* (9 February 2018).

65 SOC, p. 10.

66 Migration Act, section 501(3A).

67 SOC, p. 10.

68 Migration Act, section 198.

applying for most other visas.[69] The statement of compatibility does not address the compatibility of the measures with the obligation of non-refoulement.

1.45 The bill expands the bases upon which a person may be stripped of their citizenship, with the likely consequence of visa cancellation and removal. As such, the human rights compatibility of the underlying visa cancellation and removal provisions of the *Migration Act 1958* (Migration Act) are relevant to assessing whether the measures in the bill are compatible with Australia's non-refoulement obligations. In this respect, the committee previously concluded that expanded powers to cancel or refuse a person's visa under the Migration Act were likely to be incompatible with a number of human rights, including Australia's obligations in relation to non-refoulement and the right to an effective remedy.[70] The committee has also previously considered that section 197C of the Migration Act, by permitting the removal of persons from Australia unconstrained by Australia's non-refoulement obligations, is incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.[71]

1.46 Further, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[72] Such review mechanisms are important in

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69 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

70 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 195–217. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) pp. 13-28. The committee has also considered that measures introduced by the Migration Amendment (Validation of Decisions) Bill 2017, which retrospectively validated visa cancellation and refusal decisions that had been made in reliance on confidential information protected by a former provision of the Migration Act that had been found to be invalid by the High Court, was likely to be incompatible with a number of human rights: see *Report 11 of 2017* (17 October 2017) pp. 92-116; *Report 10 of 2017* (12 September 2017) pp. 5-26; *Report 8 of 2017* (15 August 2017) pp. 32-43. See, also, *Report 12 of 2018* (27 November 2018) pp. 2-22.

71 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78.

72 ICCPR, article 2 (the right to an effective remedy). See, for example, *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111.

guarding against the potentially irreparable harm which may be caused by breaches of Australia's non-refoulement obligations.[73]

1.47 Under the Migration Act there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds.[74] Further, there is no merits review of the original decision to cancel the person's citizenship.[75]

1.48 The committee has considered on a number of previous occasions that in the Australian domestic legal context, the availability of merits review would likely be required to comply with Australia's obligations under international law.[76] While judicial review of the minister's decision to strip a person of citizenship or cancel a person's visa on character grounds remains available, 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' of non-refoulement decisions.[77] This is because judicial review is only available on a number of restricted grounds 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.

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73 *Alzery v Sweden*, UN Human Rights Committee Communication No.1416/2005(20 November 2006) [11.8].

74 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the Administrative Appeals Tribunal (AAT): see section 500(1)(b) of the Migration Act. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the AAT not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the Migration Act. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

75 Citizenship Act, section 52.

76 See, most recently, in relation to the Migration Amendment (Strengthening the Character Test) Bill 2018, Parliamentary Joint Committee on Human Rights*, Report 12 of 2018* (27 November 2018) pp. 2-22. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

77 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84- 90. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

1.49 Further, in relation to the scope of judicial review afforded, by amending the threshold in relation to dual nationality, the bill would also restrict the scope of judicial review as to the question of a person's dual nationality. This is because, rather than being able to look at evidence and examine whether a person held dual nationality as a question of jurisdictional fact, the court would be restricted to looking at the reasonableness of the minister's satisfaction and the legality of the decision. This raises further concerns that the proposed expansion of the cessation of citizenship power is likely to be incompatible with Australia's non-refoulement obligations in the context of existing laws.

Committee comment

1.50 The preceding analysis indicates that, in the context of existing laws, the proposed expansion of the minister's power to determinate a person's citizenship has ceased is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy. This issue was not addressed in the statement of compatibility.

1.51 The committee therefore seeks the advice of the minister as to the compatibility of the measures with Australia's non-refoulement obligations and the right to an effective remedy.

Compatibility of the measure with the right to a fair trial and fair hearing, prohibition on double punishment and retrospective criminal law

1.52 The right to a fair trial and fair hearing apply to both criminal and civil proceedings. However, there are additional guarantees which apply in relation to criminal proceedings. This includes that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted (article 14(7) of the ICCPR). It also includes the prohibition on retrospective criminal laws, which requires laws to not impose criminal liability for acts that were not criminal offences at the time they were committed and that the law must not impose greater penalties than those which would have been available at the time the acts were done (article 15 of the ICCPR).[78]

1.53 Here, the concern is whether the measure is compatible with article 14(7) and article 15 of the ICCPR. This is because the amendments in the bill would apply to persons who committed offences or were convicted of offences prior to the commencement of the bill such that they may now be liable for a greater punishment. Further, there are concerns that loss of citizenship may constitute a double punishment. The effect of the proposed amendments would be that dual nationals convicted of a 'relevant terrorism conviction' of less than six years will be

78 The prohibition against retrospective criminal law is absolute and may never be subject to permissible limitations.

eligible for loss of citizenship. This would be the case regardless of the length of their sentence.

1.54 However, articles 14(7) and 15 of the ICCPR, will only apply if stripping citizenship constitutes a 'punishment' or 'penalty' within the meaning of those articles.

1.55 The statement of compatibility argues that the right to a fair trial and fair hearing is not 'in any way affected or limited by the proposed amendments'[79] and that proposed 'section 35A does not create a criminal offence' but rather 'allows for the imposition of a civil consequence in respect of a conviction and penalty that occurred prior to commencement.'[80]

1.56 However, as set out in the committee's *Guidance Note 2*, even if a penalty is classified as civil or administrative under domestic law it may nevertheless be considered 'criminal' under international human rights law. A penalty or punishment that is considered 'criminal' under international human rights law will engage criminal process rights under articles 14(7) and 15 ICCPR.[81]

1.57 The committee's *Guidance Note 2* sets out the relevant steps for determining whether penalty provisions may be considered 'criminal' for the purpose of international human rights law:

- first, the domestic classification of the penalty as civil or criminal (although the classification of a provision as 'civil' or 'administrative' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);
- second, the nature and purpose of the penalty: a penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, *and* where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.

1.58 Here, the second and third steps of the test are particularly relevant. Of relevance to step two, the minister states that section 35A is intended to be protective in relation to the safety and security of Australians. This purpose indicates that section 35A is less likely to be considered criminal under the second part of the test.

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79 SOC, p. 12.

80 SOC, p. 14.

81 Specific guarantees of the right to a fair trial in the determination of a criminal charge guaranteed by article 14(1) are set out in article 14(2) to (7). These include the presumption of innocence (article 14(2)) and minimum guarantees in criminal proceedings, such as the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1)).

1.59 Even if step two of the test is not established, a penalty may still be 'criminal' for the purposes of international human rights law under step three based on severity. As discussed above, loss of citizenship may lead to very severe consequences including ultimately deportation. Loss of citizenship may be considered to be a form of banishment in some circumstances.[82] It is noted that banishment has historically been regarded as one of the most serious forms of punishment.[83] As such is possible that loss of citizenship may be considered 'criminal' for the purpose of international human rights law.

Committee comment

1.60 The preceding analysis raises questions as to the compatibility of the proposed retrospective application of expanded powers to cease a person's citizenship with the prohibition on double punishment and retrospective criminal law.

1.61 The committee therefore seeks the advice of the minister as to the compatibility of the measures with the prohibition on double punishment and retrospective criminal law (including whether the loss of citizenship may be considered a 'criminal' penalty for the purposes of international human rights law).

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

1.62 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law. 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of

82 The loss of citizenship may be considered to be a form of banishment: See, J Bleichmar, 'Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law', *Georgetown Immigration Law Journal* (1999) 27. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14; Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"' 39(2) *Queen's Law Journal* (2014) 573; Audrey Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40(1) *Queen's Law Journal* (2014) 1-54.

83 See, Rebecca Kingston, 'The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France', (2005) 9 *Citizenship Studies*23. Macklin, Audrey and Rainer Baubock, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?' (February 2015), Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/14.

rights (indirect discrimination).[84] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular protected attribute (for example, nationality or national origin).[85] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[86]

1.63 The statement of compatibility acknowledges that the bill provides for differential treatment on the basis that it applies only to those persons who hold, or are eligible to hold, dual citizenship. This gives rise to the possibility that the measure may directly discriminate on the basis of dual nationality. Additionally, noting that the measures may have a disproportionate negative effect on the basis of national or social origin or race, this raises a concern in relation to the possibility of indirect discrimination. As such, the measures engage the right to equality and non-discrimination.

1.64 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.65 The statement of compatibility argues that the differential treatment does not constitute discrimination because:

> By acting against Australia and Australian interests in engaging in terrorism, a person has repudiated their allegiance to Australia. Cessation of Australian citizenship is proportionate to the seriousness of such conduct, and acts to protect Australia and the Australian community from further harm.[87]

1.66 As such, the statement of compatibility only provides a statement that the cessation of citizenship is proportionate to the seriousness of the conduct, without providing any analysis. As set out above, there are serious questions as to whether

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

85 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 (8 August 2003) [10.2].

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

87 SOC, p. 15.

the measures pursue a legitimate objective, are rationally connected to this objective and are proportionate. Accordingly, without further information, the measures may be incompatible with the right to equality and non-discrimination.

Committee comment

1.67 The preceding analysis raises questions as to the compatibility of the measures with the right to equality and non-discrimination.

1.68 The committee therefore requests the advice of the minister as to the compatibility of the measures with the right to equality and non-discrimination, in particular:

- **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 proportionate measure to achieve the stated objective (including how the measures are based on reasonable and objective criteria, whether the measures are the least rights-restrictive way of achieving the stated objective and the existence of any safeguards).**

Compatibility of the measures with the rights of the child

1.69 The Convention on the Rights of the Child (CRC) requires state parties to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.[88] Article 8 of the CRC provides that children have the right to preserve their identity, including their nationality, without unlawful interference. The terms 'nationality' and 'citizenship' are interchangeable as a matter of international law.

1.70 As the measures in the bill apply to children and may result in a child losing Australian citizenship,[89] they engage and may limit these rights. The enjoyment of a range of rights is tied to citizenship under Australian law, such that the removal of citizenship may negatively impact upon what is in the child's best interests.

1.71 However, the statement of compatibility argues that the measures are compatible with these rights. In relation to the obligation to consider the best interests of the child as a primary consideration, the statement of compatibility explains that:

> Where a child is involved in terrorist activities, and is held criminally responsible for their conduct under Australian law, the Government must

88 Article 3(1).

89 Under international law all people aged under 18 years are defined as children.

> balance the protection of the Australian community with the best interests of the child.
>
> The cessation power is discretionary and allows the Minister to take into account all the circumstances of each individual case. The Minister must expressly have regard to the best interests of the child as a primary consideration when reaching satisfaction on whether it is in the public interest for the child to remain an Australian citizen. The Minister also has the power to revoke a determination made under section 35A if a conviction (in relation to a child or otherwise) is later overturned or quashed.[90]

1.72 It is relevant to the compatibility of the measure that the cessation power is discretionary and the minister must have regard to the best interests of the child. However, it is noted that the best interests of the child appears to be only one of a number of factors in respect of which the minister must have regard. Indeed, the statement of compatibility states that 'the Government must balance the protection of the Australian community with the best interests of the child'.[91] It is noted in this respect that the UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…[92]

1.73 It follows that it would be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. As such, there are concerns that the measures as described may not be compatible with the obligation to consider the best interests of the child.

1.74 In relation to a child's right to preserve their identity including nationality, the statement of compatibility argues that cessation of a child's citizenship as a result of the amendments is 'reasonable, proportionate and necessary in light of the serious conduct of the child.'[93] However, both international human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[94] In this context, cessation of a child's citizenship on the basis of conduct

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90 SOC, p. 15.

91 SOC, p. 15.

92 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (29 May 2013).

93 SOC, p. 16.

94 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), http://www.un.org/documents/ga/res/40/a40r033.htm; Australian Institute of Criminology, *The Age of Criminal Responsibility*, https://aic.gov.au/publications/cfi/cfi106.

may not be in accordance with accepted understandings of the capacity and culpability of children under international human rights law. Further, international human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.[95] There are serious questions about the proportionality of the amendments in a context where a child as young as 10 may be subject to a loss of citizenship.

1.75 Further, as noted above, more generally, there are serious questions as to whether the measures pursue a legitimate objective, are rationally connected to that objective and are proportionate. The application of the amendments to children raises further concerns that the measures may not be the least rights restrictive approach.

Committee comment

1.76 The preceding analysis raises questions as to the compatibility of the measures with the rights of the child.

1.77 The committee therefore seeks the advice of the minister as to the compatibility of the measures with the rights of the child including whether any limitations are permissible, including:

- **the relative weight which will be given to the obligation to consider the best interests of the child as a primary consideration in the context of the proposed measures;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate measure to achieve the stated objective.**

95 CRC, article 40. See, also, UN Committee on the Rights of the Child, *General Comment 10: children's rights in juvenile justice* (2007) [10].

Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018

Purpose	Seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*, including to require prospective candidates in federal elections to provide information to demonstrate their eligibility to be elected under section 44 of the Constitution.
Portfolio	Special Minister of State
Introduced	House of Representatives, 29 November 2018
Rights	Privacy; right to take part in public affairs
Status	Seeking additional information

Collection and publication of information relating to a person's eligibility for election under section 44 of the Constitution

1.78 The bill would amend the *Commonwealth Electoral Act 1918* to provide that a person must complete all mandatory questions on a qualification checklist in order to validly nominate for a federal election.[1] It also seeks to require the Electoral Commissioner to publish the completed qualification checklist, along with any supporting documents provided by the nominee, on the website of the Australian Electoral Commission (AEC).[2]

1.79 The qualification checklist includes questions concerning the nominee's birthplace and citizenship, and other matters relevant to their eligibility for election (for example, the nominee's criminal history). It also includes questions concerning the birthplace and citizenship of related third parties, such as the nominee's biological and adoptive parents and grandparents, and current and former spouses.[3]

Compatibility of the measures with the right to privacy and the right to take part in public affairs

1.80 The right to privacy protects against arbitrary and unlawful interference with an individual's privacy and attacks on reputation. It includes respect for information privacy, including the right to control the storing, use and sharing of personal information. As acknowledged in the statement of compatibility, the publication and

1 Proposed section 170(1)(d). A definition of 'mandatory question' would be inserted by item 6 of the bill. The definition would include questions to which the answer is 'Yes' or 'No', or (if applicable) 'Unknown' or 'N/A'.

2 Proposed section 181A.

3 See proposed Form DB, in particular questions 1 to 9.

disclosure requirements with respect to the qualification checklist and supporting documents engage and limit the right to privacy.[4] In this respect, the statement of compatibility expressly notes that the requirements:

> …could cause third party personal information to be released, potentially without the individual's [the third party's] consent or knowledge – such as details of the citizenship status of a parent, grandparent, current or former spouse.[5]

1.81 The right to take part in public affairs guarantees the right of citizens to stand for public office, and requires that any administrative and legal requirements imposed on persons standing for office be reasonable and non-discriminatory. As acknowledged in the statement of compatibility, the requirements relating to the qualification checklist and supporting documents engage the right to take part in public affairs.[6] The requirements also limit this right by imposing additional eligibility requirements on persons nominating for election for public office.

1.82 The right to privacy and the right to take part in public affairs may be subject to permissible limitations under international human rights law. In order to be permissible, any limitation must pursue a legitimate objective and be rationally connected and proportionate to achieving that objective. The statement of compatibility states that, with respect to each right engaged by the bill, any limitations are reasonable, necessary and proportionate.[7]

1.83 In relation to the objectives of the measures, the statement of compatibility provides that:

> The purpose of publishing the Qualification Checklist and any accompanying documents is to increase transparency regarding candidates' eligibility and reassure Australians that persons nominating for elections are qualified to sit or be chosen under section 44 of the Constitution. Pursuing elected office is a serious endeavour. Making these details public encourages prospective candidates to seriously consider their eligibility status before nominating.[8]

1.84 Ensuring the eligibility of political candidates, and encouraging prospective candidates to consider their eligibility before nominating, are likely to be legitimate objectives for the purposes of international human rights law. In this respect, noting the disqualification of a number of parliamentarians under the eligibility requirements in section 44 of the Constitution during the 45th Parliament, the

4 Statement of compatibility (SOC), p. 11.

5 SOC, p. 12.

6 SOC, p. 14.

7 SOC, p. 14.

8 SOC, p. 12.

measures appear to address a pressing and substantial concern.[9] Mandating the collection and publication of information relevant to candidates' eligibility may be rationally connected to (that is, effective to achieve) this objective. However, it is noted that insufficient information is provided in the statement of compatibility about this issue, particularly in relation to how mandating the publication of the information would be effective to achieve the stated objectives of the measures.

1.85 Questions also arise as to the proportionality of the measures. In particular, the measures may go beyond what is strictly necessary to achieve their stated objectives. It appears that the identified objectives could be achieved by less rights-restrictive measures, such as requiring candidates to provide the checklist and supporting documents to the Electoral Commissioner and requiring confirmation, on the basis of the information provided, that the candidate is eligible for election under section 44 of the Constitution.

1.86 The statement of compatibility states that vetting qualification checklists and supporting documents for third party information and notifying affected persons prior to publication would impose a significant administrative burden on the AEC during the election period.[10] It is noted that it may be resource intensive for the AEC to review checklists and supporting documents to confirm candidates' eligibility during election periods. It is further acknowledged that there may be impediments to the AEC or the Electoral Commissioner confirming a candidate's eligibility, noting that eligibility under the Constitution is generally a matter for the High Court sitting as the Court of Disputed Returns.[11] However, it is not clear from the statement of compatibility why it is strictly necessary for the Electoral Commissioner to publish the qualification checklist and supporting documents on the AEC website. In this respect, it appears that the objectives of the measures could be achieved by assurances as to a candidate's eligibility either by the candidate or another body, with the qualification checklist and any supporting documents kept by the AEC as internal documents. Further information would assist in determining whether the measures are the least rights-restrictive means of achieving their stated objectives.

1.87 It is also unclear whether the measures are accompanied by adequate safeguards. In this respect, it is noted that the statement of compatibility does not identify any specific safeguards in relation to the right to take part in public affairs.

1.88 In relation to the right to privacy, the statement of compatibility states that the mandatary and voluntary questions in the qualification checklist are 'designed to

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9 The citizenship eligibility requirements in section 44 of the Constitution engage and limit the right to take part in public affairs, and also engage and may limit the right to equality and non-discrimination (on the basis of nationality). This may raise additional human rights concerns or questions.

10 SOC, p. 12.

11 Section 353 of the *Commonwealth Electoral Act 1918.*

elicit relevant general information, without asking for specific personal details such as birth date etc.'[12] However, a 'yes,' 'no', 'n/a' or 'unknown' in response to mandatory questions may still reveal significant personal information. Further, while such questions may be framed to collect more limited personal details, there is nothing that would prevent a nominee from disclosing further information, including the personal details of third parties, in response to a voluntary question. This risk is expressly noted in the statement of compatibility.[13] Moreover, it appears that even the mandatory questions could result in the disclosure of third party personal information without their consent or knowledge. For example, if the identities of a nominee's parents are already known, the measures may result in the publication of information that the nominee's parents were born overseas. This issue is not addressed in the statement of compatibility.

1.89 The statement of compatibility also identifies the following safeguards with respect to the right to privacy:

- prospective candidates may redact, omit or delete information from documents that they do not wish to be published;
- prospective candidates may not include the address of a silent elector in a document published on the AEC website without consent. Where the Electoral Commissioner becomes aware that such an address has been included in a document, the Commissioner must delete the address; and
- the Electoral Commissioner may omit, redact or delete from the qualification checklist or a supporting document any information that the Commissioner is satisfied (on reasonable grounds) is unacceptable, inappropriate, offensive or unreasonable.[14]

1.90 These safeguards are important and relevant to the proportionality of the measures. However, with the exception of the restrictions on publishing the address of a silent elector, they appear to rely on the discretion of the nominee and the Electoral Commissioner. Discretionary safeguards alone may be insufficient for the purposes of international human rights law. In this respect, it appears that while nominees may have some control over the extent to which their personal information is collected and released under the proposed requirements (that is, because they may choose to redact or omit some information), this protection may not extend to third parties. This is particularly the case given the absence of any requirement to consider the privacy of third parties, or obtain their consent, before including third party personal information in the qualification checklist or supporting documents.

12 SOC, p. 12.

13 SOC, p. 12.

14 SOC, p. 12. See also proposed sections 170B(3), (5) and (6).

1.91 The statement of compatibility indicates that that the Commissioner may have insufficient resources to vet the qualification checklist and supporting documents for third party personal information before the documents are published.[15] The statement of compatibility also does not explain how the Commissioner would determine whether a matter is 'unacceptable, inappropriate, offensive or unreasonable'. These matters raise concerns as to whether the discretion conferred on the Electoral Commissioner would operate as an adequate safeguard in practice.

1.92 Further information as to how each of the safeguards identified above would operate in practice would assist in determining whether the measures constitute a proportionate limitation on human rights.

Committee comment

1.93 The preceding analysis raises questions as to whether the measures are compatible with the right to privacy and the right to take part in public affairs.

1.94 Accordingly, the committee requests the minister's advice as to:

- **how the measures would be effective to achieve (that is, rationally connected to) their stated objectives; and**
- **whether the measures are proportionate to achieving their stated objectives, including:**
    - **whether the measures are the least rights-restrictive means of achieving their stated objectives (including whether publishing the qualifications checklist and supporting documents online is strictly necessary);**
    - **how the identified safeguards would ensure that the measures would, in practice, constitute a proportionate limitation on the right to take part in public affairs and the right to privacy (including safeguards to protect the rights of third parties whose personal information may be publicly disclosed, and any information as to how the Electoral Commission would determine whether a matter is 'unacceptable, inappropriate, offensive or unreasonable'); and**
    - **any other information that may be relevant to the proportionality of the measures.**

15 SOC, pp. 12-13.

Intelligence Services Amendment Bill 2018

Purpose	Enables the Minister to specify additional persons outside Australia who may be protected by an ASIS staff member or agent, and to provide that an ASIS staff member or agent performing specified activities outside Australia will be able to use force in the performance of an ASIS function.
Portfolio	Foreign Affairs
Introduced	House of Representatives, 29 November 2018
Rights	Life; liberty; torture, cruel, inhuman and degrading treatment or punishment.
Status	Seeking additional information

Use of force by ASIS staff members overseas

1.95 The bill passed both Houses on 5 December 2018 and received royal assent on 10 December 2018.

1.96 Prior to the amendments, section 6(4) of the *Intelligence Services Act 2001* (IS Act) provided that the Australian Secret Intelligence Service (ASIS) must not plan for or undertake activities that involve paramilitary activities, violence against the person, or the use of weapons, by staff members or agents of ASIS. This was subject to certain limited exceptions relating to the provision of weapons, training relating to the use of weapons, and the use of weapons or self-defence techniques, where it was provided to or used by a staff member of ASIS for the purpose of enabling the person to protect themselves, to protect a staff member or ASIS agent, to protect a person cooperating with ASIS under section 13 of the IS Act, or to provide training to ASIS staff members and agents.[1]

1.97 The bill amends the IS Act to provide that the minister may specify additional persons outside Australia who may be protected by an ASIS staff member or agent.[2]

1.98 The bill also amends the IS Act to introduce new subsection 6(5A) and new Schedule 3 to expand the circumstances in which ASIS staff and agents overseas may use force. Section 6(5A) provides that the general prohibition on activities in section

1 See section 6(5) and Schedule 2 of the IS Act. The provision of a weapon, or training in the use of a weapon or in self-defence techniques must be in accordance with Ministerial approval: section 1(1)(c) of Schedule 2 of the IS Act. For the use of a weapon or self-defence techniques, guidelines must have been issued by the Director-General of ASIS and the weapon or techniques must be used in accordance with those guidelines: section 1(2) of Schedule 2 of the IS Act.

2 See new section 1(1)(b)(iiia) and section 1(1A)(iv) of Schedule 2 of the IS Act.

6(4) of the IS Act does not prevent provision of weapons or training in the use of force, or the use of force or threat of force against a person in the course of activities undertaken by ASIS outside Australia in accordance with new Schedule 3 of the IS Act.

1.99 Schedule 3 provides that the use of force (including the use of a weapon) against a person, or the threat of the use of force against a person, in the course of activities undertaken by ASIS outside Australia is not prevented by the general prohibition on activities set out in section 6(4) of the IS Act if:

- the conduct is by a staff member or agent of ASIS; and
- the conduct is for the purpose of preventing, mitigating or removing:
  - a significant risk to a person's safety; or
  - a significant threat to security;[3] or
  - a significant risk to the operational security of ASIS from interference by a foreign person or entity; and
- the conduct is in accordance with Ministerial approval; and
- guidelines have been issued by the Director-General of ASIS;[4] and
- the conduct is in compliance with those guidelines.[5]

1.100 Similar requirements are imposed in relation to the provision of a weapon, or training in the use of force, however, for such activities there is no requirement for guidelines to be issued by the Director-General of ASIS.[6]

1.101 The minister must not give approval for the use of force or threat of use of force unless the minister has consulted with the Prime Minister, the Attorney-General, the Defence minister and any other minister who has responsibility for a

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3 'Security' is defined by reference to sections 4(a) and (aa) of the *Australian Security Intelligence Organisation Act 1979* to mean the protection of, and of the people of, the Commonwealth and the several States and Territories from espionage; sabotage; politically motivated violence; promotion of communal violence; attacks on Australia's defence system; or acts of foreign interference; whether directed from, or committed within, Australia or not; and the protection of Australia's territorial and border integrity from serious threats.

4 Section 2 of Schedule 3 sets out the requirements for guidelines issued by the Director-General of ASIS relating to the use or threat of use of force. Section 2 requires that a copy of the guidelines must be provided to the Inspector-General of Intelligence and Security, and that the Inspector-General of Intelligence and Security must brief the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on the content and the effect of the guidelines if so requested by the Committee or if the guidelines change.

5 Section 1(2) of Schedule 3 to the IS Act.

6 Section 1(1) of Schedule 3 to the IS Act.

matter that is likely to be significantly affected by the act that is to be approved.[7] The approving minister must also be satisfied, having regard to the purposes for which the approval is given, that there are satisfactory arrangements in place to ensure that nothing will be done pursuant to the approval beyond what is necessary; and that there are satisfactory arrangements in place to ensure that the nature and consequence of acts done under the approval will be reasonable.[8]

1.102 The bill also introduces section 6(5B) which provides that these new exceptions do not permit conduct by a person that:

- would constitute torture; or
- would subject a person to cruel, inhuman or degrading treatment; or
- would involve the commission of a sexual offence against any person; or
- is likely to cause the death of, or grievous bodily harm to, a person, unless the actor believes on reasonable grounds that the conduct is necessary to protect life or to prevent serious injury to another person.

1.103 The safeguards in section 6(5B) may be sufficient so as to ensure that any use of force would be compatible with Australia's obligations relating to torture, cruel, inhuman and degrading treatment or punishment (TCIDT), and the right to life. However, there are questions as to compatibility of the measure with the right to liberty and security of the person, discussed below.

Compatibility of the measure with the right to liberty and security of the person

1.104 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) prohibits states from depriving a person of their liberty except in accordance with the law, and provides that no one shall be subject to arbitrary detention. It applies to deprivations of liberty, rather than mere restrictions on whether a person can freely move around. However, a restriction on a person's movement may be to such a degree and intensity that it would constitute a 'deprivation' of liberty, particularly if an element of coercion is present.[9] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention

7 Section 1(3)(b) and (4)(a) of Schedule 3 to the IS Act.

8 Section 1(4)(b) of Schedule 3 to the IS Act.

9 United Nations Human Rights Committee, *General Comment No.27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9 (2 November 1999) [7]; see also United Nations Human Rights Council, *Report of the Working Group on Arbitrary* Detention, A/HRC/22.44 (22 December 2012) [55] and [57]; *Foka v Turkey,* European Court of Human Rights Application No.28940/95, Judgment (24 June 2008) [78]; *Gillan and Quinton v United Kingdom,* European Court of Human Rights Application No.4158/05, Judgment (12 January 2010) [54]-[57]; *Austin v United Kingdom,* European Court of Human Rights Application Nos. 39692/09, 40713/09 and 41008/09, Grand Chamber, (15 March 2012) [57]; *Gahramanov v Azerbaijan*, European Court of Human Rights Application No.26291/06, Judgment (15 October 2013) [38]-[45].

must not only be lawful, it must also be reasonable, necessary and proportionate in all the circumstances. Australia's obligations under the ICCPR are applicable in respect of its acts undertaken in the exercise of its jurisdiction to anyone within its power or effective control, even if the acts occur outside its own territory.[10]

1.105 The statement of compatibility states that the new powers for ASIS would allow for temporary restraint of persons, and to this extent acknowledges that 'this could infringe on a person's right to liberty'.[11] The statement of compatibility also acknowledges that the obligations under Article 9 of the ICCPR may apply beyond the territory of Australia.[12]

1.106 However, it states that any limitation on the right to liberty is permissible for the following reasons:

> …the measures provided in the Bill ensure that where this could occur, it is not done for an arbitrary purpose. Any such instances will only be lawful in limited circumstances as set out in Schedule 3 and the guidelines, and are scrutinised by the oversight mechanisms provided for in the Bill.
>
> Further, such approved activities would be necessary to protect the right to life and liberty of ASIS staff members and agents who are performing activities in accordance with Government requirements consistent with Australia's national interests.[13]

1.107 The statement of compatibility also explains:

> The amendments are intended to address current legal uncertainty as to whether the existing provisions enabling the use of a weapon or self-defence technique for protection also extend to the ability to apply pre-emptive force or a threat of force to restrain, control or compel a person in a situation where the ASIS staff member or agent anticipates that if this action is not taken at this early stage, matters are likely to escalate to a point where greater force would be required to address an immediate threat of harm to the staff member or agent or a colleague or other protected person.[14]

1.108 Protecting the right to life and liberty of ASIS staff members is likely to be a legitimate objective for the purposes of international human rights law. The use of

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10 United Nations Human Rights Committee, *General Comment No.31: The nature of the general legal obligation imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136 [107]-[111].

11 Statement of Compatibility (SOC), [25].

12 SOC, [24].

13 SOC, [26]-[27].

14 SOC, [18].

force in such circumstances, including the ability to temporarily restrain persons, appears also to be rationally connected to this objective.

1.109 The statement of compatibility also sets out a number of safeguards, including the oversight mechanisms by the Inspector-General of Intelligence and Security, the requirement for ministerial authorisation, the requirement for issuing guidelines and compliance with those guidelines, and the oversight by the PJCIS.[15] These safeguards are important and assist in determining the proportionality of the measures.

1.110 However, in order to be a proportionate limitation on human rights, a measure must be sufficiently circumscribed. This is because, without sufficient safeguards, powers may be exercised in such a way as to be incompatible with human rights. As noted above, the circumstances in which force can be used or threatened to be used are limited to where there is a 'significant risk' to a person's safety or a 'significant threat' to 'security' or 'operational security of ASIS from interference by a foreign person or entity'.[16] While 'security' is defined and the threshold of 'significant' risk or threat provides an important safeguard, it is not clear from the bill or the statement of compatibility what is meant by the term 'operational security' and what would constitute 'interference' so as to enliven the use of force power. Further information as to the meaning of these concepts would assist in determining whether the use of force power is proportionate.

1.111 Further, in relation to the guidelines to be issued by the Director-General, the statement of compatibility states that the guidelines 'further refine the principles on the use of weapons and self-defence techniques and the application of force respectively which must be applied'.[17] The statement of compatibility also emphasises that ASIS is required to comply with those guidelines, and that these guidelines are overseen by the Inspector General of Intelligence of Security and the PJCIS. Such guidelines may be capable, in practice, of providing sufficient safeguards to ensure that any deprivation of liberty that arises when exercising the use of force power is compatible with the right to liberty. However, in the absence of a copy of those guidelines or further information as to the proposed content of those guidelines, it is not clear whether the guidelines would be sufficient. Further information, including in relation to what safeguards will be included in the guidelines to ensure that any use of force is compatible with the right to liberty (for example, information as to time limits for which a person may be restrained), would assist in this respect.

15 SOC, [33]-[44].

16 Section 1(2) of Schedule 3 to the IS Act.

17 SOC, [23].

Committee comment

1.112 The preceding analysis indicates the proposed use of force power engages and may limit the right to liberty.

1.113 The committee seeks the advice of the minister as to the compatibility of the measure with this right, in particular:

- **whether the measure is sufficiently circumscribed for the purposes of proportionality, including the meaning of 'operational security' and what would constitute 'interference' so as to enliven to use of force power in section 1(2) of Schedule 3;**
- **in relation to the guidelines to be issued by the Director-General of ASIS, a copy of those guidelines or information, including in relation to what safeguards will be included in the guidelines to ensure that any use of force is compatible with the right to liberty (for example, information as to time limits for which a person may be restrained); and**
- **any other safeguards that may be relevant to the proportionality of the measure.**

Migration Amendment (Seamless Traveller) Regulations 2018 [F2018L01538]

Purpose	Introduces contactless processing at international entry points
Portfolio	Immigration, Citizenship and Multicultural Affairs
Authorising legislation	*Migration Amendment 1994*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 26 November 2018; tabled Senate 12 November 2018)
Right	Privacy
Status	Seeking additional information

Facial matching and disclosure to establish identity

1.114 The *Migration Amendment (Seamless Traveller) Regulations 2018* (the Regulations) amend the *Migration Regulations 1994* to provide for an additional method for travellers to establish their identity at international entry ports.

1.115 Under the amendments, an image of a person's face and shoulders can be compared with electronic passport details held by the Department of Home Affairs (the Department) using new SmartGate technology or another authorised system, instead of a physical passport. For all travellers, the electronic details are taken the first time a person travels on that passport or, for Australian citizens, they may also be obtained from the Department of Foreign Affairs and Trade.[1]

1.116 At ports where the new technology has not been introduced, or where identity cannot be established through contactless processing, a physical passport will still be required. Further, at ports where the technology has been introduced, travellers can still choose to be manually processed or use the old SmartGate technology if still available, which requires a physical passport.

Compatibility of the measure with the right to privacy

1.117 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 sharing of personal information.

1.118 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. As noted in the statement of compatibility,

1 Explanatory Statement, p. 8.

the instrument engages and limits the right to privacy because it allows the Department to collect, store, use and disclose the biometric information of people who choose to self-process through contactless processing and states that this limitation is permissible.[2]

1.119 The statement of compatibility identified a number of objectives of the measure. These included creating greater efficiencies in border processing and reducing the processing burden for travellers.[3] To be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. These objectives therefore do not appear to constitute a legitimate objective for the purposes of international human rights law.

1.120 However, another objective identified in the statement of compatibility is to confirm the identity of a person entering an international port.[4] The statement of compatibility explains that the 'ability to accurately collect, store, use and disclose biometric identification of all persons increases the integrity of identity, security, and immigration checks of people entering and departing Australia'.[5] However, while this may be capable of constituting a legitimate objective, the statement of compatibility does not identify how using the new SmartGate technology more accurately establishes identity than processing physical passports. As such, it is unclear how the measure addresses a pressing and substantial concern. Similarly, as the implementation of technology to allow processing without the need for a physical passport provides an alternative way of establishing identity, it is unclear how it is rationally connected to (that is, effective to achieve) the stated objective.

1.121 There are also concerns as to the proportionality of the measure. Limitations on the right to privacy must only be as extensive as is strictly necessary to achieve its legitimate objective. In this respect, there are 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.

1.122 The statement of compatibility states that the measure is proportionate to the objective and provides information identifying a number of safeguards. One of the identified safeguards is that the collection, storage, use and disclosure of personal information must be undertaken in accordance with the Australian Privacy Principles (APPs) in the *Privacy Act 1988* (Privacy Act), the *Australian Border Force Act 2015* and Part4A of the *Migration Act 1958*.[6]

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2 Statement of Compatibility (SOC), p. 6.

3 SOC, p. 2.

4 SOC, p. 5.

5 SOC, p. 5.

6 SOC, p. 4.

1.123 However, while biometric information is protected by the APPs and Privacy Act, compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including where its use or disclosure is authorised under an Australian Law,[7] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[8]

1.124 Other safeguards identified in the statement of compatibility are that travellers are notified ahead of attending a SmartGate about the collection of their personal information (through signage and pamphlets available at the airport and on the Department's website) and have the option of being manually processed instead.[9] These safeguards are relevant to the proportionality of the measure, however, it is uncertain in practice whether many travellers will understand which methods of entry will result in what kind of personal information being held, particularly after an international journey to enter Australia, and language barriers may pose additional difficulties for some travellers. Therefore, it is unclear whether these will be effective safeguards to ensure that the measure is proportionate to its objective.

1.125 Further, there are concerns regarding the security of the information that is collected and held. In this respect, the statement of compatibility does not identify what measures are in place to ensure the information collected is stored securely, and does not identify who is able to access the information. The statement of compatibility also does not identify the period of time for which the information is retained. The question of who can access travellers' biometric information, in what circumstances, and how long it is retained for is relevant to whether the measure is sufficiently circumscribed.

7 APP 9; APP 6.2(b).

8 APP 6.2(e).

9 SOC, pp. 3 and 5.

Committee comment

1.126 The preceding analysis raises questions about whether the measure in the Migration Amendment (Seamless Traveller) Regulations 2018 is compatible with the right to privacy.

1.127 The committee seeks the advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether this measure is rationally connected to (that is, effective to achieve) the objective; and**
- **whether the measure is a proportionate limitation, including whether the measure is sufficiently circumscribed and whether adequate and effective safeguards are in place to ensure the limitation on the right to privacy is proportionate.**

Migration Amendment (Streamlining Visa Processing) Bill 2018

Purpose	This bill seeks to amend the *Migration Act 1958* to enable the minister, in a legislative instrument, to specify groups of visa applicants who are required to provide one or more personal identifiers to make a valid visa application
Portfolio	Home Affairs
Introduced	House of Representatives, 29 November 2018
Rights	Privacy; equality and non-discrimination; rights of children
Status	Seeking additional information

Background

1.128 The committee has previously considered the broad discretionary power of the minister to collect biometric data or 'personal identifiers' from an individual under the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015.[1] This bill finally passed both houses of parliament and received Royal Assent on 26 August 2015 and was incorporated into the *Migration Act 1958* (the Migration Act).

Broad discretionary power to collect biometric data from classes of persons

1.129 The bill proposes to enable the minister to determine, by legislative instrument, to specify classes of persons who must provide one or more specified types of 'personal identifiers'[2] in one or more specified ways,[3] as a prerequisite to making a valid visa application. If an applicant in this specific class refuses to provide the required personal identifiers, they cannot make a valid visa application.[4]

1 Parliamentary Joint Committee on Human Rights, *Twenty-Fifth Report of the 44th Parliament* (11 August 2015) pp. 81-93.

2 Section 5A of the Migration Act: 'personal identifier' means any of the following: (a) fingerprints or handprints of a person (including those taken using paper and ink or digital livescanning technologies); (b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914* .

3 Proposed subsection 46(2B) of the bill.

4 Statement of Compatibility (SOC), p. 11.

Compatibility of the measure with the right to privacy

1.130 The right to privacy includes respect for informational privacy, including the right to respect for private information, particularly the storing, use and sharing of personal information.

1.131 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, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

1.132 The statement of compatibility acknowledges that the collection of personal identifiers engages and limits the right to privacy but argues that this limitation is justifiable.[5] It states that the measure seeks to ensure 'the integrity of Australia's visa system and the protection of the Australian community' and 'enables the department to identify visa applicants as soon as practicable, who are attempting to represent themselves as a particular person, but who are someone else'.[6] The statement of compatibility further explains that recent border and terrorism-related events worldwide mean that there is a need for measures to strengthen community protection, including the need for greater scrutiny of visa applicants and certainty that the identity presented by a visa applicant is their true identity.[7] This is likely to be a pressing and substantial concern, and therefore be a legitimate objective for the purposes of international human rights law. The proposed measure is also likely to be rationally connected to that objective.

1.133 To be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards. The statement of compatibility explains that the measure is proportionate as it assists in establishing with greater certainty the identity of the applicant, and collecting personal identifiers earlier in the assessment of an application will allow the Department to more efficiently manage and mitigate particular risks, including recent border and terrorism-related events worldwide.[8]

1.134 However, concerns raised in the human rights assessment of the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 in relation to the collection of 'personal identifiers' remain relevant.[9] Under international human rights law, in order to use technology in a manner that limits a person's right to

5 SOC, p. 14.

6 SOC, p. 13.

7 SOC, p. 14.

8 SOC, p. 14.

9 Parliamentary Joint Committee on Human Rights, *Twenty-Fifth Report of the 44th Parliament* (11 August 2015) pp. 82-86.

privacy, there must be appropriate safeguards and the approach taken must be the least rights restrictive method to achieve appropriate identity checks.

1.135 As noted above, the measure would provide the minister with broad powers to determine, by legislative instrument, classes of persons who must provide one or more specified types of 'personal identifiers' in applying for a visa. The breadth of the power raises concerns that the measure as drafted may be overly broad with respect to its stated objective. Indeed, there do not appear to be any specific limits on the exercise of the power in proposed section 46(2B). This raises concerns that the power may be exercised in a matter that is not compatible with human rights. It is therefore uncertain whether any instrument made under section 46(2B) will include sufficient safeguards to ensure that the measure is compatible with the right to privacy. As such, should the bill pass, much will depend on the content of the instrument and how the power is applied in practice as to whether it will be compatible with the right to privacy.

1.136 To the extent that current Australian privacy laws may apply to the collection of personal identifiers, there are questions as to whether the current laws would provide adequate and effective safeguards for the purposes of international human rights law. In particular, while the biometric information collected is a type of personal information protected by the Australian Privacy Principles (APPs) and the *Privacy Act 1988* (Privacy Act), compliance with the APPs and the Privacy Act does not necessarily provide an adequate safeguard for the purposes of international human rights law. This is because the APPs contain a number of exceptions to the prohibition on use or disclosure of personal information, including where its use or disclosure is authorised under an Australian Law,[10] which may be a broader exception than permitted in international human rights law. There is also a general exemption in the APPs on the disclosure of personal information for a secondary purpose where it is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.[11] Therefore, in the absence of greater safeguards in the bill, there are serious questions as to whether the safeguards currently provided under Australian law would be sufficient for the purposes of international human rights law.

1.137 The application of the measure to persons who may be incapable of understanding and consenting to the collection of personal identifiers also raises concerns in relation to the proportionality of the measure. While the statement of compatibility explains that in these circumstances a legal guardian will need to make arrangements for personal identifiers to be collected,[12] the broad nature of the power to determine classes of people, specify different types of personal identifiers

10 APP 9; APP 6.2(b).

11 APP; 6.2(e).

12 SOC, p. 18.

to be provided and the method in which information is collected, without any identification of any safeguards in place in relation to persons who cannot provide consent, suggests that the measure may not be proportionate to the objective.

1.138 There is also concern regarding the security of the biometric information collected. In this respect, the statement of compatibility does not identify what measures are in place to ensure the information collected is stored securely, who has access to this information, and the period of time in which the information is retained. These concerns are relevant to whether the measure is sufficiently circumscribed and accompanied by adequate and effective safeguards.

1.139 In light of these concerns, further information as to the proportionality of the power to collect personal identifiers from classes of persons would be of assistance in determining the human rights compatibility of the measure.

Committee comment

1.140 The preceding analysis raises questions as to the compatibility of the measure with the right to privacy.

1.141 The committee therefore requests the advice of the minister as to whether the limitations on the right to privacy contained in the Migration Amendment (Streamlining Visa Processing) Bill 2018 are proportionate to the stated objective, including:

- **whether the power to determine, by legislative instrument, classes of persons who must provide one or more specified types of 'personal identifiers' in one or more specified ways is sufficiently circumscribed and accompanied by adequate safeguards;**
- **whether there exists a detailed outline of the proposed instrument insofar as it relates to the right to privacy;**
- **whether adequate safeguards are in place for individuals incapable of understanding and consenting to the collection of personal identifiers; and**
- **any other matters relevant to the adequacy of the safeguards in relation to the collection, use, disclosure and retention of personal identifiers.**

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

1.142 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.

1.143 'Discrimination' under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the

enjoyment of rights (indirect discrimination).[13] The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral at face value or without intent to discriminate', but which exclusively or disproportionately affects people with a particular personal attribute.[14]

1.144 The statement of compatibility acknowledges that the measure may engage the right to equality and non-discrimination as it differentiates between citizens and non-citizens in order to regulate non-citizens coming into Australia.[15]

1.145 However, the statement of compatibility does not acknowledge that the right to equality and non-discrimination may also be engaged by the determination of 'classes of visa applicants'. It is unclear whether these classes could lead to distinctions based on protected attributes (such as, race, sex, religion or national origin) which could amount to direct discrimination. Additionally, the determination of 'classes of visa applicants' may also have a disproportionate negative effect on particular groups based on national origin, race or religion and therefore be potentially indirectly discriminatory. Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.

1.146 Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that legitimate objective and is a proportionate means of achieving that objective.

1.147 The statement of compatibility states that the determination of which class must provide personal identifiers targets certain non-citizens based on factors including:

> Australia's national security and fraud risks in visa caseloads (informed by objective information such as the Department's collection and analysis of statistics and intelligence information) and practical considerations such as the availability of personal identifier collection facilities.[16]

1.148 However, the statement of compatibility does not acknowledge the risk of 'targeting' or profiling of classes of visa applicants noting the broad scope of the

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

14 *Althammer v Austria*, Human Rights Committee Communication no. 998/01 [10.2].

15 SOC, p. 15.

16 SOC, p. 15.

power, which may be a possible limitation on the right to equality and non-discrimination and without adequate justification may not be a proportionate means of achieving the objective.

Committee comment

1.149 The preceding analysis indicates that the proposed expanded power to collect personal identifiers may engage and limit the right to equality and non-discrimination.

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

- **whether the measure is a proportionate means of achieving the stated objective (including whether there are other, less rights restrictive, measures reasonably available); and**
- **whether there are any safeguards in place to ensure that the determination of 'classes of persons' is based on reasonable and objective criteria.**

Compatibility of the measure with rights of the child

1.151 Children have special rights under human rights law taking into account their particular vulnerabilities. Children's rights are protected under a number of treaties, particularly the Convention on the Rights of the Child (CRC). All children under the age of 18 years are guaranteed these rights, including the right to protection from harmful influences, abuse and exploitation and the obligation to consider the best interests of the child.

1.152 The statement of compatibility acknowledges that the rights of the child are engaged by this measure. It states that it is in the child's best interests that personal identifiers be provided, given the risk of trafficking and smuggling and the disincentive the collection of personal identifiers will provide to people seeking to move a child into Australia without the consent or knowledge of one or more parents, and that any limitation on the right to privacy is necessary and proportionate to this objective.[17]

1.153 While the objective of preventing the trafficking of children is a legitimate objective for the purposes of international human rights law, and the collection of personal identifiers is likely rationally connected to that objective, there are concerns about the proportionality of the measure.

1.154 While the statement of compatibility notes that personal identifiers allow a higher level of certainty in establishing the identity of children than is possible with documents alone,[18] collection, use, disclosure and retention of biometric information

17 SOC, p. 17.

18 SOC, p. 17.

from children as young as 5 years is a serious intrusion into their privacy. It raises specific concerns that it may not be the least rights restrictive approach to achieving the stated objective.

1.155 Further, as raised in [1.135], the bill does not appear to set any limits on the exercise of the instrument-making power in proposed section 46(2B). It is unclear whether the instrument itself will contain adequate safeguards. Accordingly, without sufficient safeguards, it is possible that the instrument may impose limitations on the rights of the child that are not proportionate. For example, even though the statement of compatibility states that the policy intention is that taking personal identifiers from children be undertaken when their parents or legal guardians provide their personal identifiers for collection, much will depend on the content of the rules made under section 46(2B) and how the power is applied in practice. There is concern, then, that the bill provides for an overly broad discretionary power without adequate safeguards in the bill or in any instrument made under section 46(2A).

Committee comment

1.156 The committee seeks the advice of the minister as to the compatibility of the measure with the rights of the child, specifically whether the measure is compatible with the obligation to consider the best interests of the child and the child's right to privacy (including whether the limitation is proportionate given the broad nature of the discretionary power and whether adequate and effective safeguards exist).

Social Security (Pension Valuation Factor) Determination 2018 [F2018L01627]

Purpose	Prescribes the pension valuation factor that applies to a defined benefit income stream, for the purposes of determining a person's assets under the social security law
Portfolio	Social Services
Authorising legislation	*Social Security Act 1991*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 3 December 2018; tabled Senate 4 December 2018)
Right	Social security
Status	Seeking additional information

Specification of pension valuation factor for a defined benefit income stream

1.157 Under the *Social Security Act 1991* (Social Security Act), a person's eligibility for a number of social security benefits is based (in part) on the value of the assets the person owns or in which they have an interest.[1] The assets taken into account in determining a person's eligibility for a social security benefit, and the amount of social security that a person may receive, include defined benefit income streams.[2] Under the Social Security Act, the value of a defined benefit income stream as an asset is determined by multiplying the annual amount payable under the stream by the applicable 'pension valuation factor'.[3]

1.158 The Social Security (Pension Valuation Factor) Determination 2018 (2018 Determination) specifies the 'pension valuation factor' to be applied to a person's defined benefit income stream for a year. It also repeals the Social Security (Pension Valuation Factor) Determination 1998 (1998 Determination) which previously set the 'pension valuation factor'.

1.159 The pension valuation factor is determined on the basis of a person's age on their next birthday, and the indexation factor applicable to the relevant income

1 See, for example, section 1064 of the *Social Security Act 1991*: Rate of age, disability support, wife pensions and carer payment (people who are not blind).

2 'Defined benefit income stream' is defined in section 9(1F) of the *Social Security Act 1991*, and refers mainly to income streams arising out of superannuation funds.

3 Section 1120 of the *Social Security Act 1991*.

stream. The indexation factor is also set by the 2018 Determination, based on the method by which the income stream is indexed.[4]

Compatibility of the measure with the right to social security

1.160 Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health. Australia has obligations to progressively realise the right to social security, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of that right.[5]

1.161 By prescribing the 'pension valuation factor' for a defined benefit income stream, the measure engages the right to social security. This is because the measure would determine the value of a person's assets, which in turn determines whether a person is eligible for certain social security benefits and the amount of benefit they receive. If the measure increases the asset value of a person's income stream, and therefore reduces the person's eligibility for social security benefits, it may also constitute a backwards step in the progressive realisation of the right to social security.

1.162 Retrogressive measures, as a type of limitation, may be permissible under international human rights law provided that they address a legitimate objective and are rationally connected and proportionate to achieve that objective.

1.163 The statement of compatibility recognises that the right to social security is engaged by the measure, and argues that the measure supports that right. It also states that the instrument is 'purely administrative in nature, and does not interfere with a person accessing a minimum level of benefits'.[6] However, the statement of compatibility does not provide an assessment of how the measures are compatible with the right to social security. For example, it does not explain whether the measure may limit a person's eligibility for a social security benefit, or reduce the benefits to which a person may be entitled. In the absence of further information in the statement of compatibility, it is difficult to determine whether the measure is compatible with the right to social security.

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4 For example, section 7(2) of the 2018 Determination provides that, for an income stream that is indexed by reference to movements in salary, the indexation factor is taken to be a rate of at least 4 per cent but less than 5 per cent.

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

6 Statement of compatibility, p. 5.

Committee comment

1.164 The preceding analysis raises questions as to whether the measures are compatible with the right to social security.

1.165 Accordingly, the committee requests the minister's advice as to whether the measure is compatible with Australia's obligations not to take any backwards steps (retrogressive measures) in relation to the right to social security, in particular:

- **whether the measure may restrict a person's eligibility to receive a social security benefit, or reduce the benefits to which a person may be entitled, and if so:**
  - **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
  - **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
  - **whether the measure is a reasonable and proportionate means of achieving its stated objective (including whether any less rights restrictive measures may be reasonably available and the sufficiency of any relevant safeguards).**

Advice only

1.166 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.

Australian Cannabis Agency Bill 2018

Purpose	Seeks to establish the Australian Cannabis Agency with the responsibility to regulate the production and distribution of recreational cannabis in the Australian Capital Territory and the Northern Territory.
Legislation proponent	Senator Richard Di Natale
Introduced	Senate, 27 November 2018
Rights	Criminal process rights (civil penalties); privacy
Status	Advice only

Civil penalty provisions

1.167 The bill seeks to introduce civil penalty provisions of 500 penalty units for unlicensed production, distribution or sale of recreational cannabis or a breach of a licence condition.[1]

Compatibility of the measure with criminal process rights

1.168 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, if the proposed civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility does not acknowledge that criminal process rights may be engaged.

1.169 The committee's *Guidance Note 2* sets out the relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purpose of international human rights law:

- first, the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);

1 See proposed sections 56(4); 57(4); 57A(4); 58(4) of the bill.

- second, the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.

1.170 Here, the second and third steps of the test are particularly relevant as the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law. Under step two, the penalty would apply to persons in the Australian Capital Territory and Northern Territory who grow recreational cannabis without a licence. No information is provided in the statement of compatibility as to the purpose of the civil penalties and whether the penalties are restricted to a particular regulatory context. As such it is unclear whether the penalties should be characterised as 'criminal' under this aspect of the test.

1.171 As to the third step, a penalty is likely to be considered 'criminal' where it carries a substantial pecuniary sanction. However, this must be assessed with due regard to the regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. In this case, an individual could be exposed to a penalty of up to 500 penalty units (currently $105,000). A significant sanction such as this raises the concern that the penalty may be 'criminal' for the purposes of international human rights law.

1.172 If the civil penalties are assessed to be 'criminal' for the purposes of international human rights law, it does not mean that they need to be turned into criminal offences or are illegitimate. Rather, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. To the extent the penalties may be considered 'criminal' for the purposes of international human rights law, the statement of compatibility should explain how the civil penalties are compatible with these criminal process rights, including whether any limitations on these rights are permissible.

Monitoring and investigation powers

1.173 The bill also seeks to incorporate the standard provisions in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) to monitor compliance with the proposed provisions, and incorporate Part 3 of the Regulatory Powers Act to investigate the proposed civil penalty provisions or an offence against the *Crimes Act 1914* or the *Criminal Code* that relates to the bill.[2]

2 See proposed sections 60 and 61 of the bill.

1.174 The monitoring powers include powers of entry and inspection,[3] and the investigation powers include powers of entry, search and seizure.[4]

Compatibility of the measure with the right to privacy

1.175 The right to privacy prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. Use of search and entry powers would engage and limit the right to privacy of individuals subject to searches, including respect for the privacy of a person's home or workplace.

1.176 The statement of compatibility does not acknowledge that the proposed powers may engage the right to privacy and therefore does not provide an assessment of whether the measures engage and limit this right. The committee's expectation is that a statement of compatibility would address whether such a limitation on the right to privacy pursues a legitimate objective, is rationally connected to that objective and is proportionate.

Committee comment

1.177 The committee draws the legislation proponent's attention to the committee's *Guidance Note 2* on offence provisions, civil penalties and human rights in relation to criminal process rights.

1.178 The committee further draws the human rights implications of the measure in respect of the right to privacy to the attention of the legislation proponent and the Parliament.

1.179 If the bill proceeds to further stages of debate, the committee may seek further information from the legislation proponent with respect to the human rights implications of the bill.

3 See, for example, sections 18 and 19 of the *Regulatory Powers (Standard Provisions) Act 2014*.

4 See, for example, sections 48 and 49 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Foreign Influence Transparency Scheme Legislation Amendment Bill 2018

Purpose	Amends the *Foreign Influence Transparency Scheme Act 2018* to allow information published on the online register to remain publicly available after a person ceases to be registered
Portfolio	Attorney-General
Introduced	House of Representatives, 28 November 2018
Rights	Freedom of expression, freedom of association, right to take part in public affairs, privacy
Status	Advice only

Background

1.180 The bill passed in the House of Representatives on 4 December 2018 and in the Senate on 5 December 2018, and received Royal Assent on 10 December 2018.

1.181 The committee previously commented on the Foreign Influence Transparency Scheme Bill 2017 (the FITS Bill) in its *Report 1 of 2018* and *Report 3 of 2018*.[1] The FITS Bill established a scheme requiring persons to register where those persons undertook certain activities 'on behalf of' a 'foreign principal', including activities 'for the purpose of political or governmental influence'.

1.182 The obligation to publicly disclose, by way of registration, information about a person's relationship with a foreign principal and activities undertaken pursuant to that relationship engaged the freedom of expression, the freedom of association, the right to take part in the conduct of public affairs and the right to privacy.[2] The committee raised concerns as to the compatibility of the measures with these rights. This was because the definitions in the bill of 'on behalf of'[3], 'foreign principal'[4] and

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44; *Report 3 of 2018* (27 March 2018) pp. 189-206.

2 See, Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp. 34-44; *Report 3 of 2018* (27 March 2018) pp.192-203.

3 At the time of the committee's consideration of the FITS Bill, 'on behalf of' a foreign principal was defined in section 11 to mean undertaking activity: (a) under the arrangement with the foreign principal; or (b) in the service of the foreign principal; or (c) on the order or at the request of the foreign principal; or (d) under the control or direction of the foreign principal; or (e) with the funding or supervision by the foreign principal; or (f) in collaboration with the foreign principal.

'for the purpose of political and governmental influence'[5] did not appear to be sufficiently circumscribed to constitute a proportionate limitation on these rights.[6] The committee also raised concerns as to the compatibility of the bill with the right to equality and non-discrimination. This was because, while the bill did not directly target persons on the basis of nationality or national origin, the scheme may have indirectly discriminated on the basis of nationality or national origin because the registration requirement may have a disproportionate negative effect on persons or entities that have a foreign membership base.[7]

1.183 The analysis of the FITS Bill also raised concerns in relation to the power in the bill for the Secretary to make available to the public 'any other information prescribed by the rules'. The committee considered that this power may give rise to privacy concerns in relation to its operation. This was because the scope was such that it could be used in ways that may risk being incompatible with the right to privacy.[8]

1.184 After the committee's consideration of the FITS Bill, the bill was the subject of a number of amendments which narrowed the scope of the registration scheme. In particular, in the *Foreign Influence Transparency Scheme Act 2018* (FITS Act), the definition of 'on behalf of' was amended to remove from its scope activities undertaken 'with the funding or supervision by the foreign principal' and activities undertaken 'in collaboration with the foreign principal'. The definition of 'for the purpose of political or governmental influence' was also narrowed such that only the prescribed activities where the purpose was the 'sole or primary purpose, or a substantial purpose' would fall within the definition.[9] A number of additional

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4 At the time of the committee's consideration of the FITS Bill, 'foreign principal' was defined in section 10 of the bill to mean: (a) a foreign government; (b) a foreign public enterprise; (c) a foreign political organisation; (d) a foreign business; (e) an individual who is neither an Australian citizen nor a permanent Australian resident.

5 At the time of the committee's consideration of the FITS Bill, section 12 provided that a person would undertake an activity for the purpose of political or governmental influence if (1)….a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of any one or more of the following: (a) a process in relation to a federal election or a designated vote; (b) a process in relation to a federal government decision; (c) proceedings of a House of the Parliament; (d) a process in relation to a registered political party; (e) a process in relation to a member of the Parliament who is not a member of a registered political party; (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

6 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) p. 203.

7 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 203-206.

8 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 197-203.

9 *Foreign Influence Transparency Scheme Act 2018,* section 12.

exemptions from registration, including for registered charities, were also introduced.[10] These amendments partially addressed a number of the committee's concerns as to the human rights compatibility of the legislation.[11]

Publication of historical information after person ceases to be registered

1.185 The bill amended the FITS Act so that the Secretary would be required to continue to publish certain information about registered persons after they cease to be registered, including information that was published about that person before their registration ceased. The information to be made public includes the name of the person and the foreign principal, a description of the kind of registrable activities the person undertakes or undertook on behalf of the foreign principal, and any other information prescribed by the rules.[12]

Compatibility of the measure with the right to privacy

1.186 The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy, and recognises that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for information privacy, including the right to control the dissemination of information about one's private life. The statement of compatibility acknowledges that the right to privacy is limited by the requirement that historical information pertaining to the activities and relationships undertaken by persons on behalf of a foreign principal remain published online after a person ceases to be registered.[13]

1.187 As noted earlier, in the previous analysis of the FITS Bill, the committee raised concerns as to the broad scope in section 43(1)(c) of the bill (now section 43(1)(c) of the FITS Act) to make available to the public 'any other information prescribed by the rules'.[14] This was because the broad scope of the power could be exercised in ways that may risk being incompatible with the right to privacy. However, the committee noted that any safeguards in the proposed rules may be capable of addressing the concerns.

1.188 As the amendments to the FITS Act would allow information to be publicly disclosed after a person ceases to be registered, the concerns raised in the previous analysis, as to the broad power of the Secretary to make available further

10 *Foreign Influence Transparency Scheme Act 2018,* sections 24-30.

11 In particular, the narrower scope of the scheme means that the measures may be compatible with freedom of expression, freedom of association, the right to take part in the conduct of public affairs and the right to equality and non-discrimination.

12 See the amendments to section 43(1)(b) of *Foreign Influence Transparency Scheme Act 2018* and section 43 of the *Foreign Influence Transparency Scheme Act 2018.*

13 Statement of Compatibility (SOC) p.5.

14 Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018) pp. 197.

information as prescribed by rules, apply equally to the present bill. That is, to the extent that the power of the Secretary may be overly broad insofar as it applies to the publication of information of persons with an extant liability to register, it may also be overly broad insofar as it applies to the publication of historical information. Indeed, additional concerns may arise in the context of publishing historical information, as it is less clear how publishing information of persons who no longer are required to register (that is, they are no longer acting on behalf of a foreign principal) is rationally connected or proportionate to the legitimate objectives of increasing accountability for the foreign influence on political processes. There may also be concerns insofar as it is not clear whether there would be any time limits on the disclosure of historical information.

1.189 However, as noted in the previous analysis, safeguards in any legislative instrument enacted pursuant to section 43(1)(c) may be capable of addressing some of these concerns. The committee will consider the human rights compatibility of any legislative instrument pursuant to section 43(1)(c) when it is received.

Committee comment

1.190 The committee notes that its previous analysis of the Foreign Influence Transparency Scheme Bill 2017 raised concerns as to the compatibility of the bill with the right to privacy. By extending the operation of the scheme to allow publication of historical information, these concerns apply to the present bill.

1.191 The committee draws the human rights implications of the bill to the attention of the parliament.

Halal Certification Transitional Authority Bill 2018

Purpose	Establishes the Halal Certification Transitional Authority and sets out the Authority's powers, functions, appointment processes and other operational matters. Sets out the process by which the Authority certifies food as halal.
Legislation proponent	Senator Bernardi
Introduced	Senate, 28 November 2018
Rights	Criminal process rights (civil penalties); freedom of religion; presumption of innocence; privacy; work; equality and non-discrimination.
Status	Advice only

Halal certification scheme

1.192 The bill seeks to establish the Halal Certification Transitional Authority (the Authority), and to set up a scheme for certifying food as halal. Under the scheme, the Authority would be able to grant a person a halal certificate for a kind of food if satisfied that:

- the applicant is a 'fit and proper person' to hold a halal certificate; and
- the kind of food covered is halal.[1]

1.193 The Authority would be able to have regard to any other matters it considers relevant when deciding whether to grant a halal certificate.[2] The Authority would also be able to impose conditions on halal certificates, and to revoke a certificate if it reasonably believes that a condition has been breached.[3]

1.194 Additionally, the bill seeks to introduce civil penalty provisions of 500 penalty units, and strict liability offences of 50 penalty units, in relation to a person who, in the course of constitutional trade and commerce:[4]

- sells, or offers to sell, uncertified food as halal,[5] or
- certifies, or purports to certify, food as halal.[6]

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1 Proposed section 30(2).

2 Proposed section 30(3).

3 Proposed sections 31 and 34.

4 Proposed section 5 defines 'constitutional trade and commerce' as trade or commerce between Australia and places outside Australia, trade or commerce among the states, or trade or commerce within a territory, between a state and a territory or between two territories.

5 Proposed sections 38(3) and (4).

Compatibility of the measures with the right to freedom of religion, the right to work and the right to freedom of association

1.195 The right to freedom of religion includes the freedom to exercise religion or belief publicly or privately, alone or with others. By regulating the means by which halal food may be sold and certified, the measures in the bill may engage and limit the right to freedom of religion.[7]

1.196 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 freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. By requiring persons to be certified to sell food as halal, and by prohibiting persons from certifying food as halal, the measures may engage and limit the right to work. The measures may also engage and limit the right to freedom of association as, in the absence of limits on the matters the Authority may consider when deciding whether to grant a halal certificate, the Authority may refuse to grant a halal certificate on the basis of the nature or conduct of an applicant's associates.

1.197 Each of the rights identified above may be subject to permissible limitations provided that the measures pursue a legitimate objective and are rationally connected and proportionate to achieving that objective.

1.198 The statement of compatibility recognises that the bill engages the right to freedom of religion, and argues that the measures are a reasonable, necessary and proportionate limitation on that right.[8] However, it does not identify any engagement with the right to work and the right to freedom of association, and provides no assessment of whether the measures are compatible with those rights.

1.199 The statement of compatibility indicates that the objective of the bill is to address fraud and misrepresentation in the halal industry in response to community concerns.[9] This may be capable of constituting a legitimate objective for the purposes of international human rights law. However, limited evidence has been provided in the statement of compatibility that the measures address a pressing and substantial concern as is required to constitute a legitimate objective. Regulating the selling and certification of halal food may be rationally connected to the objective.

1.200 In relation to the proportionality of the measures, the statement of compatibility explains that '[t]he Bill makes clear that its provisions do not apply to

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6 Proposed sections 40(3) and (4).

7 *Cha'are Shalom Ve Tsedek v France*, European Court of Human Rights Application no. 27417/95 (2000).

8 Statement of compatibility (SOC), p. 10.

9 SOC, p. 10.

the extent that it infringes religious freedom'.[10] Additionally, all decisions of the Authority would be subject to review by the Administrative Appeals Tribunal.[11]

1.201 These matters assist the proportionality of the measures. However, the discretion afforded to the Authority in relation to halal certificates is very broad. In this respect, it is noted that there do not appear to be any limits on the Authority's power to grant or refuse a certificate, beyond the requirements that the applicant be a 'fit and proper person' and the relevant food be halal. Moreover, there do not appear to be any limits on the matters the Authority may consider when determining whether a person is 'fit and proper' to hold a halal certificate. These matters raise concerns that the measures may not be appropriately circumscribed.

1.202 The prohibition on selling, or offering to sell, uncertified food as halal, and the associated offences and civil penalty provisions, raise additional concerns in relation to the proportionality of the measures. In this respect, it is noted that certain kinds of foods (for example, fruits and vegetables) are automatically considered halal, and would not generally require certification. Other foods, such as meat products, are only considered halal if they have been prepared in accordance with Islamic law. Despite these distinctions, the bill appears to impose a blanket prohibition on selling food as halal without a certificate issued by the Authority. As such, the restriction on freedom of religion may be extensive.

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

1.203 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.204 'Discrimination' under articles 2 and 26 of the ICCPR includes both measures that have a discriminatory intent (direct discrimination) and measures that have a discriminatory effect on the enjoyment of rights (indirect discrimination).[12] 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.[13]

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10 SOC, p. 10. See also proposed section 9.

11 Proposed section 50.

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

13 *Athammer v Austria,* Communication No. 998/2001, CCPR/C/78/D/998/2001 (2003) [10.2].

1.205 Where a measure impacts disproportionately on a particular group, it establishes *prima facie* that there may be indirect discrimination.[14] Halal food is food that adheres to Islamic law, and is primarily bought, sold and consumed by persons from Muslim backgrounds. Consequently, regulating the sale and certification of halal food may disproportionately affect persons from that group. This raises concerns regarding discrimination on the basis of religion.

1.206 The statement of compatibility does not acknowledge that the right to equality and non-discrimination is engaged, and therefore provides no assessment as to whether the measures are compatible with that right.

Civil penalty provisions

1.207 As outlined above at [1.194], the bill seeks to introduce civil penalties of 500 penalty units for selling, or offering to sell, uncertified food as halal and for certifying, or purporting to certify, food as halal.

Compatibility of the measure with criminal process rights

1.208 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, where civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they must be shown to be compatible with the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

1.209 In this case, as the relevant civil penalties are substantial (500 penalty units, or $105,000) this raises concerns that they may be considered 'criminal' for the purposes of international human rights law due to their severity. The committee's *Guidance Note 2* sets out the relevant steps for determining whether civil penalty provisions may be considered 'criminal' for the purposes of international human rights law. However, this issue was not addressed in the statement of compatibility.

Strict liability offences

1.210 As outlined above at [1.194], the bill seeks to introduce strict liability offences, punishable by 50 penalty units, for selling or offering to sell uncertified food as halal, and for certifying, or purporting to certify, food as halal.

Compatibility of the measure with the presumption of innocence

1.211 Article 14(2) of the ICCPR provides that anyone charged with a criminal offence has the right to be presumed innocent until proven guilty. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. Strict liability offences

14 *D.H. and Others v the Czech Republic,* European Court of Human Rights Application no. 57325/00 (2007); *Hoogendijk v the Netherland,* European Court of Human Rights Application no. 58641/00 (2005).

engage the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault.

1.212 The statement of compatibility acknowledges that the strict liability offences engage and limit the presumption of innocence, and argues that any limitations on human rights are reasonable, necessary and proportionate.[15] However, it does not provide an assessment of whether the strict liability offences are compatible with the right to the presumption of innocence. As such, it does not meet the committee's expectations for statements of compatibility as set out in the committee's *Guidance Note 1.*

Monitoring and investigation powers

1.213 The bill seeks to incorporate the standard provisions in Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). This would enable authorised officers to monitor compliance with the bill, and to investigate potential breaches of the proposed civil penalty provisions and offences against the *Crimes Act 1914* and the *Criminal Code* that relate to the bill. The monitoring powers include powers of entry and inspection,[16] and the investigation powers include powers of entry, search and seizure.[17]

Compatibility of the measure with the right to privacy

1.214 The right to privacy includes respect for the home, which prohibits arbitrary interference with a person's home and workplace. It also includes respect for informational privacy, including the right to control the dissemination of information about one's private life. By enabling authorised officers to search premises and seize evidential material, the measures engage and limit the right to privacy.

1.215 The statement of compatibility recognises that the monitoring and investigation powers engage and limit the right to privacy, and argues that the limitation is reasonable, necessary and proportionate.[18] However, no assessment is provided as to the compatibility of the measures with that right.

Committee comment

1.216 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.217 If the bill proceeds to further stages of debate, the committee may seek further information from the legislation proponent with respect to the human rights implications of the bill.

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15 SOC, p. 10.

16 See, for example, sections 18 and 19 of the *Regulatory Powers, Standard Provisions Act 2014.*

17 See, for example, sections 48 and 49 of the *Regulatory Powers, Standard Provisions Act 2014.*

18 SOC, p. 10.

International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018

Purpose	Seeks to enable sanctions to be imposed for the purposes of compliance with Australia's obligations under international law
Legislation proponent	Mr Danby MP
Introduced	House of Representatives, 3 December 2018
Rights	Privacy; fair hearing; protection of the family; adequate standard of living; freedom of movement; non-refoulement; equality and non-discrimination
Status	Advice only

Power to make regulations to impose sanctions

1.218 The bill seeks to enable the Governor-General to make regulations to impose immigration sanctions,[1] or financial or trade sanctions,[2] on prescribed foreign persons[3] in circumstances where the Governor-General is satisfied that the purpose of the regulation is:

- to provide accountability for, or be a deterrent to, gross violations of human rights or significant corruption; or
- to otherwise promote compliance with international human rights law or respect for human rights.[4]

1 Section 7(4) of the bill defines 'immigrations sanctions' as regulations that provide that an application by the person under the *Migration Act 1958* for the visa is not a valid application; or permit the Minister administering the *Migration Act 1958* to cancel a visa held by a person under the Act.

2 Section 7(4) of the bill defines 'financial or trade sanctions' as regulations that restrict or prevent uses of, dealings with, or the making available of, assets owned, held or controlled by the person; or restrict or prevent the supply, sale, transfer, import or export of goods or services by the person or to the person.

3 'Foreign person' is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975* to mean, relevantly, an individual not ordinarily resident in Australia. Section 5 of that Act provides that an individual who is not an Australian citizen is 'ordinarily resident' in Australia at a particular time if and only if: (a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and (b) at that time: (i) the individual is in Australia and the individual's continued presence in Australia is not subject to any limitation as to time imposed by law; or (ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.

4 Section 7(2) of the bill.

Compatibility of the measure with multiple rights

1.219 The statement of compatibility states that the bill does not engage any of the applicable rights or freedoms.[5]

1.220 The bill establishes the regulation-making power under which sanctions can be made, rather than setting out the terms or specific effects of the sanctions. The human rights compatibility of any sanctions introduced therefore will depend on the content of any regulations introduced pursuant to the bill.

1.221 More generally, by imposing sanctions on persons for the purpose of compliance with international human rights obligations, the bill promotes human rights. In this respect, it is noted that in recent years a number of countries have considered or introduced 'Magnitsky' sanctions legislation so as to enable sanctions regulations to be made for the purpose of responding to gross human rights violations.[6] Further, as the definition of 'foreign person' is limited to individuals not ordinarily resident in Australia,[7] the number of persons to whom Australia owes human rights obligations (that is, individuals located in Australia or subject to Australia's jurisdiction) that would be affected by the sanctions appears to be very small.

1.222 However, to the extent the sanctions regime may affect individuals within Australia's jurisdiction, the committee has previously noted that sanctions regimes engage and may limit a number of human rights for individuals who may be subject to sanctions, including:

- the right to privacy;
- the right to a fair hearing;
- the right to protection of the family;
- the right to an adequate standard of living;
- the right to freedom of movement;
- the prohibition against non-refoulement; and

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5 Statement of Compatibility (SOC), p.1.

6 See, for example, the report of the United Kingdom Joint Committee on Human Rights, which supported the inclusion of a 'Magnitsky clause' as part of its inquiry into the Sanctions and Anti-Money Laundering Bill: United Kingdom Joint Committee on Human Rights, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (28 February 2018) [18]; United Kingdom House of Commons Library, *Magnitsky Legislation Briefing Paper* (6 July 2018). See also, for example, Canada: *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law),* SC 2017, c.21.

7 See section 4 of the *Foreign Acquisitions and Takeovers Act 1975*. The explanatory memorandum to the bill explains that the bill is intended to apply to persons or entities engaged in commercial dealings, trades or using assets within Australia: See explanatory memorandum (EM) to the bill, p.1.

- the right to equality and non-discrimination.[8]

1.223 For example, the right to privacy is engaged by sanctions regimes because the freezing of a person's assets imposes a limit on a person's private life, free from interference by the state.[9] Further, the right to protection of the family is engaged insofar as persons subject to the proposed sanctions may be liable to have their visa cancelled,[10] making the person liable to deportation which may result in that person being separated from their family.[11] Further discussion of the rights engaged and limited by sanctions regimes can be found in the committee's *Report 6 of 2018* (26 June 2018) pp.104-131.

1.224 To the extent these rights may be subject to permissible limitations under international human rights law,[12] the measures will be permissible where the measures seek to achieve a legitimate objective, and are rationally connected and proportionate to achieving that objective.

1.225 Noting that the purpose of the proposed sanctions is to 'promote compliance with international human rights law and respect for human rights',[13] it is likely that the bill pursues a legitimate objective for the purposes of international human rights law. The imposition of sanctions in circumstances where a person has violated human rights is also likely to be rationally connected to this objective.

1.226 In the absence of the content of any sanctions regulations, it is difficult to ascertain whether any limitations on human rights arising from the bill are proportionate. However, if the bill passes and regulations are introduced pursuant to the bill, the existence of safeguards in any sanctions regulations would be important to prevent arbitrariness and error, and ensure that the powers are exercised only in appropriate circumstances. Relevant safeguards that would assist in ensuring that

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8 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp 104-131. See also *Report 4 of 2018* (8 May 2018) pp. 64-83; *Report 3 of 2018* (26 March 2018) pp. 82-96; *Report 9 of 2016* (22 November 2016) pp. 41-55; *Thirty-third report of the 44th Parliament* (2 February 2016) pp. 17-25; *Twenty-eighth report of the 44th Parliament* (17 September 2015) pp. 15-38; *Tenth Report of 2013* (26 June 2013) pp. 13-19; *Sixth Report of 2013* (15 May 2013) pp. 135-137.

9 See, most recently, Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 108.

10 See section 7(4) of the bill.

11 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 109. This aspect of the proposed immigration sanctions also engages the right to freedom of movement: Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) p. 109.

12 Australia's obligations in relation to *non-refoulement* are absolute and may not be subject to any limitations.

13 SOC, p.1.

the proposed sanctions would be proportionate include the availability of review (merits and judicial review) of determinations to prescribe a person for the purposes of the sanctions regime, and providing for an opportunity for a prescribed person to be heard.[14]

1.227 Further, the broad regulation-making power introduced by the bill may raise additional human rights concerns, as international human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.[15] This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

Committee comment

1.228 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the Parliament.

1.229 If the bill proceeds to further stages of debate, the committee may seek further information from the legislation proponent with respect to the human rights implications of the bill.

14 Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 104-131.

15 See the discussion of the human rights implications of expressing legal discretion of the executive in overly broad terms in *Hasan and Chaush v Bulgaria,* European Court of Human Rights Application no. 30985/96 (26 October 2000) [84].

Sex Discrimination and Marriage Legislation Amendment (Protecting Supporters of Traditional Marriage) Bill 2018

Purpose	Would amend the *Marriage Act 1961* to provide that no category of celebrant (either religious or non-religious) is bound to solemnise any marriage on the grounds of their individual conscience and would amend the *Sex Discrimination Act 1984* to permit discrimination in connection with the solemnisation of a marriage.
Legislation proponent	Senator Anning
Introduced	Senate, 4 December 2018
Rights	Equality and non-discrimination
Status	Advice only

Discrimination in connection with the solemnisation of a marriage

1.230 The bill proposes to amend the *Marriage Act 1961* (Marriage Act) to provide that no category of authorised marriage celebrant (religious[1] or non-religious) is bound to solemnise a marriage on the grounds of their individual conscience.[2]

1.231 The *Sex Discrimination Act 1984* (SDA) currently provides that it is unlawful to discriminate against a person in the provision of goods, services or facilities, on specified grounds.[3] The bill would amend the SDA to provide that in the course of providing, or offering to provide, goods, services or facilities in connection with the solemnisation of a marriage it will not be unlawful to discriminate against someone because of their sexual orientation, gender identity, intersex status, marital or relationship status.[4]

1 The Marriage Act currently grants a minister of religion of a recognised denomination discretion as to whether or not to solemnise a marriage on religious grounds where this is in accordance with their religious doctrines, tenets and beliefs; where necessary to avoid injury to the religious susceptibilities of adherents of that religion; or where the minister's religious beliefs do not allow the minister to solemnise the marriage: section 47 of the Marriage Act. Similar protections are available to those who are religious celebrants.

2 Item 3, proposed section 47AA of the Marriage Act.

3 The SDA currently provides an exemption to a body established for religious purposes, for any other act or practice, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

4 Item 10, proposed section 38A of the SDA.

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

1.232 The right to equality and non-discrimination is protected by articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).[5] This right requires state parties to have laws and measures in place to ensure that people are not subjected to discrimination by others.

1.233 By permitting discrimination in connection with the solemnisation of a marriage on the basis of sexual orientation, gender identity, intersex status, marital or relationship status, the measure engages and limits the right to equality and non-discrimination. The statement of compatibility states that the bill 'engages the right to freedom of thought, conscience and religion by ensuring that no burdens of conscience are placed on those persons who object to marriages other than between a man and a woman'. However, while the measure seeks to permit discrimination in the provision of goods, services and facilities, the statement of compatibility provides no assessment of the impact of the proposed amendments on the right to equality and non-discrimination.[6] As such it does not meet the standards outlined in the committee's *Guidance Note 1*.

1.234 On a number of occasions, the committee has considered the requirement for registered civil marriage celebrants (who are not ministers of religion, chaplains or religious celebrants) to abide by anti-discrimination laws.[7] While noting this requirement limits the right to freedom of conscience and religion, the committee has previously concluded that the limitation is proportionate and permissible under international human rights law.[8]

1.235 The committee has previously also raised concerns about proposed amendments to the SDA to expand the categories of people (and organisations) who would be permitted, in providing goods, services or facilities in connection with the

5 The International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits discrimination in relation to rights set out that treaty. Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of non-discrimination obligations, including the specific elements that state parties are required to take into account to ensure the rights to equality for women.

6 Statement of compatibility (SOC) p. 4.

7 See, Parliamentary Joint Committee on Human Rights, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, *Report 13 of 2017* (5 December 2017) pp. 19-37; Marriage Legislation Amendment Bill 2016; Marriage Legislation Amendment Bill 2016 [No.2], Freedom to Marry Bill, *Report 8 of 2016* (9 November 2016) pp. 33-44; Marriage Legislation Amendment Bill 2015, *Thirtieth Report of the 44th Parliament* (10 November 2015) pp.112-124.

8 Parliamentary Joint Committee on Human Rights, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, *Report 13 of 2017* (5 December 2017) pp. 19-37.

solemnisation of a marriage, to discriminate against a person because of their sexual orientation, gender identity, intersex status, marital or relationship status.[9]

Committee comment

1.236 The committee draws the human rights implications of the bill to the attention of the legislation proponent and the parliament.

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

9 Parliamentary Joint Committee on Human Rights, Freedom to Marry Bill, *Report 8 of 2016* (9 November 2016) pp. 33-34. See, also, Parliamentary Joint Committee on Human Rights, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, *Report 13 of 2017* (5 December 2017) pp. 34-35.

Bills not raising human rights concerns

1.238 Of the bills introduced into the Parliament between 3 and 6 December, 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):

- Aboriginal Land Rights (Northern Territory) Amendment (Land Scheduling) Bill 2018
- Coal-Fired Power Funding Prohibition Bill 2018
- Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018
- Defence Legislation Amendment Bill 2018
- Environment Protection and Biodiversity Conservation Amendment (Heritage Listing for the Bight) Bill 2018
- Galilee Basin (Coal Prohibition) Bill 2018
- Live Animal Export Prohibition (Ending Cruelty) Bill 2018
- Live Sheep Long Haul Export Prohibition Bill 2018 (No. 2)
- Major Sporting Events (Indicia and Images) Protection Amendment Bill 2018
- Migration Amendment (Urgent Medical Treatment) Bill 2018
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Regulations References) Bill 2018
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Regulations References) Bill 2018
- Parliamentary Service Amendment (Post-election Report) Bill 2018
- Social Security Commission Bill 2018
- Tertiary Education Quality and Standards Agency Amendment Bill 2018
- Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

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 available on the committee's website.[1]

Migration Amendment (Strengthening the Character Test) Bill 2018

Purpose	Seeks to amend the *Migration Act 1958* to provide additional grounds for visa cancellation or refusal where a non-citizen commits a 'designated offence'
Portfolio	Immigration, Citizenship and Multicultural Affairs
Introduced	House of Representatives, 25 October 2018
Rights	Non-refoulement; effective remedy; expulsion of aliens; liberty; protection of the family; rights of children; freedom of movement; privacy
Previous reports	12 of 2018
Status	Concluded examination

Background

2.3 The committee first reported on the bill in its *Report 12 of 2018*, and requested a response from the Minister for Immigration, Citizenship and Multicultural Affairs by 10 December 2018.[2]

2.4 The minister's response to the committee's inquiries was received on 14 December 2018. The response is discussed below and is available in full on the committee's website.[3]

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

2 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 2-22.

Power to cancel or refuse a visa when a non-citizen commits a 'designated offence'

2.5 The bill seeks to introduce amendments to the character test in section 501 of the *Migration Act 1958* (Migration Act) so that the minister may cancel or refuse a non-citizen's visa where the non-citizen has been convicted of a 'designated offence'.[4] A 'designated offence' is an offence against a law in force in Australia or a foreign country where one or more of the physical elements of the offence involves:

- violence against a person, including (without limitation) murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence; or
- non-consensual conduct of a sexual nature, including (without limitation) sexual assault and the non-consensual commission of an act of indecency or sharing of an intimate image; or
- breaching an order made by a court or tribunal for the personal protection of another person; or
- using or possessing a weapon.[5]

2.6 The definition of 'designated offence' also includes ancillary offences in relation to the commission of a designated offence, such that a person may fail the character test and be liable for visa refusal or cancellation where a person is convicted of an offence where one or more of the physical elements of the offence involves:

- aiding, abetting, counselling or procuring the commission of an offence that is a designated offence; or
- inducing the commission of an offence that is a designated offence, whether through threats or promises or otherwise; or
- being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence; or
- conspiring with others to commit an offence that is a designated offence.[6]

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3 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

4 Section 501(6)(aaa) of the bill. Some of these powers to cancel a person's visa may be exercised by a delegate of the minister: see section 501(1) and 501(2).

5 Section 501(7AA)(a)(i)-(iv) of the bill. 'Weapon' is defined to include a thing made or adapted for use for inflicting bodily injury, and a thing where the person who has the thing intends or threatens to use the thing, or intends that the thing be used, to inflict bodily injury: section 501(7AB) of the bill.

6 Section 501(7AA)(a)(v)-(viii) of the bill.

2.7 Further, to be a 'designated offence', the offence must be punishable by imprisonment for life, for a fixed term of not less than two years, or for a maximum term of not less than two years.[7]

2.8 The minister may already cancel or refuse a person's visa on the basis of the person's past or present criminal conduct.[8] However the existing framework generally focuses on a sentence-based approach whereby, for example, the determination of whether a person has a 'substantial criminal record' is by reference to a person's sentence of imprisonment.[9] The proposed amendments provide additional bases upon which the minister may cancel or refuse a visa by reference to the length of time for which the 'designated offence' may be punishable, rather than the length of time for which the person is sentenced.

Compatibility of the measure with non-refoulement obligations and the right to an effective remedy: initial analysis

2.9 The initial analysis reiterated the committee's previous concerns as to compatibility of the visa cancellation and refusal powers with Australia's *non-refoulement* obligations, which require Australia not to return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm. Non-refoulement obligations are engaged because a consequence of a person's visa being cancelled or refused is that the person will be an unlawful non-citizen and will be liable to removal from Australia as soon as reasonably practicable.[10] Such persons are also prohibited from applying for most other visas.[11]

2.10 In particular, the committee raised concerns in relation to expanding the bases upon which persons' visas can be refused or cancelled and consequently the circumstances under which a person may be removed from Australia, in light of

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7 Section 501(7AA)(b)(i)-(iii) of the bill, in relation to offences against a law in force in Australia. For offences against the law in force in a foreign country, an offence will be considered a designated offence if it were assumed that the act or omission that formed the basis of the offence occurred in the Australian Capital Territory (ACT) and the act or omission would also have been an offence against a law in force in the ACT and the offence, if committed in the ACT, would have been punishable by life imprisonment, imprisonment for a fixed term of not less than two years or a maximum term of not less than two years: section 501(7AA)(c).

8 See, for example, Migration Act, section 501(6)(a) and (c).

9 Migration Act, section 501(7).

10 Migration Act, section 198.

11 Migration Act, section 501E. While section 501E(2) provides that a person is not prevented from making an application for a protection visa, that section also notes that the person may be prevented from applying for a protection visa because of section 48A of the Migration Act. Section 48A provides that a non-citizen who, while in the migration zone, has made an application for a protection visa and that visa has been refused or cancelled, may not make a further application for a protection visa while the person is in the migration zone.

section 197C of the Migration Act. Section 197C of the Migration Act provides that, for the purposes of exercising removal powers, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. The committee has previously considered that section 197C, by permitting the removal of persons from Australia unconstrained by Australia's non-refoulement obligations, is incompatible with Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[12]

2.11 The initial analysis also raised concerns insofar as the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[13] It was noted that there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds. While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, 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' of non-refoulement decisions.[14] This is because judicial review in Australia is only available on a number of restricted grounds 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. The committee therefore raised concerns that the proposed expansion of the visa refusal and cancellation powers may be incompatible with Australia's non-refoulement obligations.

12 See the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78.

13 ICCPR, article 2 (the right to an effective remedy). See, for example, *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8]. See, also, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 82-98; *Report 2 of 2017* (21 March 2017) pp. 10-17; *Report 4 of 2017* (9 May 2017) pp. 99-111

14 See, for example, Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9].

2.12 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 4-7.[15]

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

- whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is compatible with Australia's non-refoulement obligations in light of section 197C of the Migration Act; and
- whether decisions to remove a person once a visa has been refused or cancelled pursuant to the proposed expanded powers to cancel or refuse a visa is subject to sufficiently 'independent, effective and impartial review' so as to comply with Australia's non-refoulement obligations and the right to an effective remedy.

Minister's response and analysis

2.14 The minister's response provided the following overview of steps that are taken in relation to Australia's *non-refoulement* obligations when deciding whether to remove a person whose visa has been refused or cancelled:

> Australia is committed to its international obligations and does not seek to resile from or limit its *non-refoulement* obligations. The amendments do not affect the substance of Australia's adherence to these obligations and as such the Department will not enforce the involuntary removal of a non-citizen where it would be in breach of our *non-refoulement* obligations. The removal of a non-citizen whose visa has been refused or cancelled pursuant to the proposed expanded grounds to cancel or refuse a visa will be compatible with Australia's *non-refoulement* obligations in light of section 197C of the Migration Act.
>
> Further, the amendments do not, and are not intended to, affect opportunities set out elsewhere in the Migration Act and in policy, which enable the Government to be satisfied that a person's removal will not breach Australia's *non-refoulement* obligations, such as:
>
> - consideration of *non-refoulement* obligations as part of the discretion whether to refuse or cancel the person's visa on character grounds – pursuant to a Ministerial Direction made under section 499 of the Migration Act;
> - consideration of whether the applicant meets the definition of a refugee or the complementary protection criteria under the Migration Act as part of the protection visa process;

15 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 4-7 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

- consideration of whether Australia's *non-refoulement* obligations are engaged, as part of the pre-removal clearance for persons on a removal pathway, leading to consideration of visa options; or
- consideration of the use of the Minister's personal powers under the Migration Act to intervene in a case when the Minister thinks it is in the public interest to do so.

I note the committee's concerns regarding the amendment's interaction with Australia's *non-refoulement* obligations in light of section 197C of the Migration Act. Section 197C does make it clear that, in order to exercise the removal powers under section 198 of the Act, an officer is not bound, as a matter of domestic law, to consider whether or not a person available for removal engages Australia's *non-refoulement* obligations before removing that person. It is an officer's duty to remove an unlawful non-citizen as soon as reasonably practicable.

However, this is because issues that engage Australia's *non-refoulement* obligations are identified and appropriately managed before an unlawful non-citizen becomes available for removal. Prior to a non-citizen's removal, a removal availability assessment and other pre-removal clearance processes are undertaken by the Department to ensure Australia acts in accordance with our international obligations — including identifying and managing any *non-refoulement* obligations. If these pre-removal processes were to identify *refoulement* concerns, the person would not be available for removal while visa and ministerial intervention options are explored.

Additionally, because the removal power under section 198 of the Migration Act does not specify a removal destination, it is open to the Department to explore whether it is reasonably practicable to meet our *non-refoulement* obligations by removing the non-citizen to a third country. It may also be possible to remove a non-citizen who engages Australia's *non-refoulement* obligations if we receive reliable Government assurances that the individual will not face specified types of harm if returned to their country of origin.

2.15 The safeguards identified by the minister may not be sufficient for the purposes of ensuring compliance with Australia's *non-refoulement* obligations. For example, the Ministerial Direction under section 499 is not binding on the minister personally.[16] For delegates and decision-makers bound by such ministerial directions, the current direction relating to visa cancellations under section 501 does not characterise non-refoulement as a 'primary consideration', but instead categorises it as an 'other consideration' that must be taken into account and which should be 'weighed carefully against the seriousness of the non-citizen's criminal offending or

16 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [6] (Allsop CJ and Katzmann J).

other serious conduct'.[17] That direction does note that a person would not be removed to a country in respect of which the non-refoulement obligation exists, but also notes that the existence of non-refoulement obligations does not preclude cancellation of a visa and that if a person's protection visa were cancelled the person 'would face the prospect of indefinite immigration detention'.[18]

2.16 The other safeguards identified by the minister may also not be sufficient for the purposes of international human rights law. In particular, the minister's personal powers to intervene in the public interest are discretionary.[19] If the minister decided not to intervene, as a matter of law the non-citizen would be required to be removed by the operation of section 197C notwithstanding non-refoulement obligations.[20] Further, the obligation to consider non-refoulement when determining whether someone should be granted a protection visa is not applicable in circumstances where a consequence of visa cancellation on character grounds is that a person may be precluded from being able to apply for a protection visa.[21] In any event, even if these pre-removal procedures had not occurred and there had been no assessment according to law of Australia's non-refoulement obligations, an officer still has the duty to remove a person as soon as practicable.[22]

2.17 Therefore, notwithstanding the commitment in the minister's response not to remove a person in breach of non-refoulement obligations, the effect of section 197C is that there is no statutory protection available to ensure that an unlawful non-citizen to whom Australia owes protection obligations will not be removed from Australia.[23]

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17 *Direction No.65: Visa Refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA* [10.1], available at:https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf.

18 *Direction No.65: Visa Refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA*, [10.1], available at: https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf.

19 See Migration Act, sections 195A and 197AB. See also, *NKWF v Minister for Immigration and Border Protection* [2018] FCA 409, [30].

20 Several Federal Court decisions have concluded that this is the effect of section 197C: *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448; *NKWF v Minister for Immigration and Border Protection* [2018] FCA 409; *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944; *FRH18 v Minister for Home Affairs* [2018] FCA 1769.

21 See section 48A and *Direction No.65: Visa Refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA*, [10.1], available at: https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf.

22 Migration Act, section 197C(2).

23 The minister's power to cancel or refuse a visa on character grounds extends to persons on protection visas: see Note 1 to section 501 of the Migration Act which states that "Visa is defined by section 5 and includes, but is not limited to, a protection visa".

2.18 In relation to the committee's concerns as to whether the proposed expanded powers to cancel or refuse a visa are subject to sufficiently 'independent, effective and impartial review' to comply with Australia's non-refoulement obligations and the right to an effective remedy, the minister's response states:

> While I note the Committee's concerns in regards to the right to remedy, it is the Government's position that while merits review is an important safeguard in many circumstances, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of *non-refoulement* obligations. To the extent that obligations relating to review are engaged in the context of immigration proceedings, I take the view that these obligations are satisfied where either merits review or judicial review is available. There is no obligation to provide merits review where judicial review is available.
>
> The cancellation or refusal of a non-citizen's visa under section 501 of the Migration Act, and their subsequent detention and removal, follows a well-established process within the legislative framework of the Migration Act, and is supported by robust policy and procedures.
>
> At both the primary decision-making stage of discretionary decisions, and the merits review stage, where available, *non-refoulement* obligations must be considered, where relevant in the case, as part of the requirement to exercise discretion to refuse or cancel a visa on character grounds.
>
> When considering exercise of the discretionary refusal and cancellation powers under section 501 of the *Migration Act 1958*, the decision-maker is obligated, where relevant, to consider Australia's international obligations, as described in a binding ministerial direction, when making a decision whether to refuse or cancel a visa due to convictions for designated offences.
>
> Eligible persons may seek merits review of a delegate's decision to refuse or cancel their visa on character grounds with the Administrative Appeals Tribunal. While personal decisions by the Minister are not merits reviewable, such decisions can be appealed to the Federal Court.
>
> I respectfully disagree with the Committee's view at paragraph 1.17 that:
>
> "*…judicial review in the Australian context is not likely sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions, … 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)...*"
>
> The entire purpose of judicial review is to assess whether the primary decision was legally correct, and to determine any error or unfairness in the decision-making process. Courts consider issues such as whether the decision-maker applied relevant tests correctly and whether the decision was illogical or irrational. Judicial review in Australia remains an effective mechanism by which administrative decisions are assessed by a higher

> authority. Although I agree that judicial review may not consider the merits of a decision, it does not mean that it is not an appropriate means by which decisions are reviewed. I consider that the existence of judicial review is sufficient to provide for the independent, effective and impartial review of decisions made by the Minister which may engage Australia's *non-refoulement* obligations.

2.19 As noted in the initial analysis, merits review of decisions to cancel a person's visa is only available in limited circumstances.[24] There is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds. Further, where the minister exercises his powers personally, the ministerial direction referred to in the minister's response is not binding.

2.20 In forming its view that, in the context of Australian law, merits review of decisions to remove or deport a person, would be required to comply with non-refoulement obligations, the committee has followed its usual approach of drawing on the jurisprudence of bodies recognised as authoritative in specialised fields of law that can inform the human rights treaties that fall directly under the committee's mandate. [25]

2.21 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.[26] The purpose of an

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24 Only decisions of a delegate of the minister to cancel a person's visa under section 501 may be subject to merits review by the Administrative Appeals Tribunal: see section 500(1)(b) of the Migration Act. Decisions for which merits review is not available include decisions of the minister personally exercising the visa refusal or cancellation power under section 501, and also decisions of the minister personally to set aside a decision by a delegate or the AAT not to exercise the power to refuse or cancel a person's visa and to substitute it with their own decision to refuse or to cancel the visa: section 501A of the Migration Act. Merits review is also unavailable where the minister exercises the power to set aside a decision of a delegate to refuse to cancel a person's visa and substitute it with their own refusal or cancellation under section 501B.

25 See, most recently, in relation to the Migration (Validation of Port Appointment) Bill 2018 in Parliamentary Joint Committee on Human Rights, *Report 11 of 2018* (16 October 2018) pp. 84-90. See also Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

26 See *Agiza v Sweden,* Committee against Torture Communication No.233/2003 (24 May 2005) [13.7]; *Josu Arkauz Arana v France,* Committee against Torture Communication No.63/1997 (5 June 2000); *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005 (20 November 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.

'effective' review is to 'avoid irreparable harm to the individual'.[27] In particular, in *Singh v Canada*, the UN Committee against Torture considered a claim in which the complainant stated that he did not have an effective remedy to challenge the decision of deportation because the judicial review available in Canada was not an appeal on the merits but was instead a 'very narrow review for gross errors of law'.[28] In this case, the UN Committee against Torture concluded that judicial review was insufficient for the purposes of ensuring persons have access to an effective remedy:

> The Committee notes that according to Section 18.1(4) of the Canadian Federal Courts Act, the Federal Court may quash a decision of the Immigration Refugee Board if satisfied that: the tribunal acted without jurisdiction; failed to observe a principle of natural justice or procedural fairness; erred in law in making a decision; based its decision on an erroneous finding of fact; acted, or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law. The Committee observes that none of the grounds above include a review on the merits of the complainant's claim that he would be tortured if returned to India.
>
> …the State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture. The Committee accordingly concludes that in the instant case the complainant did not have access to an effective remedy against his deportation to India.[29]

2.22 In light of this jurisprudence, limiting the form of review to the narrow grounds of judicial review without being able to 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, raises serious concerns as to whether judicial review in the Australian context would be sufficient to be 'effective review'.

Committee response

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

2.24 Consistent with the committee's previous analysis of Australia's *non-refoulement* obligations, the committee considers that the proposed expansion of

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27 *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005 (20 November 2006) [11.8].

28 *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8].

29 *Singh v Canada,* UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]–[8.9].

the minister's power to cancel or refuse a visa is likely to be incompatible with Australia's non-refoulement obligations and the right to an effective remedy.

Compatibility of the measure with the right to liberty: initial analysis

2.25 The initial analysis raised questions as to the compatibility of the measures with the right to liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[30] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require detention. Regular review must be available to scrutinise whether the continued detention is lawful and non-arbitrary.

2.26 The initial analysis noted that the expanded powers to cancel a person's visa where they have committed a 'designated offence' engaged the prohibition on arbitrary detention. This is because the cancellation of a person's visa for having committed a 'designated offence' would result in that person being classified as an unlawful non-citizen and subject to mandatory immigration detention prior to removal.[31] The initial analysis noted that in the context of mandatory detention, in which individual circumstances are not taken into account and where there is no right to periodic judicial review of detention, there may be circumstances where detention could become arbitrary under international human rights law. The committee raised questions as to whether the measures pursued a legitimate objective, were rationally connected to that objective and were proportionate to that objective.

2.27 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 7-12.[32]

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

- whether the measures pursue a legitimate objective for the purposes of international human rights law (including any reasoning or evidence that establishes the stated objectives address a substantial and pressing concern or are otherwise aimed at achieving a legitimate objective);
- whether the measures are rationally connected to (that is, effective to achieve) the objective; and

30 ICCPR, article 9.

31 Migration Act, section 189.

32 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp 7-12 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

- whether the measures are proportionate (including in light of the decision of the UN Human Rights Committee in *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009, CCPR/C/113/D/1875/2009 (7 May 2015)).

Minister's response and analysis

2.29 The minister's response emphasises that the proposed amendments 'do not alter detention powers already established in the Migration Act'. As noted in the initial analysis, while the existing provisions relating to the detention of persons following cancellation of a visa are not amended by the bill, in order to consider the human rights compatibility of the expanded visa cancellation powers it is necessary to consider the proposed amendments in the context within which they will operate. As a consequence of the exercise of the expanded discretionary cancellation power would be mandatory immigration detention, to the extent the additional grounds to refuse or cancel a visa may provide additional circumstances in which a person may be detained, the existing provisions of the Migration Act are relevant.

2.30 As to the legitimate objectives the measures seek to pursue, the minister's response states:

> The proposed amendments widen the scope of people being considered for visa cancellation and refusal, and the Government's position is that these amendments present a reasonable response to achieving a legitimate purpose under the Covenant—the safety of the Australian community.
>
> The safety of the Australian community is considered to be both a pressing and substantial concern and a legitimate objective of the Bill.
>
> - This Bill, in part, gives legislative effect to recommendations 15 and 16 of the Joint Standing Committee on Migration's report *'No one teaches you to become an Australian'*. The consultations undertaken by the Joint Standing Committee on Migration are the basis for the Migration Amendment (Strengthening the Character Test) Bill 2018.
> - The committee considered 115 public submissions and found that there were community concerns about the escalation of violent crimes, and that serious criminal offences committed by visa holders—such as aggravated burglary, serious assault, sexual offences and the possession of child pornography—must have appropriate consequences.
> - The committee recommended that the visas of those who commit these offences be cancelled under section 501 of the Migration Act. However, the sentence-based approach and more subjective limbs of the character test, do not effectively capture people convicted of all serious criminality who also pose an ongoing unacceptable risk to

> the Australian community, necessitating changes to the character test.

2.31 As noted in the initial analysis, protecting the safety of the Australian community is capable of being a legitimate objective for the purposes of international human rights law. However, it remains unclear what pressing and substantial concern the measures seek to address. This is because, as acknowledged in the statement of compatibility,[33] the current character test provisions in section 501 already enable a visa to be refused or cancelled on character grounds in circumstances that fall within the definition of 'designated offence'. The minister's response states that the existing 'sentence-based approach and more subjective limbs of the character test' do not 'effectively capture people convicted of all serious criminality who pose an ongoing unacceptable risk'. In support of this, the minister's response cites a parliamentary committee report and submissions to that committee expressing community concern about the escalation of violent crimes and of appropriate consequences for criminal offences committed by visa holders. Although the measures may, on balance, pursue a legitimate objective for the purposes of international human rights law, some questions remain as to whether the measures address a pressing and substantial concern for the purposes of international human rights law. This is because the existing law already allows for visa refusals and cancellations for individuals based on their past and present criminal conduct (including the commission of designated offences), and the minister's response has not fully explained how a court's assessment of an appropriate sentence for having a committed a designated offence would not sufficiently accommodate the risk posed by an individual to the Australian community.[34]

2.32 As to whether the measures are rationally connected to the objective, the minister's response states:

> The amendments do not of themselves limit a person's right to security of the person and freedom from arbitrary detention. However, to the extent that they may result in a greater number of people having their visa cancelled and being subsequently detained, there is a clear rational connection between an amendment that ensures that the visas of those non-citizens who pose a risk to the Australian community can be considered for visa cancellation and refusal, and the legitimate objective of

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33 See SOC, p.10. Section 501(6)(c) of the Migration Act allows for consideration of refusal or cancellation of a visa based on a person's past and present criminal or general conduct'.

34 For example, the *Penalties and Sentences Act 1992* (Qld) provides that one of the purposes for sentencing an offender include protecting the community from the offender (section 9(1)), and that for violent offences or offences that resulted in physical harm a court must have regard to the risk of physical harm to any members of the community if a custodial sentence were not imposed and the need to protect any members of the community from that risk (section 9(3)(a)-(b)).

> protecting the safety of the Australian community from those who pose an unacceptable risk.

2.33 Visa cancellation and refusal on character grounds in general terms would appear to be rationally connected to the legitimate objective of protecting the Australian community from harm.

2.34 The minister's response does not specifically address the committee's inquiries in relation to proportionality. However, the minister's response does provide the following information as to the approach taken to detention and the availability of the review:

> Whether the person is placed in an immigration detention facility, or is subject to other arrangements, is determined by using a risk-based approach. Additionally, Detention Review Managers ensure the lawfulness and reasonableness of detention by reviewing all detention decisions. Detention Review Committees are held regularly to review all cases held in detention to ensure the ongoing lawfulness and reasonableness of the person's detention, by taking into account all the circumstances of the case, including adherence to legal obligations. This regular review takes into account any changes in the client's circumstances that may impact on immigration pathways including returns and removal, to ensure the continued lawfulness of detention and to ensure alternative placement options have been duly considered.
>
> …
>
> As described above, the appropriateness of a detention placement is considered in the individual circumstances of each case, which includes the matters the UN Human Rights Committee has raised, such as 'individualised likelihood of absconding, a danger of crimes against others, or a risk of acts against national security'. Further, people who are detained after having their visas refused or cancelled using this new ground will still be able to continue to challenge the lawfulness of their detention in accordance with Article 9(4).

2.35 The minister refers in his response to other arrangements that can be made for persons other than detention. However, such arrangements are limited and remain at the discretion of the minister. For example, while section 195A gives the power to the minister to grant a visa to a person who is in detention, that is subject to the requirement that the minister must think it is 'in the public interest to do so', and the power is personal and non-compellable.[35] Similarly, section 197AB also gives the minister a personal and non-compellable power to make a 'residence determination' to the effect that a person in detention may instead reside at a specified place, however, the Migration Act and regulations continue to apply to

35 Migration Act, section 195A(2),(4),(5).

such a person as if they were being kept in immigration detention.[36] Therefore, notwithstanding the administrative processes to review detention, the minister is not obliged to release a person even if a person's individual circumstances do not justify continued or protracted detention.

2.36 In any event, while the minister refers in his response to consideration of the individual circumstances of detainees being taken into account through the detention review committee processes and the ability to challenge the lawfulness of detention in accordance with article 9(4), the committee has previously considered that the administrative and discretionary processes relating to the review of detention under Australian domestic law may not meet the requirement of periodic and substantive judicial review of detention so as to be compatible with Article 9.[37] This is because of the mandatory nature of detention of persons who have had their visa cancelled in circumstances where there does not appear to be a legal requirement of an individualised assessment of whether detention is justified, and the absence of an opportunity to challenge detention in substantive terms. Accordingly, while the detention review committee may have processes to review the lawfulness of detention under domestic law, this may not be sufficient for the purposes of article 9 in circumstances where the Migration Act requires detained non-citizens to be kept in immigration detention until they are removed, deported or granted a visa.[38] Further, the Migration Act requires that persons who have their visa cancelled under section 501 must have their detention continue unless a court finally determines that the detention is unlawful or that the person detained is not an unlawful non-citizen.[39] In circumstances where judicial review of the lawfulness of detention is limited in Australia to compliance with domestic law, and does not include the possibility to order release if detention is incompatible with the requirements of article 9 of the ICCPR, the UN Human Rights Committee has previously considered that detention in such circumstances is incompatible with Australia's obligations under article 9.[40]

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36 Migration Act, sections 197AB, 197AC(1).

37 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) pp. 202-205.

38 Migration Act, section 196(1).

39 Migration Act, section 196(4).

40 *MGC v Australia,* UN Human Rights Committee Communication No.1875/2009 (7 May 2015) [11.6].

Committee response

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

2.38 The committee considers that the expanded bases on which a person's visa may be cancelled, the consequence of which would be that the person is subject to immigration detention, is likely to be incompatible with the right to liberty.

Compatibility of the measure with the prohibition on expulsion without due process: initial analysis

2.39 The right not to be expelled from a country without due process is protected by article 13 of the ICCPR. It provides:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

2.40 The article incorporates notions of due process also reflected in article 14 of the ICCPR,[41] which protects the right to a fair hearing.[42] The Human Rights Committee has stated that the article requires that 'an alien […] be given full facilities for pursuing his remedy against expulsion so that this right will in all circumstances of his case be an effective one'.[43]

2.41 The committee raised questions as to the compatibility of the measures with the prohibition on expulsion without due process, in particular for persons who have their visa cancelled without natural justice under section 501(3) of the Migration Act for having committed a designated offence. The initial analysis also raised questions as to additional circumstances where the Migration Act and *Migration Regulations 1994* (Migration Regulations) appeared to further limit the opportunity for some non-citizens to make representations after a decision to cancel has been made. In circumstances where such person may not have an opportunity to be heard, the

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

42 The UN Human Rights Committee has held that immigration and deportation proceedings are excluded from the ambit of article 14. See, for example, *Omo-Amenaghawon v Denmark,* UN Human Rights Committee Communication No. 2288/2013 (23 July 2015) [6.4]; *Chadzjian et al. v Netherlands,* UN Human Rights Committee Communication No.1494/2006 (22 July 2008) [8.4]; and *PK v Canada,* UN Human Rights Committee Communication No. 1234/2003 (20 March 2007) [7.4]-[7.5].

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

committee required further information as to how the expanded cancellation power pursues a legitimate objective, is rationally connected to the objective and is proportionate.

2.42 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 12-16.[44]

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

- whether expanding the visa cancellation power to cancel visas where a person commits a 'designated offence' pursues a legitimate objective;
- whether this measure is rationally connected to (that is, effective to achieve) the objective; and
- whether the measure is proportionate (in particular, safeguards to ensure that non-citizens who have their visa cancelled pursuant to the proposed measures in the bill will have a sufficient opportunity to be heard prior to expulsion, including an opportunity to be heard as to the minister's exercise of discretion and as to the minister's decision that visa cancellation is in the national interest).

Minister's response and analysis

2.44 The minister's response reiterates that the amendments proposed in the bill do not alter cancellation or refusal powers of either the minister or delegates, nor the associated rights to natural justice and review. As noted in the initial analysis, while these existing provisions of the Migration Act and Migration Regulations are not amended by the bill, in order to consider the human rights compatibility of the expanded visa cancellation powers in the bill it is necessary to consider the proposed amendments in the context within which they will operate, including the human rights compatibility of these existing provisions.

2.45 The minister reiterates that decisions to cancel a visa under section 501(1) and (2) provide an opportunity for a person to submit reasons against their expulsion:

> The majority of discretionary decisions to cancel or refuse a visa on character grounds are made under section 501(1) for refusals and section 501(2) for cancellations. Such decisions afford natural justice prior to the making of the decisions, allowing the person to comment and provide any supporting documents or evidence to the Department as to why their visas should not be cancelled or refused, and provide any countervailing

44 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 12-16 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

considerations. This is the case for both decisions made by the Minister personally, and decisions made by delegates of the Minister.

2.46 However, the initial analysis specifically raised questions as to the compatibility of section 501(3) with article 13 of the ICCPR. Under section 501(3) of the Migration Act, the minister has a discretionary power to cancel a visa if the minister reasonably suspects that a person does not pass the character test (which would include, if the bill passes, where a person commits a 'designated offence') and the minister is satisfied that cancellation is in the 'national interest'. The rules of natural justice do not apply to section 501(3).[45] Instead, *after* a decision to cancel is made, the minister must give the person notice of the decision and particulars of any relevant information, and then invite a person to make representations about revoking the decision.[46]

2.47 The minister's response provides the following information in relation to the committee's inquiries:

> In a limited number of cases, a non-citizen's visa may be considered for refusal or cancellation by the Minister personally under section 501(3), without natural justice, where the Minister is satisfied that refusal or cancellation is in the national interest. National interest is determined by the Minister personally, and the Minister's satisfaction that a decision is in the national interest must be attained reasonably.
>
> Although such decisions to refuse or cancel the visa under section 501(3) are made without affording the non-citizen an opportunity to provide reasons as to why their visa should not be cancelled or refused or any countervailing considerations, the non-citizen is entitled to seek revocation of the decision. Further, it is open to the Minister to make a decision to revoke the cancellation or refusal if the non-citizen satisfies the Minister that they pass the character test.

2.48 It is acknowledged that a person who seeks revocation of a decision under section 501(3) may make representations that satisfy the minister that the person passes the character test, and the minister can revoke the cancellation decision on this basis.[47] However, as the proposed amendments in the bill provide that a person will fail the character test if the person has been convicted of a 'designated offence', it is not clear whether there would be any bases upon which a person could satisfy

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45 Migration Act, section 501(5).

46 Migration Act, section 501C(3).

47 Migration Act, section 501C(4)(b). This is in contrast to the mandatory cancellation power under the Migration Act where the person is also not afforded natural justice at the time of cancellation, but the minister may revoke the cancellation decision if satisfied the person passes the character test or alternatively on a broader discretionary basis of there being 'another reason why the original decision should be revoked': Migration Act, section 501CA(4)(b).

the minister that they pass the character test, except in the narrow circumstance where the minister made an error in relation to the person's conviction. That is, in contrast to other discretionary visa cancellation powers, there is no opportunity for the person to be heard as to the minister's broader exercise of discretion to cancel their visa (such as, for example, representations that the exercise of the discretion would be unfair because of the person's long-term residence in Australia, or the impact of visa cancellation on the person's children).[48]

2.49 Nor is there an opportunity for the person to contest the minister's decision as to whether visa cancellation is in the national interest which, as the minister explains in his response, is a matter determined by the minister personally. Article 13 requires a person to be allowed to submit the reasons against their expulsion, except where 'compelling reasons of national security otherwise require'. The initial analysis noted that section 501(3) does not require the minister to be satisfied that 'compelling reasons of national security' exist. Instead, the minister may exercise their discretion to cancel a person's visa without natural justice on the broader basis that cancellation is in the 'national interest'.[49] While 'national interest' may include reasons of national security, the concept is not defined and the minister's response does not provide any further information except to state that the minister's satisfaction that a decision is in the national interest must be attained reasonably. It therefore remains unclear as to whether the inability of a person to challenge the minister's exercise of discretion or the minister's finding that visa cancellation for having committed a designated offence is in the 'national interest' would comply with Australia's obligations under article 13. There appears to be a risk that a person may not have sufficient opportunity to present reasons against their expulsion.

2.50 To the extent that the prohibition against expulsion without due process is limited by the proposed expanded cancellation powers, the minister's response provides the following information as to the legitimate objective of the measures:

> This Bill is based upon the findings of a Joint Standing Committee on Migration, which has identified that certain serious offences, the designated offences of this Bill, represent an unwillingness by the non-citizen to be part of a cohesive society, and that those who commit these offences be appropriately considered for cancellation. These offences have a significant impact on their victims and the wider community.

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48 *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [11], [91]-[93] ('The right to make representations in support of revocation pursuant to an invitation under s 501C(3) therefore ameliorates only in part the lack of procedural fairness afforded at the initial stage of the decision-making process set out in s 501(3). Representations made by the non-citizen at the revocation stage can bear only on the question of whether or not she or he passes the character test'). See also *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177 [50]-[51]; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 [59].

49 Migration Act, section 501(3)(d).

> The Minister's power under section 501(3), if used in a particular case, is an established process that is a reasonable response to achieving a legitimate objective, which is the safety of the community.

2.51 On balance, protecting the community may constitute a legitimate objective for the purposes of international human rights law. It is also acknowledged that the commission of 'designated offences' may have a significant impact on victims and the community. However, as discussed above in relation to the right to liberty, in circumstances where the power to cancel a person's visa for offences that include 'designated offences' already exists under the Migration Act, there remain some questions as to whether the measures seek to address a pressing and substantial concern.

2.52 As to proportionality, the minister's response emphasises that any decision under section 501(3) would be made only if it is required in the national interest and further states that 'any limitation of procedural rights is therefore proportionate to the circumstances involved in the particular case'. The minister's response also identifies the following safeguards:

> The Minister is required to cause notice of the making of the decision whether or not to revoke a section 501(3) decision to be laid before each House of Parliament within 15 sitting days of that House after the day of the decision. If representations seeking revocation are not made, notice of this fact must also be laid before each house of Parliament within 15 sitting days of that House after the last day on which the representations could have been made.
>
> Judicial review is also available to affected persons who seek review within 35 days of being notified of the decision. During judicial review, the Court could consider whether or not the power given by the Migration Act has been properly exercised. For a discretionary power such as a personal decision by the Minister under the Migration Act, this could include the consideration of whether the power has been exercised in a reasonable manner. As mentioned above, I disagree with the Committee's view that judicial review may not be an "effective remedy".

2.53 However, as discussed above in relation to Australia's non-refoulement obligations and the right to an effective remedy, judicial review in the Australian context is limited. An examination of 'reasonableness' in the context of judicial review would not extend to examining the merits of the minister's exercise of discretion.[50] As discussed above, concerns remain as to whether the current review mechanisms available would satisfy the requirement that a non-citizen 'be given full facilities for pursuing his remedy against exploitation so that this right in all

50 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

circumstances of his case be an effective one'.[51] In light of the concerns discussed above as to the limited circumstances in which a person would be able to challenge the minister's decision to cancel a visa under section 501(3) where they have committed a 'designated offence', concerns remain as to the proportionality of the measure.

2.54 The initial analysis raised additional concerns as to circumstances where the Migration Act and Migration Regulations appear to further limit opportunity for some non-citizens to make representations after a decision to cancel has been made. In particular, section 2.52(7) of the Migration Regulations provides that a non-citizen whose visa was cancelled on character grounds is not entitled to make representations about revocation of a cancellation decision if the person is not a detainee.[52] The initial analysis noted that it was not clear how many (if any) persons who have their visa cancelled by the minister personally under section 501(3) for having committed a 'designated offence' would fall within the scope of section 2.52(7) of the Migration Regulations. In this respect, the minister's response states:

> With regard to the Committee's concerns about who can seek revocation of a decision made personally by the Minister under section 501(3), if the person's visa is cancelled or refused under section 501(3) while they are onshore, the non-citizen may make representations about possible revocation of the decision within seven days of being given written notice of the Minister's decision, provided the non-citizen is in immigration detention. It is open to the non-citizen to request removal from Australia to await the outcome of their revocation request while offshore. For non-citizens who were outside Australia when their visa was cancelled or refused under section 501(3), there is no impediment to their initiating a request for revocation from outside Australia provided the statutory timeframes and other format requirements are met.

2.55 While this clarifies that persons who are outside Australia when their visa was cancelled under section 501(3) may initiate a request for revocation from outside Australia, this does not clarify the effect of section 2.52(7) of the Migration Regulations which provides that persons who are not detainees are not entitled to make representations about revocation of a cancellation decision. In circumstances where immigration detention is mandatory, it remains unclear whether in practice there would be any persons who are onshore whose visa is cancelled by the minister under section 501(3) for having committed a 'designated offence' who would fall within the scope of section 2.52(7) of the Migration Regulations.

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

52 Migration Regulations 1994, regulation 2.52(7); Migration Act, section 501C(1).

Committee response

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

2.57 The committee considers that for persons who would have their visa cancelled without natural justice under section 501(3) of the Migration Act for having committed a 'designated offence', there is a risk that the measures may be incompatible with the prohibition on expulsion without due process.

Compatibility of the measure with the right to protection of the family and the obligation to consider the best interests of the child: initial analysis

2.58 The right to protection of the family protects family members from being involuntarily and unreasonably separated from one another.[53] This right may be engaged where a person is expelled from a country and is thereby separated from their family. There is significant scope for states to enforce their immigration policies and to require departure of unlawfully present persons. However, where a family has been in the country for a significant duration of time, additional factors justifying the separation of families going beyond a simple enforcement of immigration law must be demonstrated, in order to avoid a characterisation of arbitrariness or unreasonableness.[54] The initial analysis noted that the right to protection of the family is engaged and may be limited by the bill as visa refusal or cancellation for committing a 'designated offence' could operate to separate family members.

2.59 Further, under the Convention on the Rights of the Child (CRC), Australia has an obligation to ensure that, in all actions concerning children, the best interests of the child are a primary consideration. This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

2.60 The initial analysis noted that the measures in the bill do not differentiate between adults and children, and the provisions of section 501 can operate to cancel a child's visa.[55] The obligation to consider the best interests of the child is therefore engaged when determining whether to cancel or refuse a child's visa. The initial analysis noted that it is also engaged when considering the cancellation or refusal of a parent's or close family member's visa, insofar as that cancellation or refusal of the family member's visa may not be in the best interests of their children. The initial analysis raised questions as to whether the limitation on these rights pursued a

53 See ICCPR, articles 17 and 23; ICESCR, article 10(1); and the Convention on the Rights of the Child, article 16(1).

54 *Winata v Australia,* UN Human Rights Committee Communication No.930/2000 (26 July 2001) [7.3].

55 SOC, p.13.

legitimate objective, was rationally connected to that objective and was proportionate.

2.61 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 16-18.[56]

2.62 The committee therefore sought the advice of the minister as to the compatibility of the measures with these rights, including:

- whether the measures pursue a legitimate objective;
- whether there is a rational connection between the limitation of the rights and that objective; and
- whether the limitation on the right to protection of the family and obligation to consider the best interests of the child is proportionate (including safeguards to ensure that the best interests of the child are considered as a primary consideration, and any other information as to how the minister will consider protection of the family and the rights of children when making a decision).

Minister's response and analysis

2.63 The minister's response provides the following information in response to the committee's inquiries:

> If a non-citizen fails the character test for convictions relating to designated offences, a discretion then exists to cancel or refuse a non-citizen's visa. Delegates making a decision on character grounds are bound by a ministerial direction, and delegates must consider the best interests of minor children in Australia as a primary consideration when making a decision to cancel or refuse a visa. Other relevant considerations may include the effect the decision may have on other immediate family members in Australia, along with other factors such as the risk the non-citizen poses to the Australian community. This discretion will continue to form part of the decision making process.
>
> These discretionary refusal and cancellation powers must be exercised with natural justice, except in the exercise of the s501(3) power in the national interest as explained above. Prior to any decision to refuse (under s501(1)) or cancel (under s501(2)) a visa of a person who fails the character test because of this new ground, the affected person will be issued a notice advising them of the intention to consider cancellation or refusal of their visa, and provided with the opportunity to comment and submit any supporting documents or evidence to the Department as to

56 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp.16-18 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

> why their visas should not be cancelled or refused and to raise any countervailing considerations.
>
> The best interests of minor children in Australia are, and will remain, a primary consideration in any discretionary decision to refuse or cancel a minor's visa on character grounds.

2.64 As noted in the initial analysis, the potential separation of family members, including of parents from their children, where those persons may have resided in Australia for a very long time, indicates that the impact of these proposed measures may be significant. The initial analysis stated there are particular concerns as to whether cancelling or refusing a person's visa for having committed an ancillary offence that falls within the definition of 'designated offence' would be a proportionate limitation on the right to protection of the family and the rights of children, particularly in circumstances where the decision is not based on a sentence or punishment the person may have received. For example, if a child is convicted of 'being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence', an offence which may punishable by imprisonment of more than two years but for which the child is only sentenced (for example) to a non-custodial sentence, they would be liable to have their visa cancelled or refused. While the statement of compatibility stated that a child's visa would only be cancelled in 'exceptional circumstances' as a matter of policy, it is possible based on the language of the bill for a child's visa to be cancelled or refused in that circumstance. It is unclear how it would be proportionate to separate a child from their parents, for example, through cancelling a child's visa and deporting them. The minister's response did not provide any further information as to what constitutes 'exceptional circumstances' in which a child's visa would be cancelled.

2.65 Further, it is acknowledged that the best interests of the child would be required to be taken into account as a primary consideration when deciding whether to exercise the discretion to cancel a visa where a non-citizen commits a designated offence. However, while it is a primary consideration, there would appear to be other 'primary considerations' that must be taken into account as well, including the protection of the Australian community and the expectations of the Australian community.[57] There is a risk that giving the best interests of the child equal weight to these other factors may not be consistent with Australia's obligations under the CRC. The UN Committee on the Rights of the Child has explained that:

> …the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

57 See for example, *Direction No.65: Visa Refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA*, [9], available at: https://archive.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf.

> considerations. This strong position is justified by the special situation of the child…[58]

2.66 In light of this interpretation of the CRC, the committee has previously considered that placing the best interests of the child on the same level as other considerations is likely to be incompatible with Australia's obligations to consider the best interests of the child.[59]

Committee response

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

2.68 The committee considers that the measures are likely to be incompatible with the right to protection of the family and the obligation to consider the best interests of the child as a primary consideration, particularly in relation to the cancellation of a child's visa.

Compatibility of the measure with the right to freedom of movement: initial analysis

2.69 The right to freedom of movement is protected under article 12 of the ICCPR and includes a right to leave Australia as well as the right to enter, remain, or return to one's 'own country'. The reference to a person's 'own country' is not restricted to countries with which the person has the formal status of citizenship. It includes a country to which a person has very strong ties, such as the country in which they have resided for a substantial period of time and established their home.[60] In *Nystrom v Australia,* the UN Human Rights Committee interpreted the right to freedom of movement under article 12 of the ICCPR as applying to non-citizens where they had sufficient ties to a country, and noted that 'close and enduring connections' with a country 'may be stronger than those of nationality'.[61]

2.70 The initial analysis reiterated the committee's previous comments that expanded visa cancellation and refusal powers, by potentially widening the scope of people who may be considered for visa cancellation or refusal, may lead to more permanent residents having their visas refused or cancelled and potentially being

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58 UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013); see also *IAM v Denmark,* Committee on the Rights of the Child Communication No.3/2016 (8 March 2018) [11.8].

59 See Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (26 June 2018) pp. 61-62.

60 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011).

61 *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007 (1 September 2011) [7.4].

deported from Australia, thereby engaging the right to remain in one's 'own country'.[62] The statement of compatibility did not acknowledge that the right to freedom of movement was engaged or limited by the bill.

2.71 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 18-20.[63]

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

- whether the measure pursues a legitimate objective;
- whether there is a rational connection between the limitation on the right to freedom of movement and that objective; and
- whether the limitation on the right to freedom of movement is proportionate (including by reference to the UN Human Rights Committee's decision in *Nystrom v Australia,* UN Human Rights Committee Communication No.1557/2007, CCPR/C/102/D/1557/2007 (1 September 2011), and any other reasons why the measures may be proportionate).

Minister's response and analysis

2.73 The minister's response provides the following information in response to the committee's inquiries.

> While in most cases Australia will not be a non-citizen's 'own country' for the purposes of Article 12(4), I acknowledge that this phrase has been interpreted broadly by the UN Human Rights Committee and that the drafting history of the provisions supports the interpretation that "own country" goes beyond mere nationality.
>
> The strength of a non-citizen's ties to the Australian community (including the length of their residence), is a consideration included in the binding ministerial direction, which must be taken into account by decision-makers when they consider cancelling a visa on discretionary grounds under section 501 of the Migration Act. This will continue be the case when considering visa cancellations using the proposed designated offences ground.

2.74 While it is acknowledged that delegates of decision-makers would be bound to follow ministerial directions which require the strength of a non-citizen's ties to the Australian community to be taken into account, this direction is not binding on

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62 Parliamentary Joint Committee on Human Rights, *Thirty-Sixth Report of the 44th Parliament* (16 March 2016) p. 206. See also *Nineteenth Report of the 44th Parliament* (3 March 2015) p. 20.

63 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 18-20 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

the minister when making his decision personally. The minister's response does not provide any information as to whether a person's right to remain in one's 'own country' would be taken into account when the minister exercises their discretion to refuse or cancel a visa personally, and if so what weight that consideration would be given. The minister's response does not otherwise discuss how the limitation on the right to remain in one's own country would be proportionate under the proposed changes.

Committee response

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

2.76 The committee considers that there is a risk that the measures may be incompatible with the right to freedom of movement in circumstances where the minister is not required to take into account the right to enter and remain in one's 'own country' when exercising his personal power to refuse or cancel a visa.

Powers to collect personal information based on 'character concern'

2.77 Under the Migration Act, there are a number of circumstances in which a non-citizen may be required to provide 'personal identifiers',[64] including for the purposes of enhancing the department's ability to identify non-citizens who are of 'character concern'.[65] It is an offence to disclose personal identifiers collected from a non-citizen, however there is an exemption on the prohibition on disclosing personal identifiers where that disclosure is for the purpose of data-matching in order to identify non-citizens of 'character concern'.[66]

2.78 The bill seeks to amend the definition of 'character concern' in section 5C of the bill to provide that non-citizens who have been convicted of a 'designated offence' will be classified as non-citizens of 'character concern'.[67] The effect of this is that it extends the circumstances in which the Department of Home Affairs can collect and disclose personal identifiers of a non-citizen to include where those persons have been convicted of a designated offence.

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64 'personal identifier' is defined in section 5A to mean any of the following (including any of the following in digital form): (a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies); (b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the Crimes Act 1914.

65 Migration Act, sections 5A(3) and 257A.

66 Migration Act, section 336E.

67 Section 5C(1)(aa),(3)-[4] of the bill.

Compatibility of the measure with the right to privacy: initial analysis

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

2.80 The initial analysis noted that expanding the circumstances under which personal information about a non-citizen who has committed a designated offence may be collected and disclosed engages and limits the right to privacy. The initial analysis raised questions as to whether the limitations on the right to privacy pursued a legitimate objective, were rationally connected to that objective and were proportionate.

2.81 The full initial human rights analysis is set out at *Report 12 of 2018* (27 November 2018) pp. 20-22.[68]

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

- whether the measure pursues a legitimate objective;
- whether there is a rational connection between the limitation of the right to privacy and that objective; and
- whether the limitation on the right to privacy is proportionate.

Minister's response and analysis

2.83 The minister's response provides the following information as to the legitimate objective of the measure:

> As noted in the Statement of Compatibility, permitting the collection and disclosure of identifying information, such as photographs, signatures and other personal identifiers as defined in section 5A of the Migration Act, for the purpose of identifying persons of character concern, is a reasonable and proportionate measure to achieve the intended operation of the character provisions for purpose of protecting the Australian community. The amendments may result in the collection of information about additional persons than previously. As explained above, the amendments are necessary to ensure that non-citizens who pose an ongoing risk to the Australian community are identified and appropriately considered for visa refusal or cancellation. Any interference with the privacy of a person who has been convicted of a designated offence, in order to help identify them, would therefore not be unlawful or arbitrary.

68 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 20-22 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

2.84 On balance, collecting information of non-citizens for the purpose of protecting the Australian community may be a legitimate objective for the purposes of international human rights law, and appears to be rationally connected to this objective.

2.85 As to proportionality and the safeguards in place to protect the right to privacy, the minister's response states:

> Information from various state and territory agencies, including those responsible for justice administration, law enforcement and correctional institutions, is crucial to determinations as to whether specific individuals pass or do not pass the character test which was set out in section 501 of the Migration Act.
>
> This Bill does not alter the way in which information received by the Government in relation to non-citizens is used, disclosed and stored. The Department has in place detailed Memoranda of Understandings, information sharing agreements and a privacy policy to address its obligations regarding collection, use and disclosure of personal information, and sets out how the Department complies with its obligations under the *Privacy Act 1988*. All personal information held by the Department is stored in compliance with Australian Government security requirements and includes the department's processes being the subject of mandatory reporting processes and protocols in accordance with guidelines issued by the Privacy Commissioner.

2.86 The safeguards outlined by the minister may be capable of being sufficient so as to ensure that any limitation on the right to privacy introduced by the measures is proportionate. However, it is noted that the minister describes the safeguards only in general terms without providing any detail as to what those safeguards entail. For example, a copy of the memoranda of understandings or a summary of the safeguards contained therein, as well as a copy of departmental guidelines, would have assisted in ascertaining the sufficiency of the safeguards. In the absence of further information, it is not possible to conclude the limitation on the right to privacy is proportionate.

Committee response

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

2.88 The committee is unable to conclude that the measure is compatible with the right to privacy.

National Health (Privacy) Rules 2018 [F2018L01427]

Purpose	Making Rules concerned with the handling of information obtained by government agencies in connection with a claim for a payment or benefit under the Medicare Benefits Program and the Pharmaceutical Benefits Program ('claims information')
Portfolio	Health
Authorising legislation	*National Health Act 1953*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives 15 October 2018; tabled Senate 15 October 2018)
Right	Privacy
Previous report	Report 13 of 2018
Status	Concluded examination

Background

2.89 The committee first reported on the instrument in its *Report 13 of 2018*, and requested a response from the Minister for Health by 20 December 2018.[1]

2.90 The minister's response to the committee's inquiries was received on 14 January 2018. The response is discussed below and is available in full on the committee's website.[2]

Linking of identifiable claims information

2.91 The National Health (Privacy) Rules 2018 (Privacy Rules) prescribe how information obtained by government agencies in connection with a claim for a payment or benefit under the Medicare Benefits Program and the Pharmaceutical Benefits Program ('claims information') is handled.

2.92 Generally, the Privacy Rules provide that claims information under the Medicare Benefits Program (MBP) and the Pharmaceutical Benefits Program (PBP) must be held in separate unlinked databases[3] and that the claims information be

1 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 2-6 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_13_of_2018.

2 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

3 Privacy Rules, sections 7 and 8.

stripped of personal identification components, such as name and address information, with the exception of a Medicare card number or a Pharmaceutical entitlements number.[4] Information that is more than five years old ('old information') must not be stored with any personal identification components.[5]

2.93 However, there are some exemptions provided under the Privacy Rules to these provisions. The Department of Human Services and the Department of Health may link claims information relating to the same individual from the Medicare Benefits claims database and the Pharmaceutical Benefits claims database:

- *for internal use*, where it is in relation to the enforcement of a criminal law, the enforcement of a law imposing a pecuniary penalty, or the protection of public revenue*;*
- *for the purpose of external disclosure* where that disclosure is required by law, for the enforcement of a criminal law, the enforcement of a law imposing a pecuniary penalty, or the protection of public revenue;
- to determine an individual's eligibility for a benefit under one program, where eligibility for that benefit is dependent upon services provided under the other program;
- where it is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual; or
- for disclosure to an individual where that individual has given their consent.[6]

2.94 The Privacy Rules also provide that the Department of Human Services and the Department of Health may relink 'old information' to its personal identification components in certain circumstances.[7]

2.95 The Privacy Rules additionally provide that the Department of Human Services can disclose claims information to the Department of Health in specified circumstances.[8]

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4 Privacy Rules, section 8(3).

5 Privacy Rules, section 11(1)(b).

6 Privacy Rules, section 9(1).

7 Section 11(2) of the Privacy Rules states that 'old information' may be relinked for the purpose of taking action on an unresolved compensation matter; taking action on an investigation or prosecution; taking action for recovery of a debt; determining entitlement on a late lodged claim or finalising the processing of a claim; determining entitlement for a related service rendered more than five years after the service which is the subject of the old information; fulfilling a request for that information from the individual concerned or from a person acting on behalf of that individual; or lawfully disclosing identified information in accordance with the secrecy provisions of relevant legislation and this instrument.

2.96 The Privacy Rules also allow for the disclosure of identifiable claims information for medical research purposes where the individual consents or in compliance with the guidelines issued by the National Health and Medical Research Council (NHMRC).[9]

Compatibility of the measure with the right to privacy: initial analysis

2.97 The right to privacy encompasses 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.

2.98 The initial analysis raised questions as to the compatibility of the measure with the right to privacy where sensitive personal information can be linked and disclosed. While the right to privacy may be subject to permissible limitations, the statement of compatibility did not provide any information as to whether the measure pursued a legitimate objective, was rationally connected to that objective, and whether it was proportionate to achieve that objective.

2.99 The full initial human rights analysis is set out at *Report 13 of 2018* (4 December 2018) pp. 2-6.[10]

2.100 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 or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- how the measures are effective to achieve (that is, rationally connected to) that objective; and
- whether the limitations are a proportionate means to achieve the stated objective (including whether the measures are sufficiently circumscribed and whether there are adequate and effective safeguards in place with respect to the right to privacy).

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8 Sections 8(9) and 14(1) of the Privacy Rules state that the Department of Human Services may only disclose claims information provided such disclosures do not include personal identification components, except: where it is necessary to clarify which information relates to a particular individual; for the purpose of disclosing personal information in a specific case or circumstances expressly authorised or required under law; or where it is directly connected to the Department of Health assisting the Chief Executive of Medicare to perform his or her health provider compliance functions in accordance with the Privacy Rules.

9 Privacy Rules, section 12.

10 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 4-6 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_13_of_2018.

Minister's response and analysis

2.101 The minister's response emphasised that the Privacy Rules were substantively the same as the *2008 Privacy Guidelines for the Medicare Benefits and Pharmaceutical Benefits Programs* (Guidelines). It is acknowledged that many of the measures in the Privacy Rules promote the right to privacy. However, the fact that the Privacy Rules are substantively the same as previous Guidelines and largely maintain current regulatory arrangements does not address human rights concerns that may exist in relation to the linking and disclosure of personal information.

2.102 In relation to whether the measure pursues a legitimate objective, the minister explains that:

> Australia has one of the best healthcare systems in the world and is well-supported by a medical workforce that is highly trained and dedicated. The Commonwealth funds Medicare so that when Australians need to access health services they can do so, through a system that is affordable and accessible. Commonwealth expenditure on the MBS and PBS is now more than $36 billion per year. Medicare compliance activities ensure that public money is not lost to waste, inappropriate practice or fraud. The Privacy Rules identify certain limited or exceptional circumstances under which claims information may be linked and used, including for the enforcement of the criminal law and the protection of the public revenue. The Privacy Rules set out strict requirements as to the handling, use and linking of information, including requirements relating to use of the Medicare PIN [personal identifier number], destruction of records and reporting on linkages.
>
> …
>
> More generally, linking data offers enormous potential for providing new insights into people's health and wellbeing that would otherwise be difficult or expensive to obtain. These new insights can in tum drive the development of new, relevant policies and practices that make a real difference to the lives of Australians. Linking data can also identify patterns of unwarranted variation in care with inefficient use of MBS or PBS relative to clinical pathways. This could lead to changes in MBS or PBS item descriptions with improved efficiency and patient outcomes.

2.103 Improving efficiencies by preventing and detecting waste, inappropriate practice and fraud in order to ensure continued access to health care services is likely to constitute a legitimate objective for the purposes of international human rights law. More generally, the response indicates that the measure pursues the objective of improving public health.

2.104 The linking of identifiable claims information appears to be rationally connected to the objective of preventing waste, inappropriate practice and fraud. In relation to the objective of improving public health more generally, the minister's response provides the following information on how the measure is rationally connected to the objectives:

> An example of the benefits from data linking is through pathways-style research, where analysis of patients through the health system can ascertain the contribution of each component of their treatment to their health outcomes. Only linked administrative data provides the required level of detail to undertake this type of research effectively. Pathways analysis may be used to inform new service delivery models, programs or funding reform and provide information to clinicians and patients to support their decision-making about care options, all with the aim of maximising the health outcomes for patients and the consequent improved value from investments made in their care.

2.105 On this basis, the linking of identifiable claims information also appears to be rationally connected to the legitimate objective of improving public health more generally.

2.106 In relation to the proportionality of the measure, the minister has explained that a safeguard exists in the availability of a complaint mechanism under the *Privacy Act 1988* for a breach of the Privacy Rules, and noted that given the circumstances in which information may be used are narrowly-prescribed, any limitation on the right to privacy is proportionate.

2.107 The availability of a complaint mechanism is a relevant safeguard, however, it does not in itself fully address whether the limitation on the right to privacy is proportionate. On balance, however, noting the safeguards identified in the statement of compatibility,[11] and noting that the circumstances in which information can be linked and disclosed are defined, the measure may be capable of being a proportionate limitation on the right to privacy. However, it would have been useful if the minister's response provided further information about the proportionality of the measure, and how the safeguards may operate in practice in relation to some of the grounds for linking or disclosure of information which may be quite broad, for example where disclosure is required by law.

Committee response

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

2.109 The committee notes that, on balance, the measure, which provides for the linking and disclosure of sensitive personal information in specified circumstances, may be compatible with the right to privacy. However, further information as to

11 Statement of Compatibility, p. 13: The safeguards identified were holding claims information collected under the MBP and the PBP in separate databases; linking information only for specified purposes and for limited periods of time; specifying agencies' obligations concerning the retention, de-identification and destruction of claims information; and the inclusion of rules to enhance the accountability of agencies.

the proportionality of the measure would have been of assistance to the committee's examination.

Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018 [F2018L01377]

Purpose	Introduces a range of measures relating to apprehended violence orders, special measures to assist vulnerable witnesses to give evidence in court, sentencing processes in relation to sex and violent offenders, and a presumption against bail
Portfolio	Regional Development and Territories
Authorising legislation	*Norfolk Island Act 1979*
Last day to disallow	15 sitting days after tabling (tabled House of Representatives and Senate 15 October 2018)
Rights	Presumption of innocence
Previous report	Report 13 of 2018
Status	Concluded examination

Background

2.110 The committee first reported on the instrument in its *Report 13 of 2018*, and requested a response from the assistant minister by 20 December 2018.[1]

2.111 The assistant minister's response to the committee's inquiries was received on 10 January 2019. The response is discussed below and is available in full on the committee's website.[2]

Reverse legal burden

2.112 Schedule 3 of the ordinance amends the Criminal Procedure Act 2007 (NI) (CP Act) to make it an offence for a person to publish, in relation to a sexual offence proceeding, the complainant's name, or protected identity information about the complainant, or a reference or allusion that discloses the complainant's identity, or a reference or allusion from which the complainant's identity might reasonably be worked out.[3] The penalty is imprisonment for 12 months or 60 penalty units, or both. It is a defence to the offence if the person proves that the complainant consented to

1 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 7-9.

2 The minister's response is available in full on the committee's scrutiny reports page at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

3 Section 167F(1).

the publication before the publication happened.[4] A defendant bears a legal burden of proof in relation to this defence.

Compatibility of the measure with the presumption of innocence: initial analysis

2.113 The initial analysis raised questions as to the compatibility of the reverse legal burden with the presumption of innocence. An offence provision which requires the defendant to carry an evidential or legal burden of proof with regard to the existence of some fact engages and limits the presumption of innocence because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt. Similarly, a statutory exception, defence or excuse may effectively reverse the burden of proof, such that a defendant's failure to make out the defence may permit their conviction despite reasonable doubt.

2.114 Reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of the objective being sought and maintain the defendant's right to a defence.

2.115 The initial analysis raised questions as to why the offence provisions reverse the legal rather than merely the evidential burden of proof and whether this was the least rights restrictive approach to achieving the objective of the proposed legislative regime.

2.116 The full initial human rights analysis is set out at *Report 13 of 2018* (4 December 2018) pp. 7-9.[5]

2.117 The committee therefore sought the advice of the assistant minister as to the compatibility of the measure with the right to be presumed innocent, including:

- whether the reverse legal burden is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the reverse legal burden is effective to achieve (that is, rationally connected to) the legitimate objective; and
- whether the measure is a proportionate limitation on the right to be presumed innocent (including why the legal burden rather than the evidential burden is reversed).

Assistant minister's response and analysis

2.118 The assistant minister's response provides the following information that establishes the legitimate objective of the reverse legal burden provision:

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4 Section 167F(2).

5 Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 7-9 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_13_of_2018.

> The new offence in question relates to the disclosure of information about sexual and violent offence proceedings. While the imposition of a legal burden does limit, to some extent, the right of an accused person to be presumed innocent, it does so in a way that furthers other rights, both of the accused person and the complainants. The offences, and associated defence, are designed in pursuit of two legitimate objectives: to protect the complainants' right to privacy, especially given the intensely personal and intimate nature of evidence that is heard in the relevant proceedings, and to protect and further an accused person's right to both a fair trial and to privacy, by preventing the publication of potentially prejudicial material.
>
> Publishing the prescribed information, as outlined in the offence in s 167F, would pose a danger to the safety of complainants and their families, and potentially to the families of accused people.
>
> Subsection 167F(2) can also be seen as offering some protection for defendants from a limitation on the presumption of innocence. This is because the defence may serve to limit a defendant's criminal liability, which to be made out only requires proving that a person published relevant material. In this way, the statutory defence provides protection to defendants where consent has been provided for the publication and greater certainty to defendants who may rely on having obtained a person's consent prior to publishing the material.

2.119 In relation to the proportionality of the measure, the assistant minister's response emphasises that the legal burden imposed on the defendant relates only to making out the statutory defence of consent and does not apply to the underlying offence. The response also states:

> I note that the Attorney-General's Department public sector guidance sheet about the presumption of innocence states that '[t]he purpose of the reverse onus provision would be important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.'
>
> In the circumstances where consent relates to a particular act, in this case publication of certain material, it follows that, if existing and relevant, consent would be in the knowledge of the person committing the act, in this case the defendant. The existence of that consent will be significantly less difficult and less costly for the defendant to prove, than it is for the complainant or the prosecution to prove that consent does not exist. In addition, given there is a presumption against the publication of sensitive information, the defendant would be, or should be, aware of the need for consent and that he or she may need to rely on such consent, and should therefore be able to produce proof of its existence.

2.120 In light of the assistant minister's response, it is likely that the reverse legal burden in this particular case would be a proportionate limitation on the presumption of innocence.

Committee response

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

2.122 Based on the information provided by the assistant minister, it is likely that the reverse legal burden is compatible with the presumption of innocence. It is further noted that the measure appears to promote other human rights including the rights of women and children.

Social Security Legislation Amendment (Community Development Program) Bill 2018

Purpose	Seeks to extend the targeted compliance framework in the *Social Security Administration Act* to Community Development Program regions
Portfolio	Indigenous Affairs
Introduced	Senate, 23 August 2018
Rights	Social security and an adequate standard of living; work; equality and non-discrimination
Previous reports	Report 10 of 2018, Report 12 of 2018
Status	Concluded examination

Background

2.123 The committee first reported on the bill in its *Report 10 of 2018*, and requested a response from the minister for Indigenous Affairs by 4 October 2018.[1] The minister's initial response to the committee's inquiries was received on 10 October 2018, and was considered by the committee in its *Report 12 of 2018*.[2]

2.124 Following that response, the committee concluded that the measure may be capable, in practice, of being compatible with the right to work but identified some risks in relation to how the safeguards may operate in practice.[3] However, in *Report 12 of 2018,* the committee also sought further additional information from the minister noting that the response had not fully addressed a number of issues.[4]

2.125 The committee requested a response by 10 December 2018. The minister's response to the committee's inquiries was received on 14 January 2018. The response is discussed below and is available in full on the committee's website.[5]

1 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 4-19.

2 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 23-38.

3 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) p. 38.

4 The committee also concluded its examination of the compatibility of an inability to access subsidised jobs for six months with the right to work.

5 The minister's response is available in full on the committee's scrutiny reports page: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Previous consideration of the targeted compliance framework

2.126 The *Social Security Legislation Amendment (Welfare Reform) Act 2018* (Welfare Reform Act) amended the *Social Security (Administration) Act 1999* (Social Security Administration Act) to create a new compliance framework, the targeted compliance framework (TCF). The TCF applies to income support recipients subject to participation requirements,[6] except for declared program participants.[7] Participants in the Community Development Program (CDP) are not currently subject to the TCF,[8] as the CDP is a declared program.[9] CDP participants are currently subject to compliance arrangements under Division 3A of Part 3 of the Social Security Administration Act.[10]

2.127 The CDP is the Australian Government's employment and community development service for remote Australia. The CDP seeks to support job seekers in remote Australia to build skills, address barriers and contribute to their communities through a range of activities. It is 'designed around the unique social and labour market conditions in remote Australia' with the objective of 'increasing employment and breaking the cycle of welfare dependency'.[11] Under the current CDP, job seekers with activity requirements are expected to complete up to 25 hours per week of work-like activities that benefit their community.

2.128 The committee previously considered the TCF in its human rights assessment of the bill that became the Welfare Reform Act.[12] Under the TCF, a job seeker can

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6 Income support payments made to job seekers have 'participation' requirements or 'activity test' or 'mutual obligation' requirements, which require the job seeker to seek work or participate in some other labour force preparation activity as a condition of payment. Participation requirements include attending participation interviews, signing a participation plan with a compulsory work-focused activity, and undertaking the compulsory work-focused activity: see Department of Social Services, *Guide to Social Security* (2016) [1.1.P.75]. The CDP supports participants receiving a participation payment in meeting their activity test or participation requirements through Newstart Allowance, Youth Allowance (other), Parenting Payment (subject to participation requirements), Social Benefit (nominated visa holders) and the Disability Support Pension: see Explanatory Memorandum (EM) p. 3[3].

7 *Social Security (Administration) Act 1999* (Social Security Administration Act), section 42AB. 'Declared program participants' are persons who participate in employment services programs specified in a determination made under section 28C of the Social Security Administration Act: see Division 3A of Part 3 of that Act.

8 Social Security Administration Act*,* section 42AB.

9 *Social Security (Declared Program Participant) Determination 2018,* section 5.

10 Social Security Administration Act*,* section 42B.

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

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

have their payments suspended for non-compliance with a mutual obligation, such as failing to attend a job interview or appointment (mutual obligation failure),[13] or for refusing suitable employment (work refusal failure).[14] Payments may be cancelled if a job seeker commits persistent mutual obligation failures without reasonable excuse, or commits a work refusal failure without a reasonable excuse, or voluntarily leaves a job or is terminated for misconduct (unemployment failure).[15]

Penalties for persistent mutual obligation or work refusal failure without a reasonable excuse or an unemployment failure

Work refusal failure and unemployment failure

2.129 The bill seeks to extend the TCF to CDP participants. Currently, a CDP participant is subject to a non-payment period of eight weeks for refusing or failing to accept suitable work without a reasonable excuse,[16] or for an unemployment failure resulting from a voluntary act or misconduct.[17] The secretary has discretion to waive this non-payment period if it would cause 'severe financial hardship'.[18] As a result of the TCF applying to CDP participants, the non-payment period would be reduced to four weeks (six weeks if the person has received a relocation assistance to take up a job).[19] However, the measure would also remove the discretion for the secretary to waive the non-payment penalty on the basis of severe financial hardship.[20]

2.130 The bill also provides that a designated program participant (being a CDP participant) does not commit a work refusal failure if the person refuses or fails to accept an offer of subsidised employment,[21] nor does a person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.[22] As these exceptions only apply in relation to subsidised

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

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

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

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

17 Social Security Administration Act, section 42S.

18 Social Security Administration Act, section 42NC.

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

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

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

22 See section 25 of the bill.

jobs, these safeguards do not apply to persons who refuse or fail to accept an offer for unsubsidised employment or who voluntarily leave or are dismissed from unsubsidised jobs.

Persistent mutual obligation failure

2.131 The application of the TCF to CDP participants means that income support recipients, other than holders of subsidised jobs,[23] will be subject to escalating reductions in their income support payments for persistent non-compliance with mutual obligations.[24]

2.132 The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No 1)* (persistent non-compliance determination) outlines the matters to be taken into account when determining if a person has committed persistent mutual obligation failures.[25] Relevantly, among the matters the secretary must take into account are the findings of the most recent comprehensive compliance assessment in respect of the person, and whether, during the assessment period (6 months) the person has committed three or more mutual obligation failures.[26] The secretary must not take into account failures outside the person's control, but only failures that occurred intentionally, recklessly or negligently.[27] The secretary also retains discretion to take into account other matters in determining whether a person failed to comply with his or her obligations.[28]

2.133 For the first failure constituting persistent non-compliance, the rate of participation payment for the instalment period in which the failure is committed or determined will be halved.[29] For a second failure, the job seeker will lose their entire participation payment and any add-on payments or supplements for that instalment period.[30] For a third failure, the job seeker's payment will be cancelled from the start of the instalment period and a four week non-payment period, starting from the date

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

24 Non-compliance with a mutual obligation may include, for example, failure to attend a job interview or appointment.

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

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

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

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

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

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

of cancellation, will apply if the job seeker reapplies for payment.[31] There will be no waivers for non-payment periods.

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

2.134 The right to social security and the right to an adequate standard of living are protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its initial analysis the committee raised questions as to whether the measures constitute a permissible limitation on the rights to social security and an adequate standard of living. This is because the measures would operate to cancel a person's social security payments for up to four weeks without the ability to waive the non-payment period in circumstances of financial hardship. These measures would impact the person's right to an adequate standard of living in circumstances where a person could not afford basic necessities during that time.

2.135 The full initial human rights analysis and the committee's questions to the minister as to the compatibility of the measures with the rights to social security and an adequate standard of living are set out at *Report 10 of 2018* (18 September 2018) pp. 6-12.[32]

Minister's initial response

2.136 The minister's initial response to the committee's inquires, received on 10 October 2018, did not fully address human rights concerns in relation to applying the TCF to CDP participants. The full analysis of the minister's initial response is set out at *Report 12 of 2018* (27 November 2018) pp. 25-31.[33]

2.137 The committee therefore sought the further advice of the minister in relation to the compatibility of the measures with the right to social security and an adequate standard of living. In particular, the committee sought the minister's further advice as to:

- whether the measures are aimed at achieving a legitimate objective for the purposes of international human rights law (in particular, the pressing and substantial concern that the measure seeks to address, including why it is necessary to apply the TCF to CDP participants, which removes the ability of

31 Social Security Administration Act, section 42AP.

32 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 6-12 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

33 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 25-31 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

the secretary to waive the non-payment period on the basis of financial hardship);

- how the measures are effective to achieve (that is, rationally connected to) that objective (including how removing the discretion of the secretary to waive the non-payment period on the grounds of severe financial hardship will be effective to achieve the objectives of the measures); and
- the proportionality of the measures, including:
  - whether the bill could be amended to retain the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under current section 42NC of the *Social Security (Administration) Act 1999*;
  - the extent to which, in practice, subsidised jobs will represent the only or the majority of jobs which may be offered to CDP participants in remote Australia; and
  - in relation to penalties for mutual obligation failure, whether the factors which can be taken into account by the secretary to determine whether failures are outside the person's control operate as a sufficient safeguard for the purposes of international human rights law.

Minister's further response and analysis

2.138 The minister's further response received on 14 January 2019 explained the CDP reforms were developed following an extensive consultation process and informed by evaluations of the existing program. The response states that '[f]eedback regularly received through all consultations was that reform should include a focus on reducing interactions with the Department of Human Services, creating a simpler system, reducing current penalties, and providing more jobs.' Consultation with affected communities is relevant to, but does not fully address, issues of human rights compatibility.

2.139 The committee has previously considered measures similar to the TCF on a number of occasions.[34] The committee's previous analysis in relation to the Welfare Reform Bill (now Act) stated that the TCF reduces the non-payment penalty period from eight weeks to four weeks for a work refusal failure, unemployment failure or

34 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017* (17 October 2017) [2.465]-[2.467]; *Report 8 of 2017* (15 August 2017) p. 71 [1.335], [1.346]. See also Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (15 July 2014) pp. 66-70; *Thirty-Second Report of the 44th Parliament*, Social Security Legislation Amendment (Further Strengthening Job Seeker Compliance) Bill 2015 (1 December 2015) pp. 92-100; *Thirty-Third Report of the 44th Parliament*, Social Security Legislation Amendment (Community Development Program) Bill 2015 (2 February 2016) pp. 7-12.

persistent mutual obligation failures. However, the committee noted that the eight week non-payment penalty was previously subject to a waiver in situations of severe financial hardship. However, by contrast no waiver from the four week non-payment penalty period would be available under the TCF. Accordingly, the committee concluded that the financial penalty is likely to be incompatible with the right to social security insofar as there may be circumstances where a person is unable to meet basic necessities during the four week non-payment period.

2.140 In relation to the current bill, the specific concern articulated in the committee's previous reports was that extending the TCF to CDP participants raises concerns in relation to the right to social security and an adequate standard of living. That is, while the response states that there is no proposed change to the right to social security for those in a CDP region, the application of the TCF may have a considerable impact on access to social security (during any period of a non-payment penalty).

2.141 In relation to whether the application of the TCF to CDP participants is aimed at achieving a legitimate objective for the purposes of international human rights law, the minister's response focuses on the overall CDP scheme and reforms and states:

> The measures in the Bill are designed to increase support for CDP participants while assisting them to transition from welfare to work. Job seekers will also benefit from local control with greater decision making for communities and Indigenous organisations…
>
> The CDP reforms also support improved opportunities for employment through a subsidised jobs package, which supports improved standards of living. Further, the CDP and the reforms to the program support general community wellbeing through community engagement, activities to improve the wellbeing of the community and support through the CDP to get health care and ensure children have access to an education.

2.142 While it is acknowledged that many of the CDP reforms in the bill are aimed at legitimate objectives, it is unclear from the information provided how the application of the TCF pursues these objectives. It would have been useful if the minister's response had also specifically explained how applying the TCF (rather than the CDP reforms collectively) addressed a pressing and substantial concern.

2.143 In relation to how applying the TCF to CDP participants is effective to achieve (that is, rationally connected to) stated objectives such as assisting transitions from welfare to work, improving community engagement and an adequate standard of living, the minister's response explains that:

> Once the measures in the Bill commence, CDP participants will be subject to a nationally consistent compliance framework and for the purposes of compliance, they will be treated the same as all other activity-tested job seekers in non-remote regions across the country.

> The CDP reforms introduce a fairer and simpler system for remote job seekers and there are still protections in place for job seekers. The new arrangements will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements and ensure that financial compliance penalties will focus on those who are persistently and wilfully non-compliant.
>
> This means that penalties under the Targeted Compliance Framework (TCF) will be significantly reduced – 85 per cent of all penalties (No Show No Pay penalties) in the current framework will be removed and no longer apply. The focus on the CDP reforms and the TCF is on providing more local and community based support to ensure participants receive appropriate assistance to overcome barriers, build their skills and win jobs.

2.144 This information appears to indicate that, in the context of other reforms to CDP, reducing some of the penalties that apply under the current CDP system for one off-breaches with a framework which focuses to a greater extent on repeated breaches, may be capable of achieving the stated objectives. The minister's response further explains that it is intended under the proposed framework that:

> Providers will be required to engage more with job seekers under the TCF which will ensure there is more support available to job seekers before any penalties are issued. Providers also retain discretion to consider reasonable excuses before applying a demerit including because of financial hardship if it is contributing to the non-attendance. The measures in the Bill provide more authority to CDP providers, the local Indigenous organisations operating in remote communities and delivering the program, rather than centralising decision making in the Department of Human Services.

2.145 This indicates that there will still be some discretion as to the application of a mutual obligation failure or work refusal failure but this is to be applied by CDP providers rather than the department. To the extent that CDP providers are better placed to assess the CDP participant's circumstances, re-focusing discretion on providers prior to mutual obligation failure occurring rather than the secretary of the department after it occurs may be rationally connected to the stated objectives.

2.146 As to proportionality, the minister's response states that the measures:

> …have been designed so that they are sufficiently precise to ensure that they only address the matters that they are intended to capture.
>
> The measures in the Bill address the particular needs of unemployed persons in geographically remote and socially and economically disadvantaged areas and encompass a number of safeguards. The safeguards include careful consideration of the legal, policy and practical framework governing mutual obligation requirements and what circumstances will constitute a reasonable excuse. Other general safeguards include the retention of existing protections contained in the social security law as well as the new exemptions for CDP participants

> undertaking subsidised employment who are still in receipt of an applicable income support payment.

2.147 These matters are relevant to the proportionality of the measures. The minister's response further explains that a person will only commit a mutual obligation failure or work refusal failure and be subject to potential non-payment penalties where they do not have a 'reasonable excuse' for the failure. The minister's response points to the 'reasonable excuse' provisions as a relevant safeguard in relation to the application of a non-payment penalty:

> The Committee has also drawn attention to the application of reasonable excuse provisions. Providers maintain the ability to use discretion in determining whether a job seeker has a valid reason for not meeting their requirements, and whether or not they had a reasonable excuse for not notifying their provider in advance if they could not attend.
>
> As noted in the Explanatory Memorandum to the Bill, CDP participants will continue to have access to reasonable excuse provisions in circumstances where the failure to meet mutual obligation requirements is due to drug or alcohol misuse or dependency. This is in recognition of the lack of availability of drug and alcohol rehabilitation services in remote Australia.

2.148 The availability of 'reasonable excuse' provisions including where a failure to meet mutual obligation requirements is the result of drug or alcohol misuse or dependency is an important safeguard in relation to the measure. The Minister's response further explains that there will be community based support for CDP providers to assist people to meet their mutual obligation requirements:

> CDP participants will also be supported by CDP providers, local Indigenous organisations, operating in remote communities. The increased decision-making role for local providers, rather than the Department of Human Services, involves communities directly in job seeker compliance. Local providers understand the remote communities they are living and working in, and will use this understanding in working with remote job seekers, including through any consideration of demerits under the Targeted Compliance Framework.
>
> The reforms to the CDP also include more flexibility for job seekers, so they can structure their activity requirements differently, allowing activities to be undertaking outside ordinary hours or over different days to best meet the needs of remote job seekers.

2.149 As noted above, a CDP participant does not commit a work refusal failure if the person refuses or fails to accept an offer of subsidised employment,[35] nor does a

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

person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.[36] Similarly, the escalating penalties for committing mutual obligation failures do not apply to holders of subsidised jobs. The proportion of subsidised jobs in remote communities is therefore relevant in relation to the scope of this safeguard in relation to work refusal, unemployment or mutual obligation failures. The minister provides the following information about the availability of subsidised jobs:

> The 6,000 subsidised jobs in remote Australia will only be available to CDP participants and will grow the size and capacity of the remote labour market and support the development of more local businesses (leading to further employment opportunities other than the subsidised jobs component of the CDP reforms). The subsidised jobs package is part of a pathway to employment and is intended to enable participants to experience what it is like to work in a real job, and develop further skills and experience, while still accessing a level of support from employers and CDP providers.
>
> Under the CDP, almost 30,000 job outcomes have been supported for CDP participants. This is significantly more than the number of subsidised jobs. The subsidised jobs program will complement and not replace existing jobs in remote communities by providing businesses, including local Indigenous businesses, the opportunity to apply for additional positions. Therefore, the subsidised jobs package will increase employment outcomes, in addition to the job outcomes that will continue to be delivered without subsidies. The Government is also focused on increasing demand for local job seekers through policies including the Indigenous Procurement Policy and requirements for employment targets in government contracts.

2.150 The increased number of subsidised jobs and the associated exceptions from the TCF is relevant to the proportionality of the limitation. However, it appears that there will nevertheless be categories of CDP participants who will not be subject to this safeguard.

2.151 Yet, the minister's response further explains that the mutual obligation requirements that will apply will be tailored to be appropriate to remote Australia:

> The CDP responds to the unique social and labour market circumstances in remote communities. All job seekers across Australia have mutual obligation requirements, regardless of where they live. However, how a job seeker meets these requirements varies based on a range of factors, including whether the job seeker is living in remote or non-remote Australia. The requirements in remote Australia are in response to the differing labour markets and availability of jobs. Regular active participation has been called for across remote communities to ensure strong engagement in communities, and no passive welfare.

36 See section 25 of the bill.

2.152 In relation to whether the bill could be amended to retain the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under current section 42NC of the Social Security Administration Act, the minister states that he is 'confident that the design of the measures is consistent with international human rights law obligations and, as such, the Government is not considering any amendments to the Bill at this time'. He further states:

> The Bill is consistent with the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets. Increased opportunities for employment, more local support and engagement and a fairer and simpler mutual obligation system are all measures that will support the objective of reducing long term unemployment and welfare dependency.

2.153 Based on the information provided, it appears that there are intended to be processes in place to assist to ensure that mutual obligations requirements are well-tailored such that it may be less likely that a breach of these obligations occurs. It is further noted that where non-compliance with these obligations occurs, this will not lead to the imposition of a demerit unless a person does not have a 'reasonable excuse.' These matters assist with the proportionality of the measures as they mean that financial and non-payment penalties are less likely to be applied.

2.154 However, in circumstances where a person is not in subsidised employment or does not have a 'reasonable excuse' for non-compliance there remain serious issues regarding the proportionality of the limitation on the right to social security and the right to an adequate standard of living. While the TCF reduces the non-payment penalty to four weeks for a work refusal failure, unemployment failure or persistent mutual obligation failures, this non-payment penalty period was previously subject to a waiver in situations of severe financial hardship. By contrast, under the bill no discretionary waiver from the four week non-payment penalty would be available at any level on the basis of financial hardship once the penalty applies. That is, there does not appear to be capacity to mitigate the non-payment penalty itself even where it may cause serious harm. In particular, there are serious concerns that withholding a person's social security payments for four weeks will result in the person being unable to meet the expenses associated with basic necessities (such as food and housing). In this respect, no information has been provided in the response as to how a person will meet basic necessities during the four week non-payment penalty.

Committee response

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

2.156 The minister's response indicates that, with the proposed application of the Targeted Compliance Framework (TCF) to Community Development Program (CDP) participants, there will be some process and safeguards in place that may assist to

prevent breaches of mutual obligations before they occur. As such, financial penalties may be less likely to be applied and this will assist with the proportionality of the measure in practice.

2.157 However, under the TCF, where the financial non-payment penalty period is applied, a waiver is not available even in circumstances of severe financial hardship. In this respect, consistent with the committee's previous findings in relation to the TCF, this financial penalty is likely to be incompatible with the right to social security and adequate standard of living insofar as there may be circumstances where a person is unable to meet basic necessities during the four week non-payment period.

2.158 If the bill passes, to ensure human rights compatibility, the committee recommends that the department monitor the application of penalties and the extent to which they may result in a person being unable to meet basic necessities.

Payment suspension for a mutual obligation failure

2.159 Applying the TCF to CDP participants means that CDP participants who are not engaged in subsidised employment are liable to payment suspension for a mutual obligation failure unless they have a reasonable excuse.[37] The suspension period may last up to four weeks but ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day.[38] If the job seeker fails to comply with the reconnection requirement within four weeks, their social security participation payment will be cancelled (as noted above at [2.131]-[2.133]).[39]

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

2.160 The initial analysis noted that the suspension of social security payments for mutual obligation failures may limit the right to social security and the right to an adequate standard of living.

2.161 The initial analysis raised questions as to whether the measures constitute a permissible limitation on the rights to social security and an adequate standard of living. This is because the measure would operate to suspend a person's social security payments.

2.162 The initial analysis also noted that the committee has previously concluded that such a measure may be compatible with human rights given the range of

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

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

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

circumstances identified by the minister as constituting a 'reasonable excuse'. This was on the basis that the payment suspension would not apply where a person had a 'reasonable excuse' for a mutual obligation failure. However, that conclusion was made in relation to the TCF prior to its extension to CDP participants. The initial analysis therefore raised questions as to whether the matters which constituted a 'reasonable excuse' were sufficiently adapted to the conditions of remote Australia, noting large distances to be covered and limited transportation options.

2.163 The full initial human rights analysis and the committee's questions to the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living are set out at *Report 10 of 2018* (18 September 2018) pp. 12-15.[40]

Minister's initial response

2.164 The minister's initial response to the committee's inquires, received on 10 October 2018, did not fully address human rights concerns in relation to applying the TCF to CDP participants. The full analysis of the minister's initial response is set out at *Report 12 of 2018* (27 November 2018) pp. 31-33.[41]

2.165 The committee therefore sought the advice of the minister in relation to the compatibility of the measures with the right to social security and an adequate standard of living. In particular, the committee sought the minister's further advice as to:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and
- relevant safeguards to ensure the measure does not limit the right to social security any more than necessary to achieve its objectives, including information on:
    - how mutual obligation requirements will differ in remote Australia from non-remote Australia; and

40 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 12-15 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

41 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 31-33 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

- whether what constitutes reasonable excuse will be modified or interpreted to take into account the conditions of remote Australia.

Minister's response and analysis

2.166 As noted above, the minister's response indicates that there are intended to be a number of processes in place to ensure that mutual obligations requirements are well-tailored to the conditions of remote Australia such that it may be less likely that a breach of these obligations occurs. This includes that CDP providers will be required to engage more with job seekers under the TCF which will ensure there is more support available to job seekers before any penalties are issued. Where non-compliance with these obligations occurs, this will not lead to the imposition of a penalty or demerit unless a person does not have a 'reasonable excuse.' In this respect, in recognition of the lack of availability of drug and alcohol rehabilitation services in remote Australia, CDP participants will continue to have access to reasonable excuse provisions in circumstances where the failure to meet mutual obligation requirements is due to drug or alcohol misuse or dependency. The criteria for what constitutes a 'reasonable excuse' and the acceptance of these by CDP providers may act as relevant safeguards in relation to the measure. It is further noted that the payment suspension ceases when the person complies with a reconnection requirement. In view of these factors, the payment suspension may be a proportionate limitation on the right to social security and the right to an adequate standard of living.

Committee response

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

2.168 Based on the information provided and the above analysis, the measure may be compatible with the right to social security and an adequate standard of living.

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

2.169 In its initial analysis, the committee raised questions as to whether the measures are compatible with the right to equality and non-discrimination. 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or disability), which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. 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.[42] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[43]

2.170 The initial analysis raised concerns that applying the TCF to CDP participants, 80% of whom are Aboriginal and Torres Strait Islander, and all of whom live in remote Australia, may result in indirect discrimination. That is, although the statement of compatibility states that the bill seeks to ensure that 'activity tested job seekers across Australia will be subject to the same compliance framework, no matter where they live', it did not appear to take into account what effect applying the same compliance framework to CDP participants, without adjustments to take into account the conditions of remote Australia, may have.

2.171 As also noted in the initial analysis, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.[44] No evidence was provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to address the stated objective of the bill of reducing welfare dependence and long-term unemployment in remote Australia. This raised questions as to whether the differential treatment, being the disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia, is based on reasonable and objective criteria.

2.172 The full initial human rights analysis and the committee's questions to the minister as to the compatibility of the measures with the right to equality and non-discrimination is set out at *Report 10 of 2018* (18 September 2018) pp. 17-19.[45]

Minister's initial response

2.173 The minister's initial response to the committee's inquires, received on 10 October 2018, did not fully address human rights concerns in relation to applying

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

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

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

45 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 17-19 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

the TCF to CDP participants. The full analysis of the minister's initial response is set out at *Report 12 of 2018* (27 November 2018) pp. 36-38.[46]

2.174 The committee therefore sought the further advice of the minister as to the compatibility of the measure with the right to equality and non-discrimination, in particular:

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

Minister's further response and analysis

2.175 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister's response states:

> CDP and the Bill itself are consistent with the right to equality and non-discrimination. The position of the Government is that both the existing CDP and the Bill do not disproportionately impact Aboriginal and Torres Strait Islander people. Similarly, the position of the Government is that both the existing CDP and the Bill do not disproportionately impact job seekers living in remote Australia as opposed to non-remote job seekers (be they Indigenous or non-Indigenous).

2.176 However, noting that 80% of CDP participants are Aboriginal and Torres Strait Islander, all of whom live in remote Australia, it follows that the measure may have a disproportionate impact on this group. Accordingly, the minister may be indicating that the impacts are not a negative such that it does not amount to a disproportionate negative effect in the relevant sense.

2.177 Even if the application of the TCF to CDP participants does have a disproportionate negative effect, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that

46 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 36-38 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

legitimate objective and is a proportionate means of achieving that objective. In this respect, the minister's response states:

> The Committee has sought further advice on a number of specific matters on the basis that the Bill may have a disproportionate impact on certain participants. As the Government position does not align with this characterisation of the Bill I wish to clarify a number of aspects of the measures to demonstrate their consistency with the right to equality and non-discrimination.
>
> The CDP is designed around the unique social and labour market conditions found in remote Australia. It supports the specific needs of participants in remote Australia to build skills, address barriers and contribute to their communities through a range of flexible activities. It also supports remote job seekers with transitioning into paid employment which will assist with combatting long term unemployment in remote areas. This transition will ensure CDP participants are subject to the same compliance framework as their non-remote counterparts. I reiterate that the CDP reforms were developed in close consultation with a range of stakeholders.
>
> The measure is therefore reasonable, necessary and proportionate to achieve the legitimate objectives of the CDP and the Bill as outlined above. Accordingly, both CDP and the Bill itself are consistent with the right to equality and non-discrimination.

2.178 Noting that the bill would apply the same TCF framework to CDP participants as currently applies to their non-remote counterparts and that the minister indicates that there will be additional safeguards and processes in relation to the particular conditions in remote Australia, the measures may be capable of operating in a non-discriminatory way.

Committee response

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

2.180 Based on the information provided, the preceding analysis indicates that the measures may be capable of operating in a non-discriminatory way. However, if the bill passes, the committee recommends that the application of the TCF to CDP participants be monitored to ensure it operates in a way that is compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair

Appendix 1

Deferred legislation

3.1 The committee has deferred its consideration of the following legislation for the reporting period:

- Charter of the United Nations (Sanctions—Mali) Regulations 2018 [F2018L01614]
- National Integrity (Parliamentary Standards) Bill 2018
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 [No. 2]

3.2 The committee continues to defer its consideration of the following legislation:[1]

- Discrimination Free Schools Bill 2018
- Lower Tax Bill 2018
- National Integrity Commission Bill 2018
- National Integrity Commission Bill 2018 (No. 2)
- Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

1 See Parliamentary Joint Committee on Human Rights, *Report 13 of 2018* (4 December 2018) pp. 143-144.