

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.

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

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

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

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

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

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.

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.

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

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

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 <i>Commonwealth Electoral Act 1918</i> and the <i>Referendum (Machinery Provisions) Act 1984</i> , 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 mandatory and voluntary questions in the qualification checklist are 'designed to

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)(iia) 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

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

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	<i>Migration Amendment 1994</i>
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

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 <i>Migration Act 1958</i> 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

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	<i>Social Security Act 1991</i>
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.

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 <i>Foreign Influence Transparency Scheme Act 2018</i> 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

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

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

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

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.

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 persons³ 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

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

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 <i>Marriage Act 1961</i> 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 <i>Sex Discrimination Act 1984</i> 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 (religious¹ 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

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- 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