Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Migration Amendment (Strengthening the Character Test) Bill 2018

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Migration Act, section 501(7).

10 Migration Act, section 198.

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

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

2.11 The initial analysis also raised concerns insofar as the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[13] It was noted that there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds. While judicial review of the minister's decision to cancel a person's visa on character grounds remains available, the committee has previously concluded that judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions.[14] This is because judicial review in Australia is only available on a number of restricted grounds and represents a limited form of review in that it allows a court to consider only whether the decision was lawful (that is, within the power of the relevant decision maker). The court cannot undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision to determine whether the decision is the correct or preferable decision. The committee therefore raised concerns that the proposed expansion of the visa refusal and cancellation powers may be incompatible with Australia's non-refoulement obligations.

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

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

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

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

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

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

Minister's response and analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Migration Act, section 197C(2).

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

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

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

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

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

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

2.21 The jurisprudence of the UN Human Rights Committee and the UN Committee against Torture establish the proposition that there is a strict requirement for 'effective review' of non-refoulement decisions.[26] The purpose of an

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

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

26 See *Agiza v Sweden,* Committee against Torture Communication No.233/2003 (24 May 2005) [13.7]; *Josu Arkauz Arana v France,* Committee against Torture Communication No.63/1997 (5 June 2000); *Alzery v Sweden*, Human Rights Committee Communication No.1416/2005 (20 November 2006) [11.8]. For an analysis of this jurisprudence, see Parliamentary Joint Committee on Human Rights, *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 182-183.

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

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

2.22 In light of this jurisprudence, limiting the form of review to the narrow grounds of judicial review without being able to undertake a full review of the facts (that is, the merits), as well as the law and policy aspects of the original decision, to determine whether the decision is the correct or preferable decision, raises serious concerns as to whether judicial review in the Australian context would be sufficient to be 'effective review'.

Committee response

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

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

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

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

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

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

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

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

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

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

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

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

30 ICCPR, article 9.

31 Migration Act, section 189.

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

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

Minister's response and analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 Migration Act, section 196(1).

39 Migration Act, section 196(4).

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

Committee response

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Minister's response and analysis

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

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

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

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

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

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

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

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

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

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45 Migration Act, section 501(5).

46 Migration Act, section 501C(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee response

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

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

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

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

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

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

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

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

55 SOC, p.13.

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

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

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

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

Minister's response and analysis

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

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

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

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

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

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

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

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

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

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

Committee response

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

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

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

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

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

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

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

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

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

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

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

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

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

Minister's response and analysis

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

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

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

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

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

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

Committee response

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

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

Powers to collect personal information based on 'character concern'

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

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

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

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

66 Migration Act, section 336E.

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

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

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

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

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

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

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

Minister's response and analysis

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

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

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

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

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

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

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

Committee response

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

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

National Health (Privacy) Rules 2018 [F2018L01427]

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

Background

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

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

Linking of identifiable claims information

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

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

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

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

3 Privacy Rules, sections 7 and 8.

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

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

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

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

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

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4 Privacy Rules, section 8(3).

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

6 Privacy Rules, section 9(1).

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

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

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

2.97 The right to privacy encompasses respect for informational privacy, including the right to respect for private and confidential information, particularly the use and sharing of such information and the right to control the dissemination of information.

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

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

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

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

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

9 Privacy Rules, section 12.

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

Minister's response and analysis

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

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

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

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

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

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

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

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

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

Committee response

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

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

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

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

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

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

Background

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

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

Reverse legal burden

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

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

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

3 Section 167F(1).

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

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

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

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

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

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

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

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

Assistant minister's response and analysis

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

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4 Section 167F(2).

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

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

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

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

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

Committee response

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

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

Social Security Legislation Amendment (Community Development Program) Bill 2018

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

Background

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

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

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

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

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

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

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

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

Previous consideration of the targeted compliance framework

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

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

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

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

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

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

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

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

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

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

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

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

Work refusal failure and unemployment failure

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

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

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

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

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

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

17 Social Security Administration Act, section 42S.

18 Social Security Administration Act, section 42NC.

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

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

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

22 See section 25 of the bill.

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

Persistent mutual obligation failure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Minister's initial response

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

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

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

31 Social Security Administration Act, section 42AP.

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

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

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

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

Minister's further response and analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

person commit an unemployment failure for voluntarily leaving or being dismissed for misconduct from subsidised employment.[36] Similarly, the escalating penalties for committing mutual obligation failures do not apply to holders of subsidised jobs. The proportion of subsidised jobs in remote communities is therefore relevant in relation to the scope of this safeguard in relation to work refusal, unemployment or mutual obligation failures. The minister provides the following information about the availability of subsidised jobs:

> The 6,000 subsidised jobs in remote Australia will only be available to CDP participants and will grow the size and capacity of the remote labour market and support the development of more local businesses (leading to further employment opportunities other than the subsidised jobs component of the CDP reforms). The subsidised jobs package is part of a pathway to employment and is intended to enable participants to experience what it is like to work in a real job, and develop further skills and experience, while still accessing a level of support from employers and CDP providers.
>
> Under the CDP, almost 30,000 job outcomes have been supported for CDP participants. This is significantly more than the number of subsidised jobs. The subsidised jobs program will complement and not replace existing jobs in remote communities by providing businesses, including local Indigenous businesses, the opportunity to apply for additional positions. Therefore, the subsidised jobs package will increase employment outcomes, in addition to the job outcomes that will continue to be delivered without subsidies. The Government is also focused on increasing demand for local job seekers through policies including the Indigenous Procurement Policy and requirements for employment targets in government contracts.

2.150 The increased number of subsidised jobs and the associated exceptions from the TCF is relevant to the proportionality of the limitation. However, it appears that there will nevertheless be categories of CDP participants who will not be subject to this safeguard.

2.151 Yet, the minister's response further explains that the mutual obligation requirements that will apply will be tailored to be appropriate to remote Australia:

> The CDP responds to the unique social and labour market circumstances in remote communities. All job seekers across Australia have mutual obligation requirements, regardless of where they live. However, how a job seeker meets these requirements varies based on a range of factors, including whether the job seeker is living in remote or non-remote Australia. The requirements in remote Australia are in response to the differing labour markets and availability of jobs. Regular active participation has been called for across remote communities to ensure strong engagement in communities, and no passive welfare.

36 See section 25 of the bill.

2.152 In relation to whether the bill could be amended to retain the discretion of the secretary to waive a non-payment period on the grounds of severe financial hardship under current section 42NC of the Social Security Administration Act, the minister states that he is 'confident that the design of the measures is consistent with international human rights law obligations and, as such, the Government is not considering any amendments to the Bill at this time'. He further states:

> The Bill is consistent with the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets. Increased opportunities for employment, more local support and engagement and a fairer and simpler mutual obligation system are all measures that will support the objective of reducing long term unemployment and welfare dependency.

2.153 Based on the information provided, it appears that there are intended to be processes in place to assist to ensure that mutual obligations requirements are well-tailored such that it may be less likely that a breach of these obligations occurs. It is further noted that where non-compliance with these obligations occurs, this will not lead to the imposition of a demerit unless a person does not have a 'reasonable excuse.' These matters assist with the proportionality of the measures as they mean that financial and non-payment penalties are less likely to be applied.

2.154 However, in circumstances where a person is not in subsidised employment or does not have a 'reasonable excuse' for non-compliance there remain serious issues regarding the proportionality of the limitation on the right to social security and the right to an adequate standard of living. While the TCF reduces the non-payment penalty to four weeks for a work refusal failure, unemployment failure or persistent mutual obligation failures, this non-payment penalty period was previously subject to a waiver in situations of severe financial hardship. By contrast, under the bill no discretionary waiver from the four week non-payment penalty would be available at any level on the basis of financial hardship once the penalty applies. That is, there does not appear to be capacity to mitigate the non-payment penalty itself even where it may cause serious harm. In particular, there are serious concerns that withholding a person's social security payments for four weeks will result in the person being unable to meet the expenses associated with basic necessities (such as food and housing). In this respect, no information has been provided in the response as to how a person will meet basic necessities during the four week non-payment penalty.

Committee response

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

2.156 The minister's response indicates that, with the proposed application of the Targeted Compliance Framework (TCF) to Community Development Program (CDP) participants, there will be some process and safeguards in place that may assist to

prevent breaches of mutual obligations before they occur. As such, financial penalties may be less likely to be applied and this will assist with the proportionality of the measure in practice.

2.157 However, under the TCF, where the financial non-payment penalty period is applied, a waiver is not available even in circumstances of severe financial hardship. In this respect, consistent with the committee's previous findings in relation to the TCF, this financial penalty is likely to be incompatible with the right to social security and adequate standard of living insofar as there may be circumstances where a person is unable to meet basic necessities during the four week non-payment period.

2.158 If the bill passes, to ensure human rights compatibility, the committee recommends that the department monitor the application of penalties and the extent to which they may result in a person being unable to meet basic necessities.

Payment suspension for a mutual obligation failure

2.159 Applying the TCF to CDP participants means that CDP participants who are not engaged in subsidised employment are liable to payment suspension for a mutual obligation failure unless they have a reasonable excuse.[37] The suspension period may last up to four weeks but ends when the person complies with the reconnection requirement (such as reconnecting with an employment provider) unless the secretary determines an earlier day.[38] If the job seeker fails to comply with the reconnection requirement within four weeks, their social security participation payment will be cancelled (as noted above at [2.131]-[2.133]).[39]

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

2.160 The initial analysis noted that the suspension of social security payments for mutual obligation failures may limit the right to social security and the right to an adequate standard of living.

2.161 The initial analysis raised questions as to whether the measures constitute a permissible limitation on the rights to social security and an adequate standard of living. This is because the measure would operate to suspend a person's social security payments.

2.162 The initial analysis also noted that the committee has previously concluded that such a measure may be compatible with human rights given the range of

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

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

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

circumstances identified by the minister as constituting a 'reasonable excuse'. This was on the basis that the payment suspension would not apply where a person had a 'reasonable excuse' for a mutual obligation failure. However, that conclusion was made in relation to the TCF prior to its extension to CDP participants. The initial analysis therefore raised questions as to whether the matters which constituted a 'reasonable excuse' were sufficiently adapted to the conditions of remote Australia, noting large distances to be covered and limited transportation options.

2.163 The full initial human rights analysis and the committee's questions to the minister as to the compatibility of the measure with the rights to social security and an adequate standard of living are set out at *Report 10 of 2018* (18 September 2018) pp. 12-15.[40]

Minister's initial response

2.164 The minister's initial response to the committee's inquires, received on 10 October 2018, did not fully address human rights concerns in relation to applying the TCF to CDP participants. The full analysis of the minister's initial response is set out at *Report 12 of 2018* (27 November 2018) pp. 31-33.[41]

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

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;
- how the measure is rationally connected to (that is, effective to achieve) the stated objective of reducing welfare dependence and long-term unemployment in remote Australia; and
- relevant safeguards to ensure the measure does not limit the right to social security any more than necessary to achieve its objectives, including information on:
    - how mutual obligation requirements will differ in remote Australia from non-remote Australia; and

40 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 12-15 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

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

- whether what constitutes reasonable excuse will be modified or interpreted to take into account the conditions of remote Australia.

Minister's response and analysis

2.166 As noted above, the minister's response indicates that there are intended to be a number of processes in place to ensure that mutual obligations requirements are well-tailored to the conditions of remote Australia such that it may be less likely that a breach of these obligations occurs. This includes that CDP providers will be required to engage more with job seekers under the TCF which will ensure there is more support available to job seekers before any penalties are issued. Where non-compliance with these obligations occurs, this will not lead to the imposition of a penalty or demerit unless a person does not have a 'reasonable excuse.' In this respect, in recognition of the lack of availability of drug and alcohol rehabilitation services in remote Australia, CDP participants will continue to have access to reasonable excuse provisions in circumstances where the failure to meet mutual obligation requirements is due to drug or alcohol misuse or dependency. The criteria for what constitutes a 'reasonable excuse' and the acceptance of these by CDP providers may act as relevant safeguards in relation to the measure. It is further noted that the payment suspension ceases when the person complies with a reconnection requirement. In view of these factors, the payment suspension may be a proportionate limitation on the right to social security and the right to an adequate standard of living.

Committee response

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

2.168 Based on the information provided and the above analysis, the measure may be compatible with the right to social security and an adequate standard of living.

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

2.169 In its initial analysis, the committee raised questions as to whether the measures are compatible with the right to equality and non-discrimination. 'Discrimination' encompasses a distinction based on a personal attribute (for example, race, sex or disability), which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination as 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular protected

attribute.[42] Where a measure impacts on a particular group disproportionately it establishes *prima facie* that there may be indirect discrimination.[43]

2.170 The initial analysis raised concerns that applying the TCF to CDP participants, 80% of whom are Aboriginal and Torres Strait Islander, and all of whom live in remote Australia, may result in indirect discrimination. That is, although the statement of compatibility states that the bill seeks to ensure that 'activity tested job seekers across Australia will be subject to the same compliance framework, no matter where they live', it did not appear to take into account what effect applying the same compliance framework to CDP participants, without adjustments to take into account the conditions of remote Australia, may have.

2.171 As also noted in the initial analysis, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective.[44] No evidence was provided in the statement of compatibility as to whether the existing compliance arrangements for CDP participants are ineffective to address the stated objective of the bill of reducing welfare dependence and long-term unemployment in remote Australia. This raised questions as to whether the differential treatment, being the disproportionate impact this measure may have on Aboriginal and Torres Strait Islander people and jobseekers living in remote Australia, is based on reasonable and objective criteria.

2.172 The full initial human rights analysis and the committee's questions to the minister as to the compatibility of the measures with the right to equality and non-discrimination is set out at *Report 10 of 2018* (18 September 2018) pp. 17-19.[45]

Minister's initial response

2.173 The minister's initial response to the committee's inquires, received on 10 October 2018, did not fully address human rights concerns in relation to applying

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

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

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

45 Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 17-19 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_10_of_2018.

the TCF to CDP participants. The full analysis of the minister's initial response is set out at *Report 12 of 2018* (27 November 2018) pp. 36-38.[46]

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

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

Minister's further response and analysis

2.175 In relation to the compatibility of the measure with the right to equality and non-discrimination, the minister's response states:

> CDP and the Bill itself are consistent with the right to equality and non-discrimination. The position of the Government is that both the existing CDP and the Bill do not disproportionately impact Aboriginal and Torres Strait Islander people. Similarly, the position of the Government is that both the existing CDP and the Bill do not disproportionately impact job seekers living in remote Australia as opposed to non-remote job seekers (be they Indigenous or non-Indigenous).

2.176 However, noting that 80% of CDP participants are Aboriginal and Torres Strait Islander, all of whom live in remote Australia, it follows that the measure may have a disproportionate impact on this group. Accordingly, the minister may be indicating that the impacts are not a negative such that it does not amount to a disproportionate negative effect in the relevant sense.

2.177 Even if the application of the TCF to CDP participants does have a disproportionate negative effect, differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that

46 Parliamentary Joint Committee on Human Rights, *Report 12 of 2018* (27 November 2018) pp. 36-38 at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_12_of_2018.

legitimate objective and is a proportionate means of achieving that objective. In this respect, the minister's response states:

> The Committee has sought further advice on a number of specific matters on the basis that the Bill may have a disproportionate impact on certain participants. As the Government position does not align with this characterisation of the Bill I wish to clarify a number of aspects of the measures to demonstrate their consistency with the right to equality and non-discrimination.
>
> The CDP is designed around the unique social and labour market conditions found in remote Australia. It supports the specific needs of participants in remote Australia to build skills, address barriers and contribute to their communities through a range of flexible activities. It also supports remote job seekers with transitioning into paid employment which will assist with combatting long term unemployment in remote areas. This transition will ensure CDP participants are subject to the same compliance framework as their non-remote counterparts. I reiterate that the CDP reforms were developed in close consultation with a range of stakeholders.
>
> The measure is therefore reasonable, necessary and proportionate to achieve the legitimate objectives of the CDP and the Bill as outlined above. Accordingly, both CDP and the Bill itself are consistent with the right to equality and non-discrimination.

2.178 Noting that the bill would apply the same TCF framework to CDP participants as currently applies to their non-remote counterparts and that the minister indicates that there will be additional safeguards and processes in relation to the particular conditions in remote Australia, the measures may be capable of operating in a non-discriminatory way.

Committee response

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

2.180 Based on the information provided, the preceding analysis indicates that the measures may be capable of operating in a non-discriminatory way. However, if the bill passes, the committee recommends that the application of the TCF to CDP participants be monitored to ensure it operates in a way that is compatible with the right to equality and non-discrimination.

Mr Ian Goodenough MP

Chair