

# Chapter 1

## New and continuing matters<sup>1</sup>

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 14 October and 5 December 2019;
  - legislative instruments registered on the Federal Register of Legislation between 20 September and 3 December 2019;<sup>2</sup> and
  - one bill previously deferred.<sup>3</sup>

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 1 of 2020*; [2020] AUPJCHR 2.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

3 Discrimination Free Schools Bill 2018 was previously deferred in *Report 3 of 2019*, *Report 4 of 2019*, *Report 5 of 2019* and *Report 6 of 2019*.

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## Response required

1.2 The committee seeks a response from the relevant minister with respect to the following bills and instruments.

### Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019<sup>4</sup>

<p><b>Purpose</b></p>	<p>This bill seeks to amend a number of Acts in relation to combatting of money laundering and financing of terrorism to:</p> <ul style="list-style-type: none"> <li>• expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party;</li> <li>• prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed;</li> <li>• increase protections around correspondent banking;</li> <li>• expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors, and foreign members of corporate and designated business groups;</li> <li>• amend the framework for the use and disclosure of financial intelligence;</li> <li>• create a single reporting requirement for the cross-border movement of monetary instruments including physical currency and bearer negotiable instruments;</li> <li>• amend the Criminal Code to deem money or property provided by undercover law enforcement as part of a controlled operation to be the proceeds of crime for the purposes of prosecution;</li> <li>• expand the rule-making powers of the Chief Executive Officer of AUSTRAC; and</li> <li>• make it an offence for a person to dishonestly represent that a police award has been conferred on them</li> </ul>
<p><b>Portfolio</b></p>	<p>Home Affairs</p>

4 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 3.

<b>Introduced</b>	House of Representatives on 17 October 2019
<b>Right</b>	Fair hearing
<b>Status</b>	Seeking additional information

## Anti-money laundering and terrorism financing

1.3 Item 125 of the bill seeks to insert a new section 400.10A into the *Criminal Code Act 1995* to provide that money or property provided by a law enforcement participant (or civilian participant acting under their direction) as part of a controlled operation, does not need to be proved to be the proceeds of crime in any prosecution for dealing with the proceeds of crime.<sup>5</sup>

## Preliminary international human rights legal advice

### *Right to a fair trial*

1.4 By providing that money or property provided by, or on behalf of, a law enforcement participant in a controlled undercover operation does not need to be proved to be the proceeds of crime for the purposes of a prosecution, this measure may engage the right to a fair trial. The right to a fair trial and fair hearing is protected by article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings and to cases before both courts and tribunals.

1.5 When considering the impact of undercover police operations on the right to a fair trial, the main issue that arises is whether the conduct being authorised by the measure would amount to entrapment. The European Court of Human Rights has held that conduct rising to the level of entrapment constitutes an impermissible limitation of the right to a fair trial.<sup>6</sup> In determining whether law enforcement conduct amounts to entrapment, the key test is whether it can be classed as a form of *passive* investigation, or whether it is more accurately classed as *incitement* –

5 Being a prosecution under sections 400.3 to 400.8 of the *Criminal Code Act 1995*.

6 See, *Ramanauskas v Lithuania (No. 2)*, European Court of Human Rights Application No. 55146/14 (20 February 2018). Jurisprudence from the European Court of Human Rights provides guidance regarding distinguishing legitimate undercover techniques by law enforcement from entrapment, which is not permissible. The court explains that it is necessary to consider whether there is a sufficient degree of certainty that authorities instigated the individual's activities in a passive way, or whether they incited them to commit the offence. The court will take into consideration whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed to commit a criminal offence and whether the authorities exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed. See, *Matanović v. Croatia* European Court of Human Rights Application No. 2742/12 (4 April 2017), [123] – [133].

meaning that the crime being investigated would not have been committed without police intervention. This test is set out in the case of *Vanyan v Russia*:

Where the activity of undercover agents appears to have instigated the offence and there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement. Such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined.<sup>7</sup>

1.6 In considering whether a law might risk empowering conduct that amounts to entrapment (or incitement), the presence of 'clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment'.<sup>8</sup> In addition to clear guidelines around the authorisation of such conduct, these safeguards might also include requirements for sufficient documentation to enable the subsequent independent scrutiny of the conduct.<sup>9</sup> However, the statement of compatibility does not identify that the proposed measure engages the right to a fair trial, and as such no information is provided about whether such safeguards exists.

1.7 It is noted that there is no substantive defence of entrapment in Australia, although a court can exercise its discretion to exclude all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers, on public policy grounds.<sup>10</sup> Under the *Crimes Act 1914*, the authority to conduct a controlled operation cannot be granted unless an authorising officer<sup>11</sup> is satisfied on 'reasonable grounds' that the controlled operation will not be

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7 *Vanyan v. Russia*, European Court of Human Rights Application no. 53203/99 (15 March 2006), [47].

8 *Ramanauskas v Lithuania*, European Court of Human Rights Application No. 74420/01 (5 February 2008), [52].

9 See, eg, *Matanovit v. Croatia*, European Court of Human Rights Application no. 2742/12, (4 July 2017), [131]-[134].

10 *Ridgeway v the Queen* [1995] HCA 66, [33] (Mason CJ, Deane and Dawson JJ); [52]-[53] (Brennan J); and [63]-[65] (Toohney J). The court also commented that, '[T]he stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with the minimum standards of acceptable police conduct in all the circumstances including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation and prevention and any imminent danger to the community', [37] (Mason CJ, Deane and Dawson JJ).

11 'Authorising officer' is defined in section 15GF of the *Crimes Act 1914*, to include the AFP Commissioner or Deputy Commissioner, a senior executive AFP employee; the CEO of the Australian Crime Commission (ACC) or an SES member of the ACC; or an Australian Commission for Law Enforcement Integrity (ACLEI) Commissioner, Assistant Commissioner, or SES member in the case of corruption investigations.

conducted in such a way that a person is likely to be induced to commit an offence that the person would not otherwise have intended to commit.<sup>12</sup> Furthermore, a participant in a controlled operation would only be protected from criminal responsibility for an offence committed in the course of the operation,<sup>13</sup> and be indemnified from civil liability,<sup>14</sup> where 'the conduct does not involve the participant intentionally inducing a person to commit a Commonwealth offence or an offence under a law of a State or Territory that the person would not otherwise have intended to commit'.<sup>15</sup>

1.8 These provisions may safeguard against conduct which could otherwise constitute entrapment. However, the threshold requirement that an authorising officer be satisfied on 'reasonable grounds' that a person will not be induced into committing an offence appears to be broad, and more information is required to assess whether this provision would provide an adequate safeguard against the risk of entrapment. Furthermore, it is unclear whether evidence relating to the receipt of 'money or property provided by undercover law enforcement as part of a controlled operation' would still be admissible, and treated as the proceeds of crime for the purposes of prosecution, even where it is later demonstrated that:

- the authorising officer did not have reasonable grounds for providing the controlled operation authorisation; or
- despite an authorising officer having had such reasonable grounds, the conduct of the participants during the operation itself nevertheless amounted to incitement.

1.9 In summary, the bill seeks to deem money or property provided by, or on behalf of, a law enforcement participant to a person during an undercover police operation to be 'proceeds of crime', for the purposes of prosecuting a person for dealing with proceeds of crime. If the conduct by law enforcement participants amounted to entrapment, these measures would engage and limit the right to a fair trial.

1.10 More information is required in order to assess the compatibility of this measure with the right to a fair trial. In particular:

- whether there are adequate procedural safeguards in place to prevent covert law enforcement operations, which may result in a charge for an alleged offence under sections 400.3 to 400.8 of the *Criminal Code Act 1995*, from amounting to incitement;

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12 *Crimes Act 1914*, subsection 15GI(2)(f).

13 *Crimes Act 1914*, subsection 15HA(2)(c).

14 *Crimes Act 1914*, subsection 15HB(c).

15 *Crimes Act 1914*, subsections 15HA(2)(c) and 15HB(c).

- whether there is any independent oversight, or rights of review, in relation to the conduct of covert law enforcement operations; and
- whether there are any limits on the admissibility of evidence provided by a law enforcement or civilian participant in the context of a controlled operation, in relation to the prosecution for a proceeds of crime offence, if the conduct of such operation were to amount to incitement.

### **Committee view**

**1.11** The committee notes that the bill seeks to deem money or property provided by, or on behalf of, a law enforcement participant to a person during an undercover police operation to be 'proceeds of crime', for the purposes of prosecuting a person for dealing with proceeds of crime. The committee notes the legal advice on the bill that if the conduct by law enforcement participants amounted to entrapment, these measures may engage and limit the right to a fair trial. In order to assess the compatibility of this measure with the right to a fair trial, the committee seeks the minister's advice as to the matters set out at paragraph [1.10].

## Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Australian Sports Anti-Doping Authority Act 2006</i> , and other Acts, to: abolish the Anti-Doping Rule Violation Panel; empower the Chief Executive Officer to initiate a suspected anti-doping rule violation investigation, and require the provision of information or the production of documents or things where the CEO 'reasonably suspects' that a person has such information; increase the penalty for non-compliance with a disclosure notice; and extend the protection from civil actions to National Sporting Organisations
<b>Portfolio</b>	Youth and Sport
<b>Introduced</b>	House of Representatives on 17 October 2019
<b>Rights</b>	Privacy and effective remedy
<b>Status</b>	Seeking additional information

### Lowering threshold to issue a disclosure notice

1.12 The bill seeks to amend the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) to lower the threshold by which the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA) may issue a disclosure notice.<sup>2</sup> Currently, the CEO of ASADA may issue a written notice (disclosure notice), requiring a person to attend an interview to answer questions or to produce documents or things.<sup>3</sup> The CEO may currently only issue such a notice if they 'reasonably believe' that the person has information, documents or things relevant to the administration

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 4.

2 'Disclosure notice' is defined in subsection 13A(1) of the ASADA Act to mean a written notice requiring the person to attend an interview to answer questions, give information of the kind specified in the notice, and/or produce documents or things of the kind specified in the notice.

3 Proposed section 13D(1) would provide that a person is not excused from answering questions, giving information or producing a document or thing pursuant to a disclosure notice on the grounds that to do so might tend to incriminate the person or expose them to a penalty. However, proposed section 13D(2) would also provide that 'use' and 'derivative use' immunities are available in relation to answering questions, giving information, and producing information, documents and things. Accordingly, the measure does not raise human rights concerns in relation to the right not to incriminate oneself due to the availability of relevant safeguards.

of the national anti-doping scheme, and three members of the Anti-Doping Rule Violation Panel agree with that belief.<sup>4</sup>

1.13 Items 43 and 44 of the bill seek to lower this threshold, enabling the CEO to issue a disclosure notice where they 'reasonably suspect' that the person in question has such information, documents or things. As Part 1 of Schedule 1 of the bill also seeks to abolish the Anti-Doping Rule Violation Panel, item 13 of the bill seeks to remove the requirement that three panel members agree in writing that the CEO's belief is reasonable. Item 46 of the bill would also double the penalty for non-compliance with such a disclosure notice, increasing it to 60 penalty units (currently \$12,600).<sup>5</sup>

## **Preliminary international human rights legal advice**

### ***Right to privacy***

1.14 Disclosure notices may require a person to provide personal information to the CEO of ASADA, and therefore engage and limit the right to privacy.<sup>6</sup> By lowering the threshold for issuing a disclosure notice and increasing penalties for non-compliance, the proposed measures would increase the existing limitations on the right to privacy associated with the disclosure notice regime. The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use, and sharing of personal information.<sup>7</sup>

1.15 The right to privacy may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, and be rationally connected to, and a proportionate means of achieving, that objective.<sup>8</sup>

1.16 The statement of compatibility acknowledges that the measures engage and limit the right to privacy.<sup>9</sup> In relation to whether the measure pursues a legitimate

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4 Sections 13(1)(ea) and 13A of the ASADA Act. Currently, the penalty for non-compliance with a disclosure notice is 30 penalty units (currently \$6,300).

5 A 'penalty unit' is defined as \$210 (subject to indexation) under the *Crimes Act 1914*, section 4AA.

6 International Covenant on Civil and Political Rights (ICCPR), article 17.

7 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

8 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

9 Statement of compatibility, pp. 5-6.



objective, it states that the overall disclosure regime contributes to the legitimate aim of catching dope cheats and the individuals who facilitate doping, which is potentially harmful to health, and 'may distort the outcome of sporting contests, and over time undermines the overall integrity of sport.'<sup>10</sup> It also states that the changes to the threshold for issuing disclosure notices were identified by the Wood Review to better enable ASADA to investigate those persons facilitating and enabling the commission of anti-doping rule violations.<sup>11</sup> The statement of compatibility also states that, under the current regime, ASADA is typically confined to issuing disclosure notices to those persons already believed to have committed doping violations, rather than the people facilitating or enabling the commission of such violations.<sup>12</sup> It states that notices are generally only sought in circumstances where ASADA already has evidence that might suggest a violation.<sup>13</sup>

1.17 Ensuring that ASADA is able to effectively investigate potential anti-doping rule violations in the context of increasingly complex anti-doping matters is likely to be a legitimate objective for the purposes of international human rights law, and the measures seem rationally connected to that objective.

1.18 The statement of compatibility further states that the measures are a proportionate limitation on the right to privacy.<sup>14</sup> It provides some information as to the safeguards that apply to the current disclosure regime. In particular, it notes that section 67 of the ASADA Act contains strong protections over information obtained through the disclosure notice process, by making it an offence for an entrusted person to disclose protected information, which includes information obtained under a disclosure notice.<sup>15</sup> It also highlights that the ASADA Act limits the ability of the CEO to issue a disclosure notice to a medical practitioner,<sup>16</sup> which helps prevent arbitrary interferences with the doctor-patient relationship.<sup>17</sup>

1.19 However, the statement of compatibility otherwise provides limited assessment of how lowering the threshold by which the notice may be given is a

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10 Statement of compatibility, p. 5.

11 Statement of compatibility, p. 6.

12 Statement of compatibility, p. 6.

13 Statement of compatibility, p. 6.

14 Statement of compatibility, pp. 5-6.

15 Statement of compatibility, p. 8.

16 ASADA Act, subsection 13A(1A)(b).

17 Statement of compatibility, p. 8. However, it is noted that item 44 of the bill also seeks to lower the threshold necessary for the CEO to issue a disclosure notice to a medical practitioner to where the CEO 'reasonably suspects' that the practitioner has been involved, in that capacity, in the commission, or attempted commission, of a possible violation of the anti-doping rules.

proportionate limitation on the right to privacy. Instead, it states that the nature of a disclosure warrant is less intrusive than that of a search warrant and therefore a lower threshold is warranted.<sup>18</sup> However, while a disclosure warrant does not authorise the search of premises, it still requires a person to provide potentially personal and sensitive information, documents, things or answers, and provides that a person who does not do so commits an offence. The statement of compatibility provides no explanation as to the appropriateness of removing the current oversight mechanism, whereby currently a disclosure notice can only be issued where three members of the Anti-Doping Rule Violation Panel agree with the CEO. This bill would remove this so that the decision rests solely with the CEO, on the lower standard of reasonable 'suspicion' rather than reasonable 'belief'. While the Wood Review was cited as the basis for these amendments,<sup>19</sup> the removal of this safeguard has not been addressed in the statement of compatibility, and it is noted that the removal of oversight of the CEO's decision was not part of the Wood Review's recommendation.<sup>20</sup>

1.20 Also relevant to the proportionality of the measures is the nature and extent of the information, documents or things that may be required pursuant to a disclosure notice (for example, the extent to which a person may be required to disclose personal information, and whether a person may be required to provide bodily samples for testing purposes). The statement of compatibility provides no information in this regard and it is noted that the ASADA Act provides that the information, documents or things can be anything that is specified in the notice.<sup>21</sup> This raises questions as to whether the measures are appropriately circumscribed. It is also noted that the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019 seeks to overhaul ASADA, to give the CEO the significantly broader responsibility of investigating threats to 'sports integrity', which would include doping, manipulation of sporting competitions, and the abuse of children in a sporting environment. As such, the disclosure notice framework would apply to a much broader range of conduct.

1.21 In summary, the bill seeks to lower the threshold for the CEO of ASADA to issue a disclosure notice, requiring persons to answer questions or provide information, documents or things regarding a suspected doping violation, which may include personal information. These measures therefore engage and limit the right to privacy.

1.22 In order to assess the proportionality of the proposed measures with the right to privacy, more information is required as to:

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18 Statement of compatibility, p. 6.

19 Explanatory memorandum, p. 1; and statement of compatibility pp. 1, 3-10.

20 *Report of the Review of Australia's Sports Integrity Arrangements*, 2018, p. 129.

21 See section 13A of the ASADA Act.

- what, if any, oversight would apply to the CEO's decision to issue a disclosure notice, noting that the bill seeks to remove the need to have the agreement of three members of the Anti-Doping Rule Violation Panel;
- whether there are other, less rights restrictive, methods for investigating doping related matters when the CEO suspects (but does not yet believe) a contravention may have occurred; and
- the nature of the information, documents or things that may be required to be provided pursuant to a disclosure notice.

### **Committee view**

**1.23** The committee notes that the bill seeks to lower the threshold for the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority to issue a disclosure notice, requiring persons to answer questions or provide information, documents or things regarding a suspected doping violation, which may include personal information. The committee notes the legal advice on the bill that these measures engage and limit the right to privacy. In order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [1.22].

## Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Australian Sports Anti-Doping Authority Act 2006</i> to rename the Australian Sports Anti-Doping Authority as 'Sport Integrity Australia'; provide Sport Integrity Australia with a new set of functions; list Sport Integrity Australia as an enforcement body under the <i>Privacy Act 1988</i> ; and make consequential amendments to other Acts
<b>Portfolio</b>	Youth and Sport
<b>Introduced</b>	House of Representatives on 17 October 2019
<b>Right</b>	Privacy
<b>Status</b>	Seeking additional information

### Exempting Sport Integrity Australia from aspects of the *Privacy Act 1988*

1.24 The bill seeks to rename the Australian Sports Anti-Doping Authority (ASADA), whose focus is on anti-doping, as Sport Integrity Australia (SIA), and provide SIA with a broader set of responsibilities and functions. Item 24 of the bill would establish that the SIA Chief Executive Officer (CEO) is responsible for coordinating a national approach to Australia's response to matters relating to 'sports integrity', including threats to sports integrity.<sup>2</sup> 'Threats' to sports integrity are defined to include manipulation of sporting competitions, the use of drugs or doping methods in sport, the abuse of children and other persons in a sporting environment and the failure to protect members of sporting organisations from bullying, intimidation, discrimination or harassment.<sup>3</sup>

1.25 Furthermore, the bill seeks to amend subsection 6(1) of the Privacy Act to include SIA as an 'enforcement body'.<sup>4</sup> This would have the effect that:

- SIA would not be required to notify of an eligible data breach under Part IIIC of the Privacy Act, where the CEO believes on reasonable grounds that

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 5.

2 Schedule 1, item 11 of the bill. 'Sports integrity' being defined to mean the manifestation of the ethics and values that promote community confidence in sport.

3 Schedule 1, item 12.

4 Schedule 2, item 23.

- notifying the breach would be likely to prejudice one or more enforcement related activities conducted by, or on behalf of, the enforcement body;<sup>5</sup>
- SIA would not be required to obtain an individuals' consent to collect sensitive information, where the collection of that information is reasonably necessary for, or directly related to, one or more of SIA's functions or activities;<sup>6</sup>
  - another Australian Privacy Principle (APP) entity would be able to disclose information to SIA,<sup>7</sup> including a person's government identifier,<sup>8</sup> where that entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more of SIA's enforcement related activities;
  - SIA would not be required to obtain a person's consent to disclose their personal information to an overseas recipient, where that recipient is a body that performs functions, or exercises powers, that are similar to those performed or exercised by an enforcement body;<sup>9</sup> and
  - SIA would not be required to give a person access to their personal information where to do so would be likely to prejudice one or more enforcement related activities conducted by SIA.<sup>10</sup>

## **Preliminary international human rights legal advice**

### ***Right to privacy***

1.26 The proposed inclusion of SIA as an enforcement body for the purposes of the Privacy Act, which would enable SIA to use and disclose personal information, engages the right to privacy.<sup>11</sup> The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal

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5 *Privacy Act 1988*, section 26WN. 'Enforcement related activity' is defined in subsection 5(1) of the *Privacy Act 1988* to mean: the prevention, detection, investigation, prosecution or punishment of criminal offences, or breaches of a law imposing a penalty or sanction; the conduct of surveillance activities, intelligence gathering activities or monitoring activities; the conduct of protective or custodial activities; the enforcement of laws relating to the confiscation of the proceeds of crime; the protection of public revenue; the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations; or the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of court/tribunal orders.

6 Australian Privacy Principle (APP) 3.4(d)(ii).

7 APP 6.2(e).

8 APP 9.2(e).

9 APP 8.2(f).

10 APP 12.3(i).

11 International Covenant on Civil and Political Rights (ICCPR), article 17.

information.<sup>12</sup> The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.<sup>13</sup>

1.27 The statement of compatibility acknowledges that the proposed inclusion of SIA as an enforcement body engages the right to privacy.<sup>14</sup> It argues that this amendment is not arbitrary because it is 'sufficiently precise', noting that the exemptions only apply where the use or disclosure of information is reasonably necessary for SIA's enforcement related activities.<sup>15</sup> However, the statement of compatibility does not go on to explain the objective behind providing this exemption from the Privacy Act.

1.28 In relation to the proportionality of the measures, the statement of compatibility notes that SIA would otherwise remain subject to the requirements of the Privacy Act and Australian Privacy Principles.<sup>16</sup> It also argues that it is proportionate for SIA to be listed an enforcement body because, while formal allegations put forward by the body would not result in civil penalties or criminal charges, it would still have specific investigative powers in relation to threats to sports integrity, and the results of such investigations would be used to pursue cases of anti-doping rule violations, including before the National Sports Tribunal.<sup>17</sup> It also highlights that the current secrecy provisions within the ASADA Act, which will remain in place, act as a protection to ensure that information cannot be inappropriately disclosed.<sup>18</sup>

1.29 However, it remains unclear what enforcement related activity is likely to be carried out by the proposed SIA, particularly noting that it appears that the functions of SIA would be expanded beyond anti-doping, to include matters that threaten 'sports integrity', including suspected cases of child abuse and bullying, intimidation,

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12 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

13 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

14 Statement of compatibility, pp. 4-5.

15 Statement of compatibility, p. 4.

16 Statement of compatibility, p. 4.

17 Statement of compatibility, pp. 4-5.

18 Statement of compatibility, p. 5.

discrimination or harassment.<sup>19</sup> The statement of compatibility does not explain what are the likely 'enforcement related activity' that this exemption would apply to.

1.30 No information has been provided as to why each exemption from the Privacy Act is required or proportionate. For example, it is unclear what safeguards would operate in relation to the sharing of personal information with overseas entities, and what steps SIA would be required to take to ensure that personal information being shared in such a way would be protected. It is unclear why it is necessary and proportionate to give a blanket exemption from the need to obtain an individuals' consent to collect sensitive information where it is reasonably necessary or related to SIA's broad range of functions or activities. Furthermore, the extent of the proposed exemption from notifying eligible data breaches where the CEO believes this would likely prejudice enforcement related activities is unclear. For example, it is not clear if notification would be required once an enforcement related activity had ended. Similarly, it is unclear whether, once an enforcement related activity had ended, an individual would be able to require or otherwise request access to personal information being held by the SIA.

1.31 In summary, the bill seeks to expand the functions currently being exercised by the Australian Sports Anti-Doping Authority. In exercising these broader functions, the newly named Sport Integrity Australia would also be given the status of an 'enforcement body' for the purposes of the *Privacy Act 1988*, thereby enlivening a number of powers in relation to the gathering, sharing and control over access to personal information. These proposed measures engage and may limit the right to privacy.

1.32 More information is required in order to assess the compatibility of this measure with the right to privacy, in particular:

- the legitimate objective that the measure seeks to address (including any reasoning or evidence that establishes that the objective addresses a substantial and pressing concern);
- the type of information it is anticipated that SIA would obtain and/or share in addressing threats to 'sports integrity' (including what investigations are likely to be conducted by SIA in relation to the abuse of children and any bullying, intimidation, discrimination or harassment in a sporting environment);
- whether there are any other, less rights restrictive, methods to achieve the stated objective;

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19 Noting that, depending on the kinds of enforcement activities which may be undertaken, and the manner in which this takes place in practice, these measures may promote the rights of the child (see, Convention on the Rights of the Child).

- whether an eligible data breach would be required to be notified once any prejudice to an enforcement related activity has ceased; and
- what safeguards would protect the privacy of personal information which SIA could share (including with overseas entities).

### **Committee view**

**1.33** The committee notes that the bill seeks to expand the functions currently being exercised by the Australian Sports Anti-Doping Authority. In exercising these broader functions, the newly named Sport Integrity Australia would also be given the status of an 'enforcement body' for the purposes of the *Privacy Act 1988*, thereby enlivening a number of powers in relation to the gathering, sharing and control over access to personal information. The committee notes the legal advice that these measures engage and may limit the right to privacy. In order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee seeks the minister's advice as to the matters set out at paragraph [1.32].



## Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248]<sup>1</sup>

<b>Purpose</b>	These regulations repeal and re-make the Broadcasting Services (Transmitter Access) Regulations 2001, while making amendments to Australian Competition and Consumer Commission arbitration proceedings. This includes making some offence provisions strict liability and reducing the corresponding penalties, removing the defence of 'reasonable excuse' in relation to witnesses, and enabling the Commission to make some decisions based on paper submissions only
<b>Portfolio</b>	Communications, Cyber Safety and the Arts
<b>Authorising legislation</b>	<i>Broadcasting Services Act 1992</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in both the House of Representatives and the Senate on 14 October 2019).
<b>Right</b>	Freedom of expression and assembly
<b>Status</b>	Seeking additional information

### 'Insulting' or 'disturbing' an Australian Competition and Consumer Commission arbitration proceeding

1.34 This legislative instrument deals with the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) in relation to access to broadcasting transmission towers and designated associated facilities under various provisions in the *Broadcasting Services Act 1992* (the Act).

1.35 These regulations repeal and replace the Broadcasting Services (Transmitter Access) Regulations 2001, which were due to sunset. Under section 31 of the regulations, a person commits an offence if they:

- insult, disturb or use insulting language towards a member of the ACCC who is exercising powers, or performing functions or duties, as a member of the ACCC for the purposes of an arbitration hearing;
- interrupt an arbitration hearing; or
- create a disturbance, or participate in creating or continuing a disturbance, in a place where an arbitration hearing is being conducted.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248], *Report 1 of 2020*; [2020] AUPJCHR 6.

1.36 The penalty for this offence is 30 penalty units (currently \$6,300).<sup>2</sup>

## **Preliminary international human rights legal advice**

### ***Rights to freedom of expression and assembly***

1.37 Prohibiting the use of 'insulting' language or communication, or the creation of a disturbance (which could include a lawful peaceful protest) in a place where an ACCC arbitration hearing is being held, engages and may limit the rights to freedom of expression and assembly.

1.38 The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.<sup>3</sup> This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public, even if it is disruptive.<sup>5</sup> The rights to freedom of expression and assembly may be subject to permissible limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.<sup>6</sup> The limitations must be rationally connected and proportionate to such objectives.<sup>7</sup>

1.39 The statement of compatibility does not acknowledge that section 31 of the regulations engages the rights to freedom of expression and assembly, and so no information is provided to explain whether the limitation is permissible. In particular, the objective of the measures is not clear, nor whether there are any relevant safeguards to ensure they do not operate overly broadly.

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2 A 'penalty unit' is defined as \$210 (subject to indexation) under *Crimes Act 1914*, section 4AA.

3 International Covenant on Civil and Political Rights (ICCPR), article 19(2).

4 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. Article 20 of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

5 ICCPR, article 21; UN Human Rights Committee, *General Comment No 25: Article 25 (Participation in public affairs and the right to vote)* [8]. The Committee notes that citizens take part in the conduct of public affairs, including through the capacity to organise themselves.

6 ICCPR, articles 19(3) and 21.

7 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

1.40 In summary, prohibiting the use of insulting language and the creation of any disturbances in a place where an arbitration hearing of the Australian Competition and Consumer Commission is being held, engages and limits the rights to freedom of expression and assembly. This is not acknowledged in the statement of compatibility.

1.41 Further information is required in order to assess the compatibility of this measures with the rights to freedom of expression and assembly, and in particular:

- what is the objective of the measure;<sup>8</sup>
- are there are any less rights restrictive means of achieving this objective; and
- what safeguards are in place to protect the rights to freedom of expression and assembly.

### Committee view

**1.42 The committee notes that the instrument prohibits the use of insulting language and the creation of any disturbances in a place where an arbitration hearing of the Australian Competition and Consumer Commission is being held. The committee notes the legal advice that this engages and limits the rights to freedom of expression and assembly, which is not considered in the statement of compatibility. The committee seeks the minister's advice as to the compatibility of this measure with the rights to freedom of expression and assembly,<sup>9</sup> and in particular the matters set out at paragraph [1.41].**

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8 Noting that under articles 19(3), 20 and 21(3) of the ICCPR any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

9 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

## Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Fair Work (Registered Organisations) Act 2009</i> to expand the grounds on which a person can be disqualified from holding office in a union; expand the grounds on which the registration of unions may be cancelled; expand the grounds for a union to be placed into administration and provide a public interest test for amalgamations
<b>Portfolio</b>	Industrial Relations
<b>Introduced</b>	House of Representatives, 4 December 2019
<b>Rights</b>	Freedom of association; right to form and join trade unions; just and favourable conditions at work
<b>Status</b>	Seeking additional information <sup>2</sup>

### Disqualification of individuals from holding office in a union

1.43 Schedule 1 of the bill would expand the circumstances in which a person can be automatically disqualified from holding office in a registered organisation and make it a criminal offence for a person who is disqualified from holding office in a registered organisation to continue to hold office or act in a manner that would significantly influence the organisation.<sup>3</sup>

1.44 Specifically, Schedule 1 seeks to amend the *Fair Work (Registered Organisations) Act 2009* to include a discretionary regime of disqualification. The Fair Work Commissioner (the Commissioner) would be able to apply to the Federal Court for an order disqualifying a person from holding office in a union. The Federal Court could disqualify a person if satisfied that a ground for disqualification applies and it would not be unjust to disqualify the person having regard to the nature of the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, *Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019, Report 1 of 2020*; [2020] AUPJCHR 7.

2 The committee noted this bill in Parliamentary Joint Committee on Human Rights, *Report 3 of 2019* (30 July 2019), p. 15, referring to substantive comments it made with regards to the 2017 iteration of the bill in *Report 9 of 2017* (5 September 2017) pp. 13-24 and *Report 12 of 2017* (28 November 2017), pp. 113-136.

3 Explanatory memorandum, p. 2.

ground, the circumstances and any other matters the court considers relevant. Under proposed section 223<sup>4</sup> the grounds for the disqualification include:

- a 'designated finding' or contempt in relation to designated law;<sup>5</sup> or
- contempt of court in relation to an order or injunction under any law (other than designated law);
- two or more failures to take reasonable steps to prevent such conduct by a union while the person was an officer of that union;
- breach of directors' and officers' duties; or
- a person is not a 'fit and proper' person having regard to a range of factors.<sup>6</sup>

1.45 The bill seeks to make it a criminal offence for a person who is disqualified from holding office in a registered organisation to run for, hold or continue to hold office or act in a registered organisation.<sup>7</sup>

1.46 Under proposed section 9C<sup>8</sup> a 'designated finding' is defined to include a conviction against the person for an offence against a 'designated law' or any order for the person to pay a pecuniary penalty.<sup>9</sup>

### **Preliminary international human rights legal advice**

#### ***Right to freedom of association and the right to just and favourable conditions at work***

1.47 Expanding the circumstances in which individuals can be disqualified from holding office in a union engages and limits the right to freedom of association, the right to just and favourable conditions at work and in particular the right of unions to elect their own leadership freely. The right to freedom of association includes the right to form and join trade unions. The right to just and favourable conditions of work also encompasses the right to form trade unions. These rights are protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>10</sup>

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4 Schedule 1, item 11, proposed section 223.

5 As detailed in proposed subsections 9C(1)(a) and (b).

6 See proposed subsection 223(6) for the grounds for disqualification.

7 Schedule 1, item 11, proposed Division 4, Part 4 of Chapter 7.

8 Schedule 1, item 2, proposed section 9C.

9 The designated laws include the following: *Fair Work (Registered Organisations) Act 2009*; *Fair Work Act 2009* (Fair Work Act); *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Act); *Work Health and Safety Act 2011*; each State or Territory OHS law; Part 7.8 of the *Criminal Code* (causing harm to, and impersonation and obstruction of, Commonwealth public officials): See definition of designated law in proposed subsection 9C(2).

10 See, article 22 of the ICCPR and article 8 of the ICESCR.

1.48 The interpretation of these rights is informed by International Labour Organization (ILO) treaties, including the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) and the ILO Convention of 1949 concerning the Right to Organise and Collective Bargaining (ILO Convention No. 98).<sup>11</sup> ILO Convention 87 protects the right of workers to autonomy of union processes including electing their own representatives in full freedom, organising their administration and activities and formulating their own programs without interference.<sup>12</sup> Convention 87 also protects unions from being dissolved, suspended or de-registered and protects the right of workers to form organisations of their own choosing.<sup>13</sup>

1.49 International supervisory mechanisms have explained the scope of these rights and noted that:

The right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.<sup>14</sup>

1.50 The right to freedom of association may be subject to permissible limitations providing certain conditions are met. Generally, to be capable of justifying a limit on human rights, the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective. However, article 22(3) of the ICCPR and article 8 of ICESCR expressly provide that no limitations are permissible on this right if they are inconsistent with the guarantees of freedom of association and the right to collectively organise contained in ILO Convention No. 87.

1.51 The statement of compatibility identifies the objective of the measure as being to 'protect the interests of workers and ensure that they are represented by officers who demonstrate a willingness to uphold standards reasonable [*sic*] expected of person with the responsibility of holding office in an organisation.'<sup>15</sup> It

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11 The Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) is expressly referred to in the ICCPR and the ICESCR.

12 See ILO Convention N.87 article 3.

13 See ILO Convention N.87 articles 2, 4. See, also, ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [292]-[308].

14 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [391].

15 Statement of compatibility, p. 8.

points to recommendations from the Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) in support of this objective.<sup>16</sup> The statement of compatibility further explains that the measure, by ensuring that officers who deliberately disobey the law are restricted in their ability to be in charge of registered organisations, addresses these objectives.<sup>17</sup> The objective identified is likely to constitute a legitimate objective for the purposes of international human rights law.

1.52 The statement of compatibility states that providing for the possibility of disqualification from office and restricting who can be elected is rationally connected to the legitimate objective sought, that it is a 'rational means of ensuring greater compliance with the standards of conduct reasonably expected of officers, and a rational method for improving governance of organisations more generally.'<sup>18</sup> However, conduct that could result in disqualification is extremely broad and includes a 'designated finding', that is, a finding of a contravention of an industrial relations law (including contraventions that are less serious in nature) such as taking unprotected industrial action, which members may have decided to be in their best interests. As set out below, this raises questions about its rational connection to the stated objective of protecting the interests of members.

1.53 The statement of compatibility further provides that the measure is a proportionate limitation and notes a number of safeguards that 'will only be enlivened when it comes to protecting the interest of members of registered organisations', including Federal Court administration and supervision of the disqualification process,<sup>19</sup> and limiting standing to the Commissioner to apply for discretionary disqualification thereby 'ensuring that it is the independent regulator of registered organisations alone who has standing to apply.'<sup>20</sup> Further, the bill places the onus on the Commissioner to satisfy the court that disqualification would not be unjust,<sup>21</sup> and it also prohibits the Federal Court from making an order for disqualification unless it is satisfied that it would not be unjust.<sup>22</sup>

1.54 Schedule 6 also provides that the Commissioner, in carrying out their functions, must give priority to matters that raise serious or systemic concerns<sup>23</sup> which the explanatory memorandum explains will ensure there will be 'a

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16 Statement of compatibility, p. 8.

17 Statement of compatibility, p. 10.

18 Statement of compatibility, p. ix.

19 Statement of compatibility, p. ix.

20 Statement of compatibility, p. ix.

21 Schedule 1, item 11, proposed subsection 222(2)(b).

22 Schedule 1, item 11, proposed subsection 222(2A).

23 Schedule 6, item 2, proposed new subsection 329AB (2).

comparatively lesser focus on trivial or otherwise minor matters,<sup>124</sup> which may operate as a safeguard to the expanded powers of the Commissioner under this bill.

1.55 However, while these are relevant safeguards, in particular that disqualification orders are to be made by the Federal Court, which is to be satisfied that the disqualification is not unjust, it is unclear that these alone are sufficient to ensure that the measure constitutes a proportionate limitation. Relevantly, conduct that could result in disqualification is extremely broad and includes a 'designated finding', that is, a finding of a contravention of an industrial relations law (including contraventions that are less serious in nature). This would include taking unprotected industrial action.<sup>25</sup>

1.56 As an aspect of the right to freedom of association, the right to strike (or take industrial action) is protected and permitted under international law.<sup>26</sup> The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible under international law.<sup>27</sup> It appears that the proposed measure could lead to the disqualification of an individual for conduct that may be protected as a matter of international law. In this respect the measure would appear to further limit the right to strike. Additionally, this aspect of the measure raises questions about its rational connection to the stated objective of protecting the interests of members, where members may be of the view that taking particular forms of industrial action are in their interests.

1.57 It is further noted that under the proposed measure a person may be disqualified from holding office in a union on the basis of their failure to take

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24 Explanatory memorandum, p. 45.

25 Statement of compatibility, p. vi.

26 The right to strike is expressly protected in article 8(1)(d) of the ICESCR.

27 See, UN Committee on Economic Social and Cultural Rights (UNCESCR), Concluding Observations on Australia, E/C.12/AUS/CO/5 (23 June 2017) [29]-30: 'The Committee is also concerned that the right to strike remains constrained in the State party (art. 8). The Committee recommends that the State party bring its legislation on trade union rights into line with article 8 of the Covenant and with the provisions of the relevant International Labour Organization (ILO) Conventions (nos. 87 and 98), particularly by removing penalties, including six months of incarceration, for industrial action, or the secret ballot requirements for workers who wish to take industrial action.' See, also, ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 103rd ILC session, 2013 ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 101<sup>st</sup> ILC session, 2013; ILO CEACR, Observation Concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Australia, 99th ILC session, 2009; ILO CEACR, Individual Observation Concerning the Right to Organise and Collective Bargain Convention, 1949, (No. 98), Australia, 99th session, 2009, See also, UNCESCR, Concluding Observations on Australia, E/C.12/AUS/CO/4 (12 June 2009) 5.



reasonable steps to prevent more than one contravention by their union that amounts to a 'designated finding' or contempt of court or that relates to two or more civil designated findings that total at least 900 penalty units.<sup>28</sup> As noted above, 'designated findings' are defined to apply in relation to a broad range of contraventions of industrial law including taking unprotected industrial action. Where a union has engaged in two or more such contraventions, the effect of the measure could be that the entire elected union leadership could be subject to disqualification. This is regardless of whether or not union members agreed to participate in, for example, conduct which led to 'designated findings' or contempt of court and whether they considered that this was in their best interests.

1.58 In this respect, disqualification processes may have a very extensive impact on freedom of association more broadly. It is unclear from the information provided in the statement of compatibility how the breadth and impact of this measure is rationally connected to the stated objective of 'improving the governance of registered organisations and protecting the interests of members' and whether the measure is the least rights restrictive way of achieving this objective as required in order to be a proportionate limitation on human rights.

1.59 In order to assess whether these are permissible limitations on the rights to freedom of association and just and favourable conditions at work, further information is required as to:

- how the measure is effective to achieve (that is, rationally connected to) its stated objective, noting in particular concerns regarding the impact of the measures on the right to strike, which union members may consider to be in their best interests; and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (in particular, whether the measure is the least rights restrictive way of achieving its stated objective; the extent of the limitation including in respect of the right to strike noting previous concerns raised by international supervisory mechanisms and the existence of relevant safeguards).

### **Committee view**

**1.60 The committee notes that the bill would expand the circumstances in which a person can be automatically disqualified from holding office in registered organisations. The committee notes the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work.**

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28 Schedule 1, item 11, proposed subsection 223(3) and (3A).

**1.61 In order to assess the permissibility of any limitation under international human rights law, the committee seeks the minister's advice as to the matters set out at paragraph [1.59].**

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### **Cancellation of registration of registered organisations**

1.62 The registration of a union under the *Fair Work (Registered Organisations) Act 2009* grants the organisation a range of rights and responsibilities, including representing the interests of its members. Schedule 2 of the bill seeks to expand the grounds for the cancellation of the registration of unions under this Act. Under proposed section 28 the Fair Work Commissioner can apply to the Federal Court for an order cancelling registration of an organisation, if the Commissioner considers there are grounds for such cancellation,<sup>29</sup> including:

- if the organisation or parts of it have acted in their own interest rather than that of their members, or acted contrary to the interests of members, or not complied with designated laws;<sup>30</sup>
- if the organisation has been found to have committed serious breaches of criminal laws (defined as an offence punishable by at least 1,500 penalty units);<sup>31</sup>
- if there have been multiple designated findings against a substantial number of members.<sup>32</sup>

1.63 The bill also aims at simplifying some of the existing grounds for cancellation, including:

- that the organisation has failed to comply with an order or injunction;<sup>33</sup>
- that the organisation or a substantial number of members have organised or engaged in 'obstructive industrial action'.<sup>34</sup>

1.64 Under proposed section 28J, the court may cancel the organisation's registration if the court finds the ground is established and if the Commissioner satisfies the court that it would not be unjust to cancel the registration (having

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29 Schedule 2, item 4, proposed section 28.

30 Schedule 2, item 4, proposed section 28C.

31 Schedule 2, item 4, proposed section 28D.

32 Schedule 2, item 4, proposed section 28E.

33 Schedule 2, item 4, proposed section 28F.

34 Schedule 2, item 4, proposed section 28G. The section covers industrial action other than protected industrial action which prevented, hindered or interfered with a federal system employer or the provision of any public service and that had or is having a substantial adverse impact on the safety, health or welfare of the community or part of the community.

regard to the nature of the matters constituting that ground; the action (if any) that has been taken by or against the organisation; the best interests of the members of the organisation as a whole and any other matters the court considers relevant).

1.65 The Federal Court would also be empowered to make a range of alternative orders including the disqualification of certain officers, the exclusion of certain members or the suspension of the rights of the organisation.<sup>35</sup>

### **Preliminary international human rights legal advice**

#### ***Right to freedom of association and the right to just and favourable conditions at work***

1.66 By expanding the grounds on which unions can be de-registered or suspended, the measure engages and limits the right to freedom of association and the right to just and favourable conditions at work. In this respect, it is noted that international supervisory mechanisms have recognised the importance of registration as 'an essential facet of the right to organize since that is the first step that workers' or employers; organizations must take in order to be able to function efficiently, and represent their members adequately'.<sup>36</sup> They have further noted that 'the dissolution of trade union organizations is a measure which should only occur in extremely serious cases' noting the serious consequences for the representation of workers.<sup>37</sup>

1.67 Although the statement of compatibility contends that this measure does not limit the ability of individuals to form and join trade unions, it nevertheless provides some information as to whether the limitation on the right to freedom of association is permissible.<sup>38</sup> It states that the 'an organisation that obeys the law and complies with its rules is not at risk of having its registration cancelled,' and that the measure has the 'sole objective of protecting the interests of members and promoting public order by ensuring that an organisation is administered lawfully'.<sup>39</sup>

1.68 The protection of the interests of members and the maintenance of public order may be considered legitimate objectives for the purposes of international human rights law. However, it must be shown that the limitation imposed by the measure is effective to achieve (that is, rationally connected to) and proportionate to these stated objectives.

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35 Schedule 2, item 4, proposed sections 28M-28P.

36 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [391].

37 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [696], [699].

38 Statement of compatibility, p. 10.

39 Statement of compatibility, p. 12.

1.69 The statement of compatibility argues that the proposed measures provide a clearer and more streamlined scheme, thereby improving the effectiveness of provisions in the Act concerning cancellation of registration of organisations. It seeks to achieve this through addressing the costly and lengthy deregistration process and through 'facilitat[ing] the continued existence and functioning of an organisation or some of its component parts in circumstances in which one part of the organisation is affected by maladministration or dysfunction associated with a culture of lawlessness'.<sup>40</sup> While the measures may undoubtedly make the deregistration of unions easier, many of the grounds for cancellation could relate to less serious contraventions of industrial law or to taking unprotected industrial action such that it is unclear how the cancellation of union registration would necessarily be in the interests of members or would guarantee the democratic function of the organisation. For example, union members may have democratically decided to take unprotected industrial action and hold the view it is in their best interests to do so.

1.70 As set out above at [1.56], restrictions on taking industrial action in Australian domestic law have been subject to serious criticisms by international treaty monitoring bodies as going beyond permissible limitations on the right to strike as an aspect of the right to freedom of association. Cancelling the registration of unions for undertaking such conduct further limits the right to freedom of association. It is further noted that the court would be empowered to exclude particular members from union membership in a way that would appear to undermine their capacity to be part of a union of their choosing. The breadth of the proposed power to cancel union registration raises specific questions about whether it is sufficiently circumscribed with respect to its stated objectives, so as to be a proportionate limitation on the relevant rights.

1.71 The statement of compatibility provides some arguments about the proportionality of the measure and in particular notes the availability of certain safeguards. These include the possibility of the court making alternative orders, instead of cancellation, and the fact that orders for cancellation may be limited to part of an organisation that has been undertaking conduct. The statement of compatibility states that the bill contains three new safeguards that were not in the 2017 version of the bill, including the onus being placed on the Commissioner to satisfy the court that deregistration (or the making of alternative orders) would not be unjust; that the court is prohibited from making an order unless it is satisfied that, having regard to the gravity of the matters constituting the ground, cancellation would not be unjust;<sup>41</sup> and that the Commissioner must give priority to matters that raise serious or systemic concerns.<sup>42</sup>

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40 Statement of compatibility, p. xi.

41 As stipulated in Schedule 2, item 4, proposed paragraph 28J(1)(b) and subsection 28L(1A).

42 Schedule 6, item 2.

1.72 While the role of the court assists with the proportionality of the measures, in view of the breadth of the grounds for cancellation of union registration, these may not be sufficient to ensure that the limitation is the least rights restrictive way to achieve the stated objectives.

1.73 In order to assess whether these are permissible limitations under international human rights law, further information is required as to:

- how de-registering an organisation, in addition to other sanctions for non-compliance with particular laws, including industrial relations laws, would achieve the stated objectives of 'protecting the interests of members' and promoting public order, noting in particular that many of the grounds for cancellation could relate to less serious contraventions of industrial law or taking unprotected industrial action, which members may have decided to be in their best interests;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objectives (in particular whether the grounds for cancellation of registration are sufficiently circumscribed); and
- the extent of the limitation in respect of the right to strike, noting previous concerns raised by international supervisory mechanisms.

### **Committee view**

**1.74 The committee notes that the bill seeks to expand the grounds for the cancellation of the registration of unions. The committee notes the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work.**

**1.75 In order to assess the permissibility of any limitation under international human rights law, the committee seeks the minister's advice as to the matters set out at paragraph [1.73].**

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### **Placing unions into administration**

1.76 The bill seeks to expand the grounds for a remedial scheme to be approved by the Federal Court including through the appointment of an administrator.<sup>43</sup>

1.77 Proposed new section 323 enables the Federal Court to make a declaration on a number of bases including that 'an organisation or part of an organisation has ceased to exist or function effectively'.<sup>44</sup>

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43 Statement of compatibility, p. 12.

44 Schedule 3, item 4, proposed section 232.

1.78 Proposed subsection 323(4) provides that an organisation will have ceased to 'function effectively if the court is satisfied that officers of the organisation or a part of an organisation have, on multiple occasions, contravened designated laws; or misappropriated funds of the organisation or part; or otherwise repeatedly failed to fulfil their duties as officers of the organisation or part of the organisation.

1.79 If a court makes a declaration under proposed section 323 that an organisation or its officers are dysfunctional, have engaged in misconduct or positions are vacant, etc, then it may order a scheme to resolve the circumstances of the declaration including providing for the appointment of an administrator; reports to be given to a court; when the scheme begins and ends and when elections (if any) are to be held.<sup>45</sup>

### **Preliminary international human rights legal advice**

#### ***Right to freedom of association and the right to just and favourable conditions at work***

1.80 By allowing for unions to be placed into administration, the measure engages and limits the right to freedom of association and in particular the right of unions to organise their internal administration and activities and to formulate their own programs without interference. International supervisory mechanisms have noted that '[t]he placing of trade union organizations under control involves a serious danger of restricting the rights of workers' organizations to elect their representatives in full freedom and to organize their administration and activities.'<sup>46</sup>

1.81 The statement of compatibility states that the measure has:

the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organisations under the stewardship of officials and a membership that respects the law and thus maintain public order.<sup>47</sup>

1.82 Later the statement of compatibility states that the changes pursue the legitimate objective of ensuring that organisations are functioning effectively to be able to serve the interests of their members, and goes on to state:

The amendments are rationally connected to this objective because the new grounds for a declaration are all instances of an organisation not acting in the interests of their members and therefore not functioning effectively.<sup>48</sup>

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45 Schedule 3, item 4, proposed section 323A.

46 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [450].

47 Statement of compatibility, p. xiii.

48 Statement of compatibility, p. xiii.

1.83 While ensuring that registered organisations act in the interests of their members may constitute a legitimate objective, it is not clear that the new grounds on which an organisation can be forced into administration, all relate to the organisation not acting in the interests of its members. In addition, while some of the proposed grounds for a declaration may be rationally connected to the stated objectives, some of the grounds may capture conduct that does not run contrary to the interest of members. In discussing proportionality, the statement of compatibility identifies a range of matters which do not address the proportionality of the measure but rather address the aims or goals of the regime.<sup>49</sup> The test of proportionality is concerned with whether a measure is sufficiently circumscribed in relation to its stated objective, including the existence of effective safeguards. In this respect, concerns arise regarding the scope of conduct that may lead a union to be placed into administration. Given the potential breadth of definition of 'designated laws',<sup>50</sup> the proposed measure makes it possible for a declaration to be made in relation to less serious breaches of industrial law or for taking unprotected industrial action. This is a concern because placing a union under administration may have significant consequences in terms of the representational rights of employees and any current campaigns or disputes.

1.84 In order to assess whether these are permissible limitations under international human rights law, further information is required as to:

- how the measure is effective to achieve (that is, rationally connected to) the objective of protecting the interests of members (noting, for example, that members may have determined it was in their interests to take unprotected strike action, which could contravene a designated law); and
- whether the measure is proportionate to the objectives sought to be achieved, in particular, whether the grounds for placing organisations under administration are sufficiently circumscribed.

### **Committee view**

**1.85 The committee notes that the bill seeks to expand the grounds on which organisations may be placed under administration. The committee notes the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work.**

**1.86 In order to assess the permissibility of any limitation under international human rights law, the committee seeks the minister's advice as to the matters set out at paragraph [1.84].**

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49 Statement of compatibility, p. xiii.

50 'Designated law' has the meaning given in proposed section 9C(a) and includes industrial laws, see Schedule 1, item 2.

## Introduction of a public interest test for amalgamations of unions

1.87 Under proposed section 72A, before fixing a date for an amalgamation of unions, the Fair Work Commission must decide if the public interest test is to apply to the amalgamation, and if so, decide whether the amalgamation is in the public interest.<sup>51</sup> The Commission may only decide that the public interest test is to apply to a proposed amalgamation if there is information before the Commission that there are at least 20 compliance record events for an organisation (such as a designated finding against the organisation, contempt of court or engaging in certain industrial action)<sup>52</sup> within the 10 year period prior to an application for approval.<sup>53</sup> In determining whether an amalgamation is in the 'public interest' the Fair Work Commission must have regard to a range of factors including any compliance record events for each of the existing organisations and whether the amalgamation is otherwise in the public interest having regard to the impact it is likely to have on employees and employers in the industry, and may have regard to any other matter it considers relevant.<sup>54</sup> In relation to compliance record events, if having regard to the incidence, age and gravity of the events the Commission considers the organisation has a record of not complying with the law, the Commission must decide that the amalgamation is not in the public interest.<sup>55</sup>

## Preliminary international human rights legal advice

### *Rights to freedom of association and to just and favourable conditions at work*

1.88 By inserting a public interest test in relation to the amalgamation of organisations, the measure engages and limits the rights to freedom of association and to just and favourable conditions at work, and particularly the right to form associations of one's own choosing. International supervisory mechanisms have noted concerns with measures that limit the ability of unions to amalgamate stating that '[t]rade union unity voluntarily achieved should not be prohibited and should be respected by the public authorities.'<sup>56</sup>

1.89 The statement of compatibility identifies the objective of the measure as being to 'improve organisational governance, protect the interests of members, ensure that organisations meet the minimum standards set out in the Act, and address community concerns by creating a disincentive for a "culture of contempt for

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51 As set out in Schedule 4, item 7, proposed paragraph 72A(1)(b) (the 'public interest test').

52 See Schedule 4, item 7, proposed section 72E.

53 See Schedule 4, item 7, proposed subsection 72A(2).

54 See Schedule 4, item 7, proposed section 72D.

55 See Schedule 4, item 7, proposed subsection 72D(2).

56 ILO Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth Edition (2006) [332].



the rule of law" that has been identified in some registered organisations.<sup>157</sup> The statement of compatibility states that this addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law.

1.90 In relation to whether the measure is likely to be effective to achieve its stated objectives, the statement of compatibility states that 'it will reduce the risk of an adverse effect of an amalgamation of existing organisations,' and that the 'application of the public interest test to mergers of organisations with a substantial history of breaking workplace laws will curtail the potential spread of lawbreaking culture from one organisation to another.'<sup>158</sup> The statement of compatibility argues that the measure is reasonable and proportionate, and that 'it is sufficiently circumscribed in that it will not to apply to amalgamations of law abiding organisations.'<sup>159</sup> Further, it is noted that there is a safeguard in the requirement that a full bench of the Federal Court consider whether a proposed amalgamation should be subject to the public interest test in the bill.

1.91 However, it cannot be assumed that industrial disputes necessarily have adverse effects given that the right to take industrial action is protected as a matter of international law. In this respect, international treaty monitoring bodies have consistently viewed this right 'by workers and their organizations as a legitimate means of defending their economic and social interests'. This raises concerns both as to whether the proposed measures are rationally connected to the legitimate objectives identified, including protecting the interests of members, and as to whether the proposed measures are proportionate limitations on rights (given the significant impact on rights including the right to take industrial action).

1.92 In order to fully assess the compatibility of the proposed measure with international human rights law, further information is required as to:

- how each aspect of the application of the 'public interest' test is effective to achieve (that is, rationally connected to) the stated objectives;
- whether making amalgamations of an organisation subject to a public interest test is reasonable and proportionate to achieving the stated objective. In particular, more information is required as to whether the measure is the least rights restrictive way of achieving the objectives, is sufficiently circumscribed, and the extent of the limitation with respect to the right to strike (noting concerns raised by international supervisory mechanisms).

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57 Statement of compatibility, p. xv.

58 Statement of compatibility, p. xv.

59 Statement of compatibility, p. xv.

### **Committee view**

**1.93** The committee notes that the bill seeks to insert a public interest test before organisations can amalgamate. The committee notes the legal advice that this engages and limits the right to freedom of association and the right to just and favourable conditions at work.

**1.94** In order to assess the permissibility of any limitation under international human rights law, the committee seeks the minister's advice as to the matters set out at paragraph [1.92].

## Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211]<sup>1</sup>

<b>Purpose</b>	This instrument defers the sunsetting of the Sydney Harbour Federation Trust Regulations 2001 for two years
<b>Portfolio</b>	Attorney-General's
<b>Authorising legislation</b>	<i>Sydney Harbour Federation Trust Act 2001</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 14 October 2019).
<b>Rights</b>	Freedom of expression; assembly
<b>Status</b>	Seeking additional information

### Extension of prohibition on public assembly

1.95 This legislative instrument defers the sunsetting of the Sydney Harbour Federation Trust Regulations 2001 [F2010C00261] (the regulations) for two years. The regulations apply to the management of 'Trust land' under the *Sydney Harbour Federation Trust Act 2001* (the Act).

1.96 Section 11 of the regulations provides that '[a] person must not organise or participate in a public assembly on Trust land.' 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the Act. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island. A 'public assembly' is defined in section 11(3) to include an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance.

1.97 Section 23(d) provides that the activity that would otherwise be an offence under section 11 is not an offence if it 'is authorised by a licence or permit' granted by the Trust. Section 25 provides for the application of such a licence or permit, and for review of any decision made by the Sydney Harbour Federation Trust in the Administrative Appeals Tribunal (AAT).

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211], *Report 1 of 2020*; [2020] AUPJCHR 8.

## Preliminary international human rights legal advice

### *Rights to freedom of expression and assembly*

1.98 The right to freedom of opinion and expression extends to the communication of information or ideas through any medium, including public protest.<sup>2</sup> The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.<sup>3</sup>

1.99 The rights to freedom of expression and assembly may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.<sup>4</sup> Such limitations must be prescribed by law, be rationally connected (that is, effective to achieve) and proportionate to achieving the prescribed purpose.<sup>5</sup> In determining whether limitations on the freedom of expression are proportionate, the UN Human Rights Committee has previously noted that restrictions on the freedom of expression must not be overly broad.<sup>6</sup>

1.100 By providing a blanket prohibition against organising or participating in organised assemblies, the regulations engage and appear to limit the rights to freedom expression and assembly. The statement of compatibility to the instrument does not acknowledge that this measure engages human rights. Instead, it focuses on the effect of the deferral instrument, rather than the substantive effect of continuing the regulations that have been deferred.<sup>7</sup> As the legal effect of deferring the regulations is that they remain in force, it would be appropriate for the statement of compatibility to focus on the substantive effect of the regulations.

1.101 Without this information, it is difficult to assess whether the limitation on the rights to freedom of expression and assembly imposed by the continuation in force of a measure that limits peaceful protest on Trust land is rationally connected

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2 International Covenant on Civil and Political Rights (ICCPR), article 19.

3 ICCPR, article 21.

4 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

5 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

6 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]-[35].

7 Statement of compatibility.

to an objective that is 'necessary to protect the rights or reputations of others, national security, public order, or public health or morals', and whether it can be considered a proportionate means of achieving this objective.

1.102 In summary, the instrument defers the sunseting of the regulations for two years, thereby continuing in operation a measure that prohibits public assembly on public land without a permit. This, thereby, engages and limits the rights to freedom of expression and assembly, which has not been acknowledged by the statement of compatibility.

1.103 More information is therefore required in order to assess the compatibility of this measure with the rights to freedom of expression and assembly, and in particular:

- what is the objective underlying the broad prohibition of public assemblies on Trust Land contained in section 11 of the Sydney Harbour Federation Trust Regulations 2001;<sup>8</sup>
- whether there are any less rights restrictive means of achieving this objective; and
- the availability of safeguards to protect the rights to freedom of expression and assembly.

### Committee view

**1.104 The committee notes that the instrument defers the sunseting of the regulations for two years, thereby continuing in operation a measure that prohibits public assembly on public land without a permit. The committee notes the legal advice that this engages and limits the rights to freedom of expression and assembly, which has not been considered in the statement of compatibility. The committee therefore seeks the Attorney-General's advice as to the compatibility of this measure with the rights to freedom of expression and assembly,<sup>9</sup> as set out above at paragraph [1.103].**

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8 Noting that under articles 19(3), 20 and 21(3) of the ICCPR any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

9 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

## National Museum of Australia Regulations 2019 [F2019L01273]<sup>1</sup>

<b>Purpose</b>	This instrument repeals and remakes the National Museum of Australia Regulations 2000 with some changes to provide for the Director of the Museum to appoint authorised officers, to give powers to authorised officers, and to provide for persons or groups of persons who are prohibited from entering Museum premises to apply to the Administrative Appeals Tribunal for review of that decision
<b>Portfolio</b>	Communications, Cyber Safety and the Arts
<b>Authorising legislation</b>	National Museum of Australia Act 1980
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 14 October 2019).
<b>Rights</b>	Freedom of expression; freedom of assembly; privacy
<b>Status</b>	Seeking additional information

### Removal from Museum

1.105 Section 14 of the National Museum of Australia Regulations 2019 [F2019L01273] (the regulations) empowers an authorised officer<sup>2</sup> to direct a person to leave the National Museum of Australia (the Museum) for a range of reasons, including where they reasonably believe the person is 'likely to cause offence' to staff or members of the public. Section 15 allows an authorised officer to apprehend a person where they refuse to comply with a direction made under section 14 and to use such force as is reasonably necessary to either remove the person from Museum premises or to hold them until they can be taken into the custody of police.<sup>3</sup>

1.106 Section 13 of the regulations further empowers an authorised officer to prohibit entry to a person or group of persons under certain circumstances, including where the officer has reasonable grounds for believing that:

- the person has, under sections 14 or 15, been directed to leave, or removed from, Museum premises on one or more occasions; or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Museum of Australia Regulations 2019 [F2019L01273], *Report 1 of 2020*; [2020] AUPJCHR 9.

2 An 'authorised officer' is a person appointed by the Director under section 12 of the regulations.

3 Subsections 15(2) and 15(3).

- the conduct of the person or group on or in Museum premises will cause, or is likely to cause, offence to staff or members of the public.

## **Preliminary international human rights legal advice**

### ***Right to freedom of expression and assembly***

1.107 The right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.<sup>4</sup> This right embraces expression that may be regarded as deeply offensive, subject to the provisions of article 19(3) and article 20 of the International Covenant on Civil and Political Rights (ICCPR).<sup>5</sup> The right to freedom of assembly protects the right of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.<sup>6</sup>

1.108 The rights to freedom of expression and freedom of assembly may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.<sup>7</sup> Such limitations must be prescribed by law, be rationally connected to the legitimate objective of the measures, and be proportionate.<sup>8</sup>

1.109 By empowering an authorised officer to direct a person to leave the Museum, or to prohibit their entry, where the officer reasonably believes the person is 'likely to cause offence' to staff or members of the public, the regulations engage and limit the rights to freedom of expression and freedom of assembly. These rights are further engaged by the fact that the authorised officer is empowered to apprehend a person who refuses to comply with such a direction, and to either remove that person from Museum premises or hold them until they can be taken into the custody of police.

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4 International Covenant on Civil and Political Rights (ICCPR), article 19.

5 UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (2011) [11]. Article 20 of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

6 ICCPR, article 21.

7 ICCPR, article 12(3).

8 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36]. See also *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

1.110 The statement of compatibility does not acknowledge that sections 13 to 15 of the regulations engage the rights to freedom of expression and assembly. However, it does state that '[i]f a person is refusing to abide by a lawful direction of an authorised officer, the continued conduct may endanger the public or staff members, or could present a risk to Museum material.' The protection of public order and safety is a legitimate objective for the purposes of international human rights law, and this measure appears to be rationally connected to such an objective, where a direction to leave Museum premises relates to an authorised officer having 'reasonable grounds for believing that public safety or the safety of staff members is, or may be, endangered.' However, it is less clear whether a direction to leave Museum premises on the grounds that a 'person or group on or in Museum premises is likely to *cause offence* to members of the public or staff members',<sup>9</sup> is rationally connected to the objective of protecting public order or safety.

1.111 The statement of compatibility also states that these measures are designed to protect the rights of other individuals to enjoy the right to take part in cultural life 'in safety and without umbrage'.<sup>10</sup> However, while protecting the right to take part in cultural life safely would appear to be a legitimate objective for the purposes of international human rights law, it is less clear that there is a right to take part in cultural life 'without umbrage'.

1.112 In relation to the proportionality of these measures, it is relevant that section 32 provides a right of appeal to the Administrative Appeals Tribunal in relation to any decision of an authorised officer under section 13 to prohibit entry onto or into Museum premises. Access to merits review is an important safeguard. However, there is no right to merits review in relation to an exercise of power under sections 14 or 15 of the regulations (to remove a person or group of persons from, or to direct them to leave, Museum premises) and it is unclear whether any other safeguards exist in relation to these measures.

1.113 In summary, empowering an authorised officer to direct a person to leave, or prohibit entry to, the National Museum of Australia where they reasonably believe a person is 'likely to cause offence' to staff or members of the public, engages and limits the rights to freedom of expression and freedom of assembly. This is not acknowledged in the statement of compatibility.

1.114 More information is required in order to assess the compatibility of this measure with the rights to freedom of expression and assembly, and in particular:

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9 Section 14(1)(b) of the regulations (emphasis added).

10 Statement of compatibility, p. 31.



- what is the objective underlying the power granted to authorised officers under sections 13 to 15 of the regulations;<sup>11</sup>
- whether there are less rights restrictive means of achieving this objective, noting the likely impact on the rights to freedom of expression and assembly; and
- whether there are any safeguards to protect the rights to freedom of expression and assembly in relation to the exercise of these powers.

### **Committee view**

**1.115** The committee notes the instrument empowers an authorised officer to direct a person to leave, or prohibit entry to, the National Museum of Australia where they reasonably believe a person is 'likely to cause offence' to staff or members of the public. The committee notes the legal advice that this engages and limits the rights to freedom of expression and freedom of assembly.

**1.116** The committee therefore seeks the minister's advice as to the compatibility of this measure with the rights to freedom of expression and assembly,<sup>12</sup> and in particular the matters set out at paragraph [1.114].

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### **Taking photographs and collecting personal information**

1.117 Subsection 14(2) of the regulations empowers an authorised officer to take a photograph of a person subject to a direction to leave museum premises, and to direct that person to provide their name and residential address to the authorised officer.

### **Preliminary international human rights legal advice**

#### ***Right to privacy***

1.118 By empowering an authorised officer to take a person's photograph and to direct them to provide their personal information, such as their name and residential address, this measure engages and limits the right to privacy. This is particularly the case if such information were to be displayed in a manner that might damage a person's reputation. The right to privacy protects against arbitrary and unlawful

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11 Noting that under articles 19(3), 20 and 21(3) of the International Covenant on Civil and Political Rights any limitation on the rights to freedom of expression and assembly must be demonstrated to be necessary to 'protect the rights or reputations of others, national security, public order, or public health or morals' or to prohibit '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

12 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

interferences with an individual's privacy and attacks on reputation.<sup>13</sup> The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>14</sup>

1.119 The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to (that is, effective to achieve) and proportionate to achieving that objective.<sup>15</sup> In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

1.120 The statement of compatibility does not acknowledge that the right to privacy is engaged and does not explain the objective behind the measure. It also provides no information in relation to the handling of any personal information that might be collected. As such, it is difficult to assess the compatibility of the measure with the right to privacy.

1.121 Further information is therefore required as to the compatibility of this measure with the right to privacy, and in particular:

- what is the objective underlying the power granted to an authorised officer under section 14(2) of the regulations to take a photograph of a person who is subject to a direction to leave museum premises, and to direct that person to provide their name and residential address;
- whether there are less rights restrictive means of achieving this objective, noting the potential impact on the right to privacy; and
- whether there are any safeguards to protect the right to privacy, such as protocols around the handling, disclosure and destruction of any personal information that might be collected.

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13 ICCPR, article 17.

14 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, UN Human Rights Committee, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

15 See *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

## Committee view

**1.122** The committee notes the instrument empowers an authorised officer to take a person's photograph and direct them to provide their personal information, such as their name and residential address. The committee notes the legal advice that this engages and limits the right to privacy.

**1.123** The committee therefore seeks the minister's advice as to the compatibility of this measure with the right to privacy,<sup>16</sup> and in particular the matters set out at paragraph [1.121].

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16 The committee's consideration of the compatibility of a measure which limits a right is assisted if the response explicitly addresses the limitation criteria set out in the committee's [Guidance Note 1](#), pp. 2-3.

## National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491]<sup>1</sup>

<b>Purpose</b>	This instrument seeks to amend the National Redress Scheme for Institutional Child Sexual Abuse Rules 2018 to exclude eight Queensland grammar schools from the definition of 'State institution' in section 111 of the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i> .
<b>Portfolio</b>	Families and Social Services
<b>Authorising legislation</b>	<i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives and the Senate on 25 November 2019).
<b>Rights</b>	Effective remedy; rights of the child
<b>Status</b>	Seeking additional information

### Participation in the National Redress Scheme for Institutional Child Sexual Abuse

1.124 Subsection 111(1) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (the Act) provides that an institution is a 'State institution' if it is, or was, part of the State, or is, or was, a body established for public purposes by or under a law of a State. Subsection 111(2) of the Act states that an institution is not a State institution if the rules prescribe this. This instrument prescribes eight Queensland grammar schools as not being State institutions.<sup>2</sup>

1.125 The effect is that these eight schools will only become 'participating institutions' in the National Redress Scheme for Institutional Child Sexual Abuse if the minister makes a declaration that they are a participating non-government

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Redress Scheme for Institutional Child Sexual Abuse Amendment (2019 Measures No. 1) Rules 2019 [F2019L01491], *Report 1 of 2020*; [2020] AUPJCHR 10.

2 Brisbane Girls Grammar School; Brisbane Grammar School; Ipswich Girls' Grammar School including Ipswich Junior Grammar School; Ipswich Grammar School; Rockhampton Girls Grammar School; The Rockhampton Grammar School; Toowoomba Grammar School; Townsville Grammar School; and the boards of trustees for these schools.

institution,<sup>3</sup> and is satisfied that the institution has agreed to participate in the scheme.<sup>4</sup> By contrast, a State or Territory institution may be declared to be a participating institution where the relevant State or Territory has agreed to the institution participating in the scheme.<sup>5</sup>

## **Preliminary international human rights legal advice**

### ***Rights of the child and right to an effective remedy***

1.126 For an individual to be eligible for redress pursuant to this scheme, the relevant institution against which a claim is being made must be participating in the scheme.<sup>6</sup> The prescription of these eight grammar schools as not being State institutions for the purposes of the Act, means that they will not become participating institutions unless the minister is satisfied that the institutions themselves agree to participate in the scheme.

1.127 Access to redress for child sexual abuse pursuant to this scheme engages the obligation under international human rights law to take all appropriate measures to protect children from all forms of violence or abuse, including sexual abuse.<sup>7</sup> The prescription of these institutions, and the potential for delay in securing redress for individuals making a claim in relation to them, therefore engages and may limit the right to an effective remedy, as this right exists in relation to the rights of children.

1.128 The United Nations Committee on the Rights of the Child explains that for rights to have meaning, effective remedies must be available to redress violations, noting that children have a special and dependent status.<sup>8</sup> This right to an effective remedy also exists in relation to individuals who are now adults, but regarding conduct which took place when they were children.<sup>9</sup> While the statement of compatibility notes that the measure engages the rights of the child,<sup>10</sup> it does not

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3 National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Redress Act), s. 114.

4 Redress Act, subsection 115(3)(c).

5 Redress Act, subsection 115(3)(a) and (b).

6 Redress Act, s. 107.

7 Convention on the Rights of the Child, article 19.

8 See, United Nations Committee on the Rights of the Child, *General Comment No. 5 (2003): general measures of implementation of the Convention on the Rights of the Child*, [24].

9 Article 5(1) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 CRC) provides that a communication can be submitted by any *individual*. This reflects that the understanding of the temporal nature of childhood has been adopted in OP3 CRC, which facilitates complaints submitted by adults in relation to claims of abuse of their rights as children; see Malcolm Langford and Sevda Clark, 'New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', *Nordic Journal of Human Rights*, vol. 28, no. 3-4, 2010, pp. 376, 393-4.

10 Statement of compatibility, pp. 5-6.

identify that the right to an effective remedy is engaged in relation to the rights of the child. Therefore, further information is required in order to assess whether the prescription of these eight schools as not being State institutions for the purposes of this scheme, limits the rights of any individuals to access an effective remedy for the purposes of international human rights law. In particular, further information is required as to what other forms of redress (if any) are available for persons who may have suffered abuse at any of these prescribed institutions, including whether there are substantial differences between such remedies and the established redress scheme, particularly whether other avenues would likely cause greater difficulty for the claimant to access the remedy.

### **Committee view**

**1.129** The committee notes that the instrument prescribes eight Queensland grammar schools that are exempt from the operation of the National Redress Scheme for Institutional Child Sexual Abuse. The committee notes the legal advice which raises potential implications with respect to the rights of the child and the corresponding right to an effective remedy. In order to assess the potential engagement of this right, the committee seeks the minister's advice in relation to the matters set out at paragraph [1.128].

## Native Title Legislation Amendment Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Native Title Act 1993</i> and the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> to modify the native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 17 October 2019
<b>Rights</b>	Culture; self-determination; privacy
<b>Status</b>	Response required

### Majority default rule in applicant decision-making

1.130 The bill seeks, among other things, to amend the *Native Title Act 1993* (NTA) to allow, as the default position, an applicant to a native title claim to act by majority for all things that the applicant is required or permitted to do under the NTA<sup>2</sup> and to allow a claim group to place conditions on the authority of the applicant.<sup>3</sup>

1.131 The 'applicant' to a native title claim is the person or group of people authorised by a native title claim group<sup>4</sup> to make or manage a native title claim on their behalf.<sup>5</sup> Once a claim has been made and has been accepted for registration by the National Native Title Tribunal, the names of the people who make up the applicant appear on the Register of Native Title Claims (Register). The person or persons whose names appear as the applicant on the Register are then also collectively known as the 'registered native title claimant'. The applicant is also the

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Native Title Legislation Amendment Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 11.

2 See, particularly, proposed section 62C(2), and proposed Schedule 1 more broadly.

3 Proposed section 251BA.

4 A native title claim group is defined in section 253 of the *Native Title Act 1993* (NTA). See Parliamentary Joint Committee on Human Rights, *Report 2 of 2019* (2 April 2019) p. 68 for further discussion.

5 See explanatory memorandum p. 28; section 61(2) of the NTA. The definition of 'applicant' also covers applications for compensation made by a person or persons authorised to make the application by a compensation claim group: section 61(2)(b).

'native title party' for the purpose of the process through which agreements are made under section 31 of the NTA.<sup>6</sup>

1.132 Currently, the default rule under the NTA is that the applicant is required to act jointly or unanimously when carrying out duties or performing functions under the NTA.<sup>7</sup> In *McGlade v Native Title Registrar & Ors (McGlade)*,<sup>8</sup> the Full Court of the Federal Court held that all members of the applicant—or the registered native title claimant for the purpose of Indigenous Land Use Agreements (ILUAs)<sup>9</sup>—must be party to an area ILUA<sup>10</sup> before the ILUA can be registered and come into effect.<sup>11</sup>

1.133 The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (2017 Act) reversed the effect of *McGlade* by changing the default position for future area ILUAs so that a majority of members of the registered native title claimant may be party to the agreement unless otherwise determined by the group.<sup>12</sup> That Act also retrospectively validated area ILUAs that were invalidated by *McGlade*.<sup>13</sup>

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6 See explanatory memorandum, p. 27 and section 253 of the NTA. Section 31 of the NTA provides an agreement-making mechanism in the form of a right to negotiate in good faith with a view to obtaining the agreement with native title parties relating to the grant of mining and exploration rights over land which may be subject to native title. These agreements are not publicly registered.

7 Explanatory memorandum, p. 32.

8 [2017] FCAFC 10 (*McGlade*).

9 ILUAs are voluntary agreements in relation to the use of land and waters which may cover a number of matters including how native title rights coexist with the rights of other people, who may have access to an area, native title holders agreeing to a future development or future acts, extinguishment of native title, compensation for any past or future act, employment and economic opportunities for native title groups, issues of cultural heritage, and mining: see NTA section 24CB.

10 'Area ILUAs' are made in relation to land or waters for which no registered native title body corporate exists.

11 This included deceased members of the applicant.

12 Explanatory memorandum, p. 32.

13 The committee previously considered the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 and considered the measures were likely to promote the right to self-determination and represented a proportionate limitation the right to culture for any minority members of a native title claimant: Parliamentary Joint Committee on Human Rights, *Report 2 of 2017* (21 March 2017) pp. 18-25; Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 112-124.



1.134 Schedule 1 of the bill seeks to expand the effect of the 2017 Act so that the applicant may act by majority as the default position for all things that the applicant is required or permitted to do under the NTA.<sup>14</sup>

1.135 Schedule 9 of the bill also seeks to confirm the validity of section 31 agreements that may potentially be affected by *McGlade*. The effect of this is that agreements made under section 31, which relate to the grant of mining and exploration rights over land that may be subject to native title, are retrospectively validated, where at least one member of the registered native title claimant was party to the agreement.

1.136 The bill provides that the default rule may be displaced by conditions imposed on the authority of the applicant under proposed section 251BA,<sup>15</sup> such that where there is a process of decision-making that must be complied with under the traditional laws and customs of the persons who authorise the applicant,<sup>16</sup> it must be in accordance with that process.<sup>17</sup> Where there is no such decision-making process, the persons can agree to and adopt a process of decision-making.<sup>18</sup> A similar safeguard applies in relation to section 31 agreements.<sup>19</sup>

1.137 The bill also provides that the applicant's power to deal with all matters to do with an application is subject to conditions of the authority of the applicant under proposed section 251BA,<sup>20</sup> and further that the Registrar must be satisfied not only that the applicant is authorised by the claim group but also that any conditions on the authority of the applicant have been satisfied when registering a claim on the Register.<sup>21</sup>

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14 This includes making ILUAs, making applications for native title determinations or compensation applications, and section 31 agreements. See the general rule in proposed section 62C(2). The bill also includes a number of specific amendments to give effect to this general rule as it applies to specific types of agreement-making by the applicant. In so doing, it repeals and replaces aspects of the NTA as amended by the 2017 Act: see EM pp. 37-38.

15 See Schedule 1, item 23.

16 Section 251A of the NTA sets out the authorisation process for the making of indigenous land use agreements, and section 251B sets out the process for authorising the making of applications for a native title determination or compensation application.

17 Schedule 1, item 23, proposed paragraph 251BA(2)(a).

18 Schedule 1, item 23, proposed paragraph 251BA(2)(b).

19 Schedule 1, item 43, proposed section 31(1C), explanatory memorandum, p. 35.

20 Schedule 1, item 1, proposed subsection 62A(2).

21 Schedule 1, item 16, proposed subsection 190C(4AA).

## Preliminary international human rights legal advice

### *Right to culture*

1.138 The statement of compatibility acknowledges that by introducing a majority default rule for applicant decision-making, and by retrospectively validating section 31 agreements, the bill engages and may limit the right to culture.<sup>22</sup> This is because there may be a conflict between an individual's or a sub-group's right to culture, and the interests of the majority or of the group as a whole.

1.139 All individuals have a right to culture under article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); article 27 of the International Covenant on Civil and Political Rights (ICCPR) and related provisions provide individuals belonging to minority groups, including Indigenous peoples, with additional protections to enjoy their own culture, religion and language.

1.140 The rights conferred under article 27 of the ICCPR have both an individual and a group dimension: while the right is conferred on individuals, it must be exercised within the group. In the context of Indigenous peoples, the right to culture includes the right for Indigenous people to use land resources, including through traditional activities such as hunting and fishing, and to live on their traditional lands.<sup>23</sup>

1.141 Where there is a conflict between the wishes of individual members of the group and the group as a whole, international jurisprudence indicates that 'a restriction on the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.<sup>24</sup> In other words, a limitation on the right to culture will be permissible where it pursues a legitimate objective, is rationally connected to this objective and is a proportionate means of achieving this objective.

1.142 The statement of compatibility states that the objective of the majority default rule is to promote 'efficient determinations of native title and native title agreement making, to assist Indigenous Australians to realise the social and economic benefits of native title'.<sup>25</sup> It is likely that this would be considered a legitimate objective for the purposes of international human rights law. Allowing for applicant decision-making by majority would also appear to be rationally connected to this objective.

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22 Statement of compatibility, pp. 9 and 14.

23 See, UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (1994).

24 *Kitok v Sweden*, UN Human Rights Committee Communication No.197/1985 (1988) [9.8].

25 Statement of compatibility, p. 9.

1.143 The statement of compatibility further states that the limitation on the individual's right to culture is proportionate 'to achieving the broader group's right to enjoy and benefit culture'.<sup>26</sup> It states that the measures 'provide balance between promoting the rights of individuals to be consulted in relation to their cultural rights, but not to frustrate decision-making processes in a way that would deny these rights to other individuals, or to prevent the collective enjoyment of the right to culture'.<sup>27</sup>

1.144 The statement of compatibility also explains the objective of validating section 31 agreements as providing certainty to both commercial operations and native title groups in light of *McGlade*.<sup>28</sup> It states that, '[p]otential challenges to section 31 agreements may ... divert resources away from finalising native title claims to litigate affected agreements and re-negotiate agreements that are already significantly resource-intensive'.<sup>29</sup> This reasoning indicates that the measure is likely to pursue a legitimate objective for the purposes of international human rights law, and appears to be rationally connected to this objective.

1.145 The statement of compatibility identifies safeguards in the bill that were introduced in response to consultation and concerns being raised around the risk 'that allowing majority decision-making promotes outcomes at the expense of collective decision-making'.<sup>30</sup> These safeguards, in particular the safeguard requiring decision-making to accord with traditional laws and customs (where such a process exists), or for members of the applicant to determine an authorisation process that differs from the majority-default position, are important and assist the proportionality of the measures (although it should be noted that they cannot apply to the retrospective validation of section 31 agreements).

1.146 Relevant international jurisprudence also indicates that individual rights to culture can generally be restricted when to do so is in the interests of the minority group as a whole. Requiring unanimity for all applicant decision-making may undermine the process of agreement-making under the NTA and to that extent may impact on the enjoyment of the right to culture for the majority of the group.<sup>31</sup> In

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26 Statement of compatibility, pp. 9-10.

27 Statement of compatibility, p. 8.

28 Statement of compatibility, p. 14.

29 Statement of compatibility, pp. 14-15.

30 Statement of compatibility, pp. 9-10.

31 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 120-121.

this respect, the measures may be a proportionate limitation on the right to culture.<sup>32</sup>

1.147 However, processes such as native title claims, ILUAs and section 31 agreements may cover a range of serious matters. For example, matters that may be covered by ILUAs include the extinguishment of native title rights and interests. Accordingly, where the terms of an agreement are a matter of dispute within the claim group, majority decision-making may profoundly affect the interests of certain individuals or sub-groups in relation to the right to culture. It is relevant here that the law allows for decision-making in accordance with traditional laws and customs or (where there is no such process) in accordance with a process agreed to and adopted by the group,<sup>33</sup> which would appear to allow scope to be afforded to minority views. However, in cases where there is no established traditional or customary decision-making process, it remains unclear how an alternative decision-making process will be established by minority members in circumstances where the majority prefers a majority decision-making process. As such, ongoing monitoring and evaluation, including ongoing consultation with affected groups, may be an appropriate safeguard to ensure that these measures do not unduly limit the right to culture.

### ***Right to self-determination***

1.148 The proposed amendments also appear to engage and seem likely to promote the collective right to self-determination, as a minority of members would not be able to prevent decisions being made unless the authorisation process allowed for this.

1.149 It would also appear that validation of agreements already entered into may promote the right to self-determination insofar as it respects a group's decision to collectively pursue aspects of their native title rights and their economic, social and cultural development. It also ensures that those parties to section 31 agreements are able to access benefits flowing from the agreement. However, it is noted that the statement of compatibility provides more detail as to the potential risks to commercial operations (such as the impact on mining leases) than the impact on native title holders. It would have been of assistance if the statement of compatibility had addressed how the retrospective validation of section 31 agreements would promote the right to self-determination.

1.150 The right to self-determination is protected by articles 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The right to self-determination, which is a right of 'peoples' rather than individuals, includes the

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32 *Apirana Mahuika v New Zealand*, UN Human Rights Committee Communication No. 547/1993 (2000); *Kitok v Sweden*, UN Human Rights Committee Communication No. 197/1985 (1988) [9.8].

33 See *Native Title Act 1993*, section 251B.

right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.<sup>34</sup>

1.151 The principles contained in the UN Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the amendments in this bill. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides clarification as to how human rights standards under international law, including under the ICCPR and ICESCR, apply to the particular situation of Indigenous peoples.<sup>35</sup> The Declaration affirms the right of Indigenous peoples to self-determination.<sup>36</sup>

1.152 While it is acknowledged that the measures in general promote the collective right to self-determination,<sup>37</sup> the statement of compatibility also acknowledges that the measures will reduce the influence of members of the applicant who are in the minority, and any sub-groups of native title holders they represent.<sup>38</sup> It goes on to address the importance of enabling the reasonable expression of minority views as part of ensuring genuine agreement, and to highlight that this has been accommodated through the safeguards discussed in paragraphs [1.145] and [1.147] above, which was 'broadly supported by stakeholders' during consultations and which allows for 'the claim group to place limitations on the applicant's authority'.<sup>39</sup>

1.153 As part of its obligations in relation to respecting the right to self-determination, Australia has an obligation under customary international law to consult with Indigenous peoples in relation to actions which may affect them.<sup>40</sup> The UN Human Rights Council has recently provided guidance on the right to be consulted, stating that the right to be consulted should be understood as a right of Indigenous peoples to 'influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard'.<sup>41</sup>

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34 See, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21 on the right to self-determination* (1996).

35 Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp. 122-123.

36 UN Declaration on the Rights of Indigenous Peoples, article 3.

37 Statement of compatibility, pp. 16-17.

38 Statement of compatibility, p. 17.

39 Statement of compatibility, p. 17.

40 See Parliamentary Joint Committee on Human Rights, *Report 4 of 2017* (9 May 2017) pp.122-123.

41 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15]-[16].

1.154 In this respect, the statement of compatibility explains that the measures in the bill were informed by feedback from stakeholders following extensive consultation,<sup>42</sup> and that an Expert Technical Advisory Group advised the government on the development of the measures in the bill.<sup>43</sup> This extensive consultation is welcome. However, further information as to how the feedback from this consultation was incorporated into the bill would have been of assistance in assessing human rights compatibility.

1.155 The concept of 'free, prior and informed consent' also includes the principle that Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols.<sup>44</sup> In this regard, the safeguards in the bill that allow for traditional decision-making processes to prevail over the default position are important.

### **Conclusion**

1.156 Allowing native title applicants to act by majority as the default rule, and retrospectively validating section 31 agreements, engages and may limit the right to culture.

1.157 However, the effect of the measures on certain individuals' enjoyment of their right to culture must be balanced against the fact that such measures also promote the right to culture for the group as a whole. In light of this, and that members of the applicant group may determine an authorisation process that differs from the majority-default position, the measure may be a proportionate limit on the right to culture, depending on how these safeguards are implemented in practice.

1.158 The measures may promote the right to self-determination. However, while the statement of compatibility acknowledges that the right to self-determination is engaged by this amendment, it does not provide an analysis as to how this right is promoted.

1.159 Noting the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples, ultimately much will depend on how the proposed amendments operate in practice.

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42 Statement of compatibility, p. 6. Consultation took place in relation to an options paper for native title reform released in November 2017 and exposure draft legislation released in October 2018. The recommendations from the Australian Law Reform Commission and other inquiries were also considered.

43 Statement of compatibility, p. 6. See also explanatory memorandum, p. 2. The Expert Technical Advisory Group comprised of nominated representatives from the National Native Title Council, states and territories, industry peaks and the National Native Title Tribunal.

44 UN Human Rights Council, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [20].

1.160 As such, it would assist with compatibility of the bill if the bill required an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on the rights to culture and self-determination (for example, whether the safeguards are operating effectively to protect the capacity of sub-groups to influence decisions made by the majority of the native title claim group).

### **Committee view**

**1.161** The committee notes that this bill seeks to modify the native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes. The committee notes the legal advice that allowing native title applicants to act by majority as the default rule, and retrospectively validating section 31 agreements, may engage and limit the right to culture.

**1.162** However, the committee notes that the effect of the measures on certain individuals' enjoyment of their right to culture must be balanced against the fact that such measures also promote the right to culture for the group as a whole. In light of this, and that members of the applicant group may determine an authorisation process that differs from the majority-default position, the committee notes the advice that these measure may be a proportionate limit on the right to culture, depending on how these safeguards are implemented in practice.

**1.163** The committee also notes the advice that the measures may promote the right to self-determination. However, while the statement of compatibility acknowledges that the right to self-determination is engaged by this amendment, it does not provide an analysis as to how this right is promoted.

**1.164** Noting the importance of the obligation to consult with Indigenous peoples in relation to actions which may affect them, and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples, the committee considers that ultimately much will depend on how the proposed amendments operate in practice.

**1.165** As such, the committee seeks the Attorney-General's advice as to whether it would be appropriate for the bill to be amended to require an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on the rights to culture and self-determination (for example, whether the safeguards are operating effectively to protect the capacity of sub-groups to influence decisions made by the majority of the native title claim group).

## Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Tertiary Education Quality and Standards Agency Act 2011</i> to criminalise the provision and advertisement of commercial academic cheating services; and establish civil penalties regarding academic cheating services provided on a non-commercial basis and/or advertised on a non-commercial basis
<b>Portfolio</b>	Education
<b>Introduced</b>	House of Representatives, 4 December 2019
<b>Rights</b>	Fair trial; freedom of expression; equality and non-discrimination
<b>Status</b>	Seeking additional information

### Prohibition of academic cheating services

1.166 This bill seeks to make it an offence for a person, for a commercial purpose, to provide, offer to provide, or arrange for a third person to provide an 'academic cheating service' to a student undertaking higher education.<sup>2</sup> This offence would be punishable by imprisonment for two years, or 500 penalty units (currently \$105,000),<sup>3</sup> or both. Pursuant to subsection 114A(3), the same conduct carried out other than for a commercial purpose would be prohibited, and be subject to a civil penalty of 500 penalty units (also \$105,000).

1.167 'Academic cheating service' is defined to mean the 'provision of work to or the undertaking of work for students' in circumstances where that work either:

- is, or forms a substantial part of, an assessment task that students are required to personally undertake; or

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 12.

2 Schedule 1, item 10, proposed subsection 114A(1).

3 *Crimes Act 1914*, subsection 4AA(1).



- could reasonably be regarded as being, or forming a substantial part of, an assessment task that students are required to personally undertake.<sup>4</sup>

1.168 The bill would also make it an offence for a person to advertise, publish or broadcast an advertisement for an academic cheating service to students undertaking higher education, where either that academic cheating service is provided on a commercial basis, or the provision of the advertisement itself is conducted for a commercial purpose.<sup>5</sup> This offence would also be punishable by imprisonment for two years, or 500 penalty units (currently \$105,000),<sup>6</sup> or both. The same conduct, carried out other than for a commercial purpose, or relating to an academic cheating service which is not carried out for a commercial purpose, would be subject to a civil penalty of 500 penalty units (also \$105,000).<sup>7</sup>

1.169 Additionally, the bill would give the Tertiary Education Quality and Standards Agency (TEQSA) the power to apply to the Federal Court of Australia for an injunction requiring a carriage provider to take reasonable steps to disable access to an online location that contravenes, or facilitates a contravention of these new provisions.<sup>8</sup>

## **Preliminary international human rights legal advice**

### ***Right to equality and non-discrimination***

1.170 Sections 114A and 114B seek to make it an offence, or subject to a civil penalty, to provide or advertise, academic cheating services other than for a commercial purpose. Section 114C outlines the constitutional heads of power on which these two sections would be based. These include the power to legislate with regards to aliens pursuant to paragraph 51(xix) of the Constitution.<sup>9</sup> The alternatively cited constitutional heads of power are the trade and commerce, corporations and communications power,<sup>10</sup> none of which appear to be relevant in the case of an academic cheating service which is provided on a non-commercial basis conducted in person (rather than via a website). The practical effect of this may be that the civil penalties for the provision of, or advertising of, non-commercial academic cheating services that operate in person (for example, a person on a university campus

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4 Schedule 1, item 3.

5 Schedule 1, item 10, proposed subsection 114B(1).

6 *Crimes Act 1914*, subsection 4AA(1).

7 Schedule 1, item 10, proposed subsection 114B(2).

8 Schedule 1, item 26, proposed section 127A.

9 Proposed subsections 114C(4) and (8).

10 Trade and commerce: paragraph 51(i); corporations: paragraph 51(xx); communications: paragraph 51(v).

offering services to students) can only operate in relation to 'aliens'.<sup>11</sup> For example, it may be that in many instances the federal government only has the power to apply a civil penalty for the provision of a non-commercial academic cheating service (a service which is itself defined very broadly), where the student in question is an alien and/or the person providing the service is themselves an alien. This appears to be made evident in subsections 114A(4)-(5), which states that it is generally not necessary to prove that cheating services were offered to a 'particular student', but this does not apply where the student in question is an alien. This appears to anticipate that the aliens head of power may be the only applicable head of power in some instances. Additionally, the prohibition on advertising academic cheating services is confined, in some instances, to persons who are aliens.<sup>12</sup>

1.171 Consequently, the prohibition of the non-commercial provision of, or advertisement of, academic cheating services may disproportionately impact on non-citizens. If this were the case, these measures would appear to engage and limit the right to equality and non-discrimination.<sup>13</sup> This right provides that everyone is entitled to enjoy their rights without discrimination of any kind, which encompasses both 'direct' discrimination (where measures have a discriminatory *intent*) and 'indirect' discrimination (where measures have a discriminatory *effect* on the enjoyment of rights).<sup>14</sup> Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>15</sup>

1.172 Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>16</sup> As the statement of compatibility does not identify that the right to equality and non-discrimination is engaged, no

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11 The term 'alien' has been interpreted to include individuals who have an allegiance to a foreign country, include via possession of foreign citizenship, and may include people who were born in Australia. See, *Koroitamana v Commonwealth* (2006) 227 CLR 31.

12 Schedule 1, item 10, proposed subsection 114C(8).

13 Articles 2 and 26 of the International Covenant on Civil and Political Rights.

14 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

15 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

16 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

assessment of its engagement is provided. Further information is required in order to assess the engagement of this right.

### ***Right to a fair trial***

1.173 As noted above, subsections 114A(3) and 114B(2) seek to prohibit conduct related to the provision of academic cheating services in a non-commercial context. The proposed penalty for this conduct is 500 civil penalty units, which currently equates to a pecuniary penalty of \$105,000.<sup>17</sup> Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (for example, the burden of proof is on the balance of probabilities). However, if the proposed civil penalty provisions are regarded as 'criminal' for the purposes of international human rights law, they will engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The statement of compatibility does not address this issue.

1.174 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in international human rights law);
- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- third, the severity of the penalty.<sup>18</sup>

1.175 It appears that the proposed civil penalties in subsections 114A(3) and 114B(2) would apply to the public in general, rather than in a specific regulatory context. 'Academic cheating service' is defined broadly in the bill, and it would encompass not merely the provision of organised and systematic academic cheating services, but would also extend to cover individual instances of academic cheating or assistance. For instance, the provision of free academic assistance (which meets the definition of an 'academic cheating service') to one student, on one occasion, in relation to one assessment, may contravene subsection 114A(3). In addition, in relation to whether there is an intention to punish or deter, the explanatory memorandum states explicitly that these civil penalties are intended to deter the provision of, or advertisement of, academic cheating services.<sup>19</sup> It argues that the

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17 *Crimes Act 1914*, subsection 4AA(1).

18 For further detail, see Parliamentary Joint Committee on Human Rights, Guidance Note 2.

19 Explanatory memorandum, pp. 4, 15.

provision of an academic cheating service, even for a non-commercial purpose, 'undermines the integrity of Australia's higher education system and can have serious consequences', and so this kind of cheating should be deterred also.<sup>20</sup> It further states, in relation to the non-commercial advertisement of academic cheating services, that a significant financial penalty is necessary to strongly deter any person who undertakes such advertisement, 'whether for financial reward or even for misguided altruistic reasons'.<sup>21</sup>

1.176 The proposed civil penalties, at \$105,000, also appear to be a significant sanction: they apply to any member of the public, and are the same sum as the proposed financial penalty for the corresponding criminal offence. The explanatory memorandum states that a large proportion of third party cheating takes place on a non-commercial basis, including by friends, family or community members.<sup>22</sup> Noting that the penalty applies to the public at large, rather than in a regulatory context, and is significant penalty to apply to an individual, it may be that the civil penalty provisions would be regarded as 'criminal' for the purposes of international human rights law.

1.177 This does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Rather, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in articles 14 and 15 of the ICCPR, including the right not to be tried twice for the same offence (article 14(7)) and the right to be presumed innocent until proven guilty according to law (article 14(2)). To the extent the penalties may be considered 'criminal' for the purposes of international human rights law, the statement of compatibility should explain how the civil penalties are compatible with these criminal process rights, including whether any limitations on these rights are permissible.

### ***Freedom of expression***

1.178 By permitting TEQSA to seek an injunction requiring a carriage service provider to block access to certain online locations,<sup>23</sup> and prohibiting the advertisement of services which are deemed to constitute 'academic cheating services', the measures in this bill engage and may limit the right to freedom of expression.

1.179 The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form

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20 Explanatory memorandum, p. 15.

21 Explanatory memorandum, p. 18.

22 Explanatory memorandum, p. 15.

23 Proposed section 127A.

of art, or through any other media of an individual's choice.<sup>24</sup> The right may be subject to limitations that are necessary to protect the rights or reputations of others,<sup>25</sup> national security, public order, or public health or morals.<sup>26</sup> Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>27</sup>

1.180 The statement of compatibility recognises that the injunction power, in preventing users in Australia from easily accessing specific websites or receiving certain search results, would restrict the right of the website provider to impart information.<sup>28</sup> However, it does not recognise the limitation on user's rights to receive information.

1.181 Furthermore, the statement of compatibility does not recognise that the proposed offence and civil penalty provisions for advertising an academic cheating service also engage and limit the right to freedom of expression. This is because the offence and civil penalty would have the effect of limiting a person's right to impart and receive information.

1.182 As to whether the limitation on the right to impart information is permissible, the statement of compatibility states:

An injunction power is a reasonable, necessary and proportionate response to the need to prevent academic cheating services being accessed by persons in Australia. The injunctions power would be subject to a number of safeguards, by enabling the Court to take account of a wide range of factors under subsection 127A(7) before granting an injunction.<sup>29</sup>

1.183 The explanatory memorandum provides further detail as to the prevalence of academic cheating services and the need for the measures.<sup>30</sup> However, further

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24 ICCPR, article 19(2).

25 Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

26 The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32]

27 See, UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

28 Statement of compatibility, p. 8.

29 Statement of compatibility, p. 8.

30 Explanatory memorandum, pp. 3 and 20-21.

information is required in order to assess whether, by addressing these problems through the creation of offences, civil penalties and the provision of an injunction power, the right to freedom of expression would be permissibly limited, having particular regard to the specific grounds on which the right may be limited.<sup>31</sup>

1.184 The statement of compatibility states that the injunctions power would be subject to several safeguards in subsection 127A(7), being matters which the court may take into account in determining whether to grant an injunction.<sup>32</sup> These matters include whether disabling access to an online location would be a proportionate response in the circumstances, the impact on any person or class of persons likely to be affected, whether it is in the public interest to disable access, and any other remedies available under the Act.<sup>33</sup> These may be capable of acting as safeguards in practice, although the court is not obligated to consider these matters prior to the granting of an injunction. However, no information is provided as to any safeguards that would apply to the offence and civil penalty provisions, to safeguard the right to freedom of expression. As such, further information is necessary in order to assess whether the right to freedom of expression would be permissibly limited by these proposed measures.

### **Concluding observations**

1.185 The measures outlined in this bill engage and may limit the right to equality and non-discrimination, right to a fair hearing and right to freedom of expression. As discussed above, further information is required in order to conduct a full assessment of the potential limitations on each of those rights, in particular:

- whether any of the proposed criminal offences, or civil penalty provisions (or any part of the criminal offences or civil penalty provisions) will vary in operation depending on whether a person is an Australian citizen;
- if the proposed criminal offences or civil penalty provisions would treat Australian citizens and non-citizens (or 'aliens') differently, whether that differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective;
- how the civil penalties in the bill are compatible with criminal process rights, including whether any limitations on these rights are permissible;

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31 Article 19(3) of the International Covenant on Civil and Political Rights provides that limitations on this right can be placed to respect the rights or reputations of others; or for the protection of national security, public order, public health or morals.

32 Statement of compatibility, p. 8.

33 Proposed subsection 127A(7).

- whether and how the proposed offence or civil penalty for advertising an academic cheating service and the injunction power are necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

### **Committee view**

**1.186** The committee notes that this bill would make it an offence to advertise or provide academic cheating services on a commercial basis, and would impose a pecuniary penalty on the advertisement or provision of such services on a non-commercial basis. The committee notes the legal advice that this bill may engage and limit the right to equality and non-discrimination, criminal process rights and the right to freedom of expression. The committee seeks the minister's advice as to the matters set out at paragraph [1.185].

## Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills<sup>1</sup>

<b>Purpose</b>	These bills seek to establish a new Commonwealth business registry regime, by modernising Commonwealth registers and establishing a framework for director identification numbers
<b>Portfolio</b>	Treasury
<b>Introduced</b>	House of Representatives, 4 December 2019
<b>Right</b>	Privacy
<b>Status</b>	Seeking additional information

### Collection and disclosure of personal information

1.187 The Commonwealth Registers Bill 2019, Treasury Laws Amendment (Modernisation and Other Measures) Bill 2019, Business Names Registration (Fees) Amendment (Registries Modernisation) Bill, Corporations (Fees) Amendment (Registries Modernisation) Bill 2019 and the National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019 constitute a legislative package designed to establish a new business registry regime.<sup>2</sup>

1.188 The package seeks to consolidate the business registers administered by the Australian Securities and Investments Commission (ASIC) and Australian Business Registry, and provides for the appointment and functions of a registrar who would be responsible for administering the new registers regime.<sup>3</sup>

1.189 The bills would establish a legal framework by which all directors of bodies corporate registered under the *Corporations Act 2001* (Corporations Act) or *Corporations (Aboriginal and Torres Strait Islander) Act 2006* would be required to apply for, and hold, a permanent unique director identification number (DIN). The new registrar would be required to issue a director with a DIN, where they are

1 Commonwealth Registers Bill 2019; Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; Corporations (Fees) Amendment (Registries Modernisation) Bill 2019; and National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019. The committee commented on these bills as they were previously introduced into the Parliament in [Report 2 of 2019](#), seeking further information. This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills, *Report 1 of 2020*; [2020] AUPJCHR 13.

2 Statement of compatibility, p. 63.

3 Explanatory memorandum, p. 6.



satisfied the director's identity has been established, and keep a record of the DINs issued to directors.<sup>4</sup> This process would involve the disclosure of personal information to the registrar.

1.190 The bills would enable the registrar to make, by legislative instrument, data standards on matters relating to the performance of their functions and exercise of their powers.<sup>5</sup> These may address a range of issues relating to the collection and disclosure of information, including:

- the type of information which may be collected by the registrar to perform their functions and exercise their powers;
- how such information may be collected;
- the manner and form in which such information is given to the registrar;
- what information is given to the registrar;
- how information held by the registrar is to be stored; and
- the integration or linking of information held by the registrar.<sup>6</sup>

1.191 The Commonwealth Registers Bill would regulate the disclosure of 'protected information' by the registrar,<sup>7</sup> which could include personal information. 'Protected information' is defined broadly to mean information which is obtained by a person in the course of the person's official employment; and disclosed to the person or another person, or obtained by the person or another person under, or in relation to, this bill, or under another law of the Commonwealth in connection with particular functions or powers of the Registrar.<sup>8</sup>

1.192 The Commonwealth Registers Bill would empower the registrar to make a disclosure framework relating to disclosing protected information.<sup>9</sup> The framework may set out the circumstances in which: protected information must not be disclosed without the consent of the person to whom the information relates; de-identified

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4 See *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, proposed section 308-5; *Corporations Act 2001* (Corporations Act), proposed section 1272.

5 Commonwealth Registers Bill, proposed subsection 13(1).

6 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 inserts equivalent provisions into the *National Consumer Credit Protection Act 2009* (NCCP Act) (proposed section 212H), the *Business Names Registration Act 2011* (Business Names Registration Act) (proposed section 62H), and the Corporations Act (proposed section 1270G).

7 Commonwealth Registers Bill, Part 4.

8 Commonwealth Registers Bill, section 5. The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to insert the same definition of 'protected information' into the Corporations Act, section 9; Business Names Registration Act, section 3; and the NCCP Act, section 5(1).

9 Proposed section 16.

personal information may be disclosed; protected information may be disclosed to the general public; and confidentiality agreements are required for disclosure of protected information.<sup>10</sup> The framework may also impose conditions on the disclosure of protected information.<sup>11</sup> The framework must not permit the disclosure of protected information unless the registrar is satisfied that the benefits of disclosure outweigh the risks of disclosure, taking into account any mitigation of those risks in accordance with the disclosure framework.<sup>12</sup>

1.193 The Commonwealth Registers Bill would create an offence for a person who is, or has been, in official employment to make a record of information or disclose information to another person, where they obtained that information in the course of their official employment.<sup>13</sup>

## **Preliminary international human rights legal advice**

### ***Right to privacy***

1.194 As these bills seek to confer a range of powers and functions on the new registrar, including the collection and disclosure of personal information, the measures engage and may limit the right to privacy. This is acknowledged in the statement of compatibility accompanying the suite of bills.<sup>14</sup> The right to privacy encompasses respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and the right to control the dissemination of information.<sup>15</sup> The right to privacy may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a

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10 Commonwealth Registers Bill, proposed subsection 16(2).

11 Commonwealth Registers Bill, proposed subsection 16(2).

12 Commonwealth Registers Bill, proposed subsection 16(5).

13 Commonwealth Registers Bill, proposed section 17. Subsection 17(2) would create an exemption to this offence where the disclosed information is authorised by subsection 17(3), namely where: the recording or disclosure is for the purposes of the Act; the recording or disclosure happens in the course of the performance of the duties of the person's official employment; the disclosure is to another person to use in the course of their official employment and performance or exercise of the functions or powers of a government entity; each person to whom the information relates consents to the disclosure; or the disclosure is in accordance with the disclosure framework.

14 Statement of compatibility, pp. 69-72.

15 International Covenant on Civil and Political Rights, article 17.

legitimate objective and be rationally connected and proportionate to achieving that objective.<sup>16</sup>

*Legitimate objective and rational connection*

1.195 The statement of compatibility explains that the collection of personal information by the registrar in accordance with data standards 'is required for the effective operation of the registry regime'.<sup>17</sup> In relation to the disclosure of information, the statement of compatibility explains that there are a number of circumstances in which disclosure is authorised, including:

- where it is for the purposes of the new regime, or in the course of the person's official employment, or to be used by another official in the course of their employment;
- where the person to whom the information relates consents to the disclosure; or
- in accordance with the disclosure framework.<sup>18</sup>

1.196 The statement of compatibility sets out the objectives of these measures:

These disclosures achieve a number of legitimate objectives, and ensure that the new registry regime can be effectively administered.

In relation to disclosure within Government, registry information that is required for the administration of other Australian laws is made available for that purpose. Disclosure with consent achieves the benefit of allowing data to be used for other purposes with a public benefit so long as each person to whom the data relates consents to the disclosure.

Disclosure in accordance with the disclosure framework is intended to provide the registrar with flexibility that will provide broader public benefits in the future. It is envisaged that the ability to make a disclosure framework will provide the registrar with flexibility regarding the release of registry information. For example, the framework could allow a trusted user (for instance a university whose IT systems, processes and staff have been vetted) to access information that may not be appropriate for wider

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16 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

17 Statement of compatibility, p. 70.

18 Statement of compatibility, p. 71.

dissemination where a social benefit exists and appropriate undertakings are made.<sup>19</sup>

1.197 In relation to disclosure within government, ensuring the effective operation of the registry regime and facilitating the administration of other laws may be capable of constituting legitimate objectives under international human rights law. Further, these measures would appear to be rationally connected to those objectives. However, in relation to disclosure in accordance with the disclosure framework, it is unclear what is meant by the term 'public benefit' in the statement of compatibility. Further information as to the nature of this 'public benefit' is required to determine whether the disclosure of personal information under the disclosure framework pursues a legitimate objective for the purposes of international human rights law, bearing in mind that to be capable of justifying a proposed limitation on human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.<sup>20</sup>

### *Proportionality*

1.198 It is also necessary to consider whether the power to collect information pursuant to data standards, or to disclose information pursuant to a disclosure framework, is a proportionate limit on the right to privacy. In relation to the scope of information which may potentially be collected and disclosed, the statement of compatibility explains that:

While the making of the data standards is a matter for the registrar, it is likely that personal information about company officers, financial service licensees and other persons on the current business registers will be collected. This is because such information is required for the effective operation of the registry regime.<sup>21</sup>

1.199 It is not clear what personal details of such officers and licensees is likely to be collected, although it would appear to be restricted to the relevant business context. However, the type of information which may be disclosed under the proposed disclosure framework appears to be quite broad, extending to any information obtained and disclosed by a person in the course of their official employment under the relevant Act, or under another Commonwealth law in connection with the functions or powers of the registrar.<sup>22</sup> This raises concerns as to whether the measures are sufficiently circumscribed. Further information about the nature and scope of the personal information which is likely to be collected and

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19 Statement of compatibility, pp. 71-72.

20 See, Parliamentary Joint Committee on Human Rights, *Guidance Note 1 – Drafting Statements of Compatibility*.

21 Statement of compatibility, p. 70.

22 Commonwealth Registers Bill 2019, section 5.

disclosed under the new regime is therefore necessary to determine whether these measures constitute a proportionate limitation on the right to privacy.

1.200 The availability of adequate safeguards to protect the right to privacy is relevant to assessing the proportionality of a measure that engages and limits that right. In this regard, it is noted that there are penalties in place for persons who engage in unauthorised recording, disclosure or use of protected information.<sup>23</sup> In addition, the disclosure framework enabled by section 16 of the Commonwealth Registers Bill could potentially contain additional safeguards on the disclosure of protected information. Subsection 16(2) of the Commonwealth Registers Bill 2019 provides that the disclosure framework *may* require that protected information only be disclosed in circumstances where the person to whom the information relates has consented to the disclosure,<sup>24</sup> and the intended recipient is subject to the Australian Privacy Principles and has entered into a confidentiality agreement.<sup>25</sup> However, whether the disclosure framework contains sufficient safeguards to protect the right to privacy will ultimately depend on how the framework is drafted.

1.201 In this regard, it is noted that subsection 16(5) of the Commonwealth Registers Bill states that the disclosure framework must not permit the disclosure of protected information unless the registrar is satisfied that the benefits of disclosure outweigh the risks of disclosure, taking into account any mitigation of those risks in accordance with the disclosure framework. This may serve as a safeguard on the right to privacy, however there is no mandatory requirement that the registrar expressly consider the right to privacy in making such an assessment. Consequently, whether this would be effective safeguard would depend on the content of the disclosure framework and how the measure operates in practice.

1.202 In order to assess the implications of these measures with regards to the right to privacy, further information is required as to:

- what is meant by the term 'public benefit' in relation to the disclosure of information by the registrar in accordance with disclosure framework, and whether it would constitute a legitimate objective for the purposes of international human rights law;
- the nature and scope of the personal information which is likely to be collected and disclosed under the new regime;
- whether the disclosure framework set out in section 16 of the Commonwealth Registers Bill 2019 is sufficiently circumscribed and accompanied by adequate safeguards (having regard to, but not limited to, the matters set out at subsection 16(2));

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23 Commonwealth Registers Bill, subsection 17(1).

24 Commonwealth Registers Bill, subsection 16(2)(a).

25 Commonwealth Registers Bill, subsections 16(2)(e)-(f).

- whether there exists a detailed outline of the proposed disclosure framework insofar as it relates to the right to privacy; and
- any other matters relevant to the adequacy of safeguards in relation to the collection, use, disclosure and detention of personal information pursuant to this suite of bills.

### **Committee view**

**1.203** The committee notes the package of bills would establish a new Commonwealth business registry regime and sets out when personal information relating to the registry regime may be collected and disclosed. The committee notes the legal advice on these bills. In order to assess whether these measures constitute a proportionate limitation on the right to privacy, the committee seeks the Treasurer's advice as to the matters set out at paragraph [1.202].

## Advice only<sup>1</sup>

1.204 The committee notes that the following private members' and senators' bills appears to engage and may limit human rights. Should either of these bills proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill:

- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019; and
- National Integrity (Parliamentary Standards) Bill 2019.

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

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 1 of 2020*; [2020] AUPJCHR 14.

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## Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019 [F2019L01397]<sup>2</sup>

<b>Purpose</b>	The regulations amend the Crimes Regulations 2019 to prescribe four state and territory National Disability Insurance Scheme (NDIS) worker screening units, and four related state and territory laws, for the purposes of Division 6 of Part VIIC of the <i>Crimes Act 1914</i>
<b>Portfolio</b>	Attorney-General
<b>Authorising legislation</b>	<i>Crimes Act 1914</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the Senate on 11 November 2019 and the House of Representatives on 25 November 2019). Notice of motion to disallow must be given by 10 February 2020 in the Senate, and 24 February 2020 in the House of Representatives <sup>3</sup>
<b>Rights</b>	Privacy; work
<b>Status</b>	Advice only

### Permitting the disclosure of spent, quashed and pardoned convictions

1.206 The regulations prescribe four state and territory persons and bodies under the Crimes Regulations 2019. The effect is that the spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability under the National Disability Insurance Scheme (NDIS) may be disclosed to and by NDIS worker screening units, and taken into account by these units, for the purposes of assessing a person's suitability as a disability worker.

1.207 The exceptions permitting the disclosure of information about a person's criminal history (including pardons, and quashed and spent convictions) in the context of working with persons with disability, are set out in Subdivision AA,

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019 [F2019L01397], *Report 1 of 2020*; [2020] AUPJCHR 15.

3 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.



Division 6 of Part VIIC of the *Crimes Act 1914* (Crimes Act).<sup>4</sup> These regulations prescribe persons and bodies for the purposes of that Subdivision.

## International human rights legal advice

### *Rights to privacy and work*

1.208 As the statement of compatibility acknowledges,<sup>5</sup> by enabling the disclosure, and the taking into account, of information relating to a person's spent and quashed convictions, and convictions for which a person has been pardoned, where that person is seeking employment within the NDIS, the regulations engage and may limit the right to privacy. Insofar as individuals may be subsequently excluded from employment with the NDIS on the basis of their criminal record, and as is acknowledged in the statement of compatibility,<sup>6</sup> this information sharing also engages and may limit the right to work.

1.209 The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>7</sup> The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.<sup>8</sup> The right to work also requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.<sup>9</sup>

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4 The committee previously considered the bill which created those exclusions—the Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Bill 2018. Parliamentary Joint Committee on Human Rights, *Report 3 of 2018* (27 March 2018), Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Bill 2018, pp. 6-11; *Report 4 of 2018* (8 May 2018), pp. 38-46; and *Report 5 of 2018* (19 June 2018), pp. 64-76.

5 Statement of compatibility, p. 10.

6 Statement of compatibility, pp. 8-9.

7 International Covenant on Civil and Political Rights (ICCPR), article 17. See also, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988); and *General Comment No. 34 (Freedom of opinion and expression)* (2011).

8 International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 6 and 7.

9 ICESCR, articles 6 and 2(1).

1.210 These rights may be limited, provided such limitations pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and a proportionate means of achieving that objective.<sup>10</sup>

1.211 The statement of compatibility states that these regulations support the implementation of nationally consistent NDIS worker screening arrangements,<sup>11</sup> with the paramount objective of protecting persons with disability from experiencing harm arising from unsafe supports or services under the NDIS, noting that persons with disability are among the most vulnerable in the community.<sup>12</sup> This is likely to be a legitimate objective for the purposes of international human rights law.<sup>13</sup>

1.212 The statement of compatibility states that access to a person's full criminal or 'behavioural' history is an important and relevant consideration in assessing whether that applicant poses an 'unacceptable risk of harm' to persons with disability.<sup>14</sup> It states that there is 'sufficient research and objective evidence' to support the relevance of a criminal record as a basis for determining a person's risk to vulnerable persons.<sup>15</sup> Insofar as including information about spent, quashed and pardoned convictions may enable worker screening units to accurately assess a person's suitability as a disability support worker in terms of any risk they may pose to a person with disability, the measure appears to be rationally connected to this objective.

1.213 In relation to the proportionality of the proposed measures, the statement of compatibility notes that the NDIS Check clearance applies only to persons applying for a 'risk assessed role' within the NDIS scheme.<sup>16</sup> It states that those individuals

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10 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

11 Statement of compatibility, p. 8.

12 Statement of compatibility, p. 9.

13 Noting that, as set out at page 8 of the statement of compatibility, these measures may promote the rights of persons with disabilities (see, Convention on the Rights of Persons with Disabilities).

14 Statement of compatibility, p. 9.

15 Statement of compatibility, p. 10.

16 'Risk assessed role' is defined in section 5 of the National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018 to mean a key personnel role of a person or entity; a role for which normal duties include the direct delivery of specified supports or specified services to a person with disability; or a role for which normal duties are likely to require more than incidental contact with a person with disability.

would only be excluded from potential employment where their criminal history information was determined to pose an unacceptable risk of harm to persons with disability.<sup>17</sup> Additionally, pursuant to the Inter-Governmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme (the IGA), states and territories have agreed to establish review mechanisms in the case of a decision by an NDIS worker screening unit to exclude or revoke a person's clearance.<sup>18</sup> If the review mechanisms outlined in the IGA are available at state and territory level this would operate as a safeguard.

1.214 When the committee examined the legislation establishing the sharing and disclosure of spent, quashed and pardoned convictions to NDIS worker screening units it was advised by the minister that the NDIS worker screening regime is a shared responsibility of Commonwealth, state and territory governments, with the states and territories responsible for the implementation and operation of the regime.<sup>19</sup> As such, the committee previously concluded that as any safeguards would be operationalised by the states and territories rather than through federal legislation, much will depend on the implementation of the NDIS worker screening scheme in practice, such that it may be useful for there to be ongoing monitoring so as to ensure it is implemented in a manner compatible with human rights.<sup>20</sup>

1.215 There may be sufficient safeguards in place to appropriately protect the rights to privacy and work, however as any safeguards would be operationalised by the states and territories rather than through federal legislation, much will depend on the implementation of the NDIS worker screening scheme in practice. As such, the implementation of the NDIS worker screening scheme should be monitored so as to ensure that it is implemented in a manner consistent with human rights.

### Committee view

**1.216 The committee notes that the regulations prescribe four state and territory National Disability Insurance Scheme (NDIS) worker screening units as those that may take into account spent, quashed and pardoned convictions of persons working or seeking to work with persons with disability, for the purposes of assessing a person's suitability as a disability worker. The committee notes the legal advice that this may engage and limit the rights to privacy and work.**

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17 Statement of compatibility, pp. 8-9.

18 Council of Australian Governments, *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*, p. 18.

19 See, Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018), at p. 70.

20 See, Parliamentary Joint Committee on Human Rights, *Report 5 of 2018* (19 June 2018), at pp. 71 and 73.

**1.217** The committee considers there are sufficient safeguards in place to appropriately protect the rights to privacy and work, however as any safeguards would be operationalised by the states and territories rather than through federal legislation, much will depend on the implementation of the NDIS worker screening scheme in practice. As such, the committee recommends that the implementation of the NDIS worker screening scheme be monitored so as to ensure that it is implemented in a manner consistent with human rights.

## Discrimination Free Schools Bill 2018<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Sex Discrimination Act 1984</i> and the <i>Fair Work Act 2009</i> to remove exemptions from the prohibition on certain grounds of discrimination
<b>Legislation Proponent</b>	Senator Di Natale
<b>Introduced</b>	Senate, 16 October 2018, restored to the <i>Notice Paper</i> 4 July 2019
<b>Rights</b>	Equality and non-discrimination; freedom of religion
<b>Status</b>	Advice only

### Removal of anti-discrimination exemptions for religious schools

1.218 The bill seeks to amend the *Sex Discrimination Act 1984* (Sex Discrimination Act) and the *Fair Work Act 2009* (Fair Work Act) to remove the existing exemptions from the prohibition on discrimination outlined in the Sex Discrimination Act.

#### **Employment**

1.219 Sections 14 and 16 of the Sex Discrimination Act make it unlawful for an employer (or principal) to discriminate against a person on the basis of 'sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities', in relation to a range of actions, including the offer or termination of employment or contract work.

1.220 These sections are currently subject to a number of exemptions. Paragraph 37(1)(d) of the Sex Discrimination Act provides an exemption for 'a body established for religious purposes' to discriminate against a person if the discriminatory act or practice 'conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.' Subsections 38(1) and 38(2) further provide a specific exemption for staff members (or contractors) of religious educational institutions to discriminate against another person in connection with their employment or work if they do so 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

1.221 The bill seeks to remove the exemptions contained in paragraph 37(1)(d) and section 38 of the Sex Discrimination Act that apply to educational institutions, with

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Discrimination Free Schools Bill 2018, *Report 1 of 2020*; [2020] AUPJCHR 16.

the result that such conduct would be subject to the broad prohibition on discrimination set out in sections 14 and 16.

1.222 The Fair Work Act also contains a number of provisions prohibiting discrimination in relation to a 'modern award';<sup>2</sup> an 'enterprise agreement';<sup>3</sup> 'adverse action';<sup>4</sup> or 'termination'<sup>5</sup> on the basis of an 'employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'<sup>6</sup> However, exemptions are provided for religious institutions if the conduct 'is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed in good faith; and to avoid injury to the religious susceptibilities of adherents of that religion or creed.'<sup>7</sup>

1.223 The bill also seeks to amend the Fair Work Act, in order to insert a broad definition of educational institutions,<sup>8</sup> and to exclude such institutions from these exemptions.

### ***Education or training***

1.224 Section 21 of the Sex Discrimination Act makes it unlawful for an educational authority to discriminate against a person on the basis of 'sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities', in relation to their admission, expulsion or other treatment as a student. Section 21 is currently subject to a number of exemptions provided under subsections 37(1) and 38(3) of the Sex Discrimination Act.

1.225 Paragraph 37(1)(d) provides a broad exemption for religious bodies to discriminate against a person if the discriminatory act or practice 'conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion', while paragraphs 37(1)(a)-(b) provide specific exemptions for the ordination, appointment, training, and education of religious leaders.<sup>9</sup> Subsection 38(3) further provides a specific exemption for

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2 *Fair Work Act 2009* (Fair Work Act), section 153(1).

3 Fair Work Act, section 195(1).

4 Fair Work Act, section 351(1).

5 Fair Work Act, section 772(1).

6 Fair Work Act, sections 153(1), 195(1), 351(1), 772(1).

7 Fair Work Act, sections 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

8 Proposed section 12.

9 Section 37(1)(c) of the *Sex Discrimination Act 1984* also provides an exemption for 'the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice'.

discrimination on the grounds of 'sexual orientation, gender identity, marital or relationship status or pregnancy':

in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

1.226 The bill seeks to remove the exemptions contained in paragraph 37(1)(d) and section 38 of the Sex Discrimination Act with the result that such conduct would be subject to the broad prohibition on discrimination as set out in section 21. The specific exemptions in paragraphs 37(1)(a)-(c) would remain.

## **International human rights legal advice**

### ***Removing exemptions for religious schools in connection with employment***

#### *Freedom of religion, right to equality and non-discrimination*

1.227 By seeking to limit existing exemptions from discrimination laws for religious educational institutions in relation to the employment of persons, or the offer or termination of contract work, this bill engages and appears to promote the right to equality and non-discrimination (as is noted in the statement of compatibility),<sup>10</sup> and to promote non-discrimination in relation to the right to work.<sup>11</sup> The bill may also engage and potentially limit the right to freedom of religion.

1.228 Article 18 of the International Covenant on Civil and Political Rights (ICCPR) protects the rights of all persons to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs.<sup>12</sup> The right to freedom of religion not only requires that the state should not, through legislative or other measures, impair a person's freedom of religion, but that the state should also take steps to prevent others from coercing persons into having, or changing, religion.

1.229 The right to freedom of religion includes the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice and

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10 Statement of compatibility, p. 4.

11 The rights to work, and to just and favourable conditions of work are protected by articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Articles 2(1) and 2(2) of the ICESCR protect the non-discriminatory application of these rights. See UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005). By providing access to a remedy for any breach of the right to equality and non-discrimination, the bill also appears to engage and promote the right to an effective remedy (International Covenant on Civil and Political Rights (ICCPR), article 2(3)).

12 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* [1].

teaching.<sup>13</sup> The practice and teaching of religion or belief includes 'acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools'.<sup>14</sup> However, while the right to hold a religious or other belief or opinion is an absolute right,<sup>15</sup> the right to *exercise* one's belief can be limited given its potential impact on others. Article 18(3) of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Such measures must also be rationally connected (that is, effective to achieve) and proportionate to one or more of these listed legitimate objectives.<sup>16</sup> Such restrictions may not be imposed for a discriminatory purpose or applied in a discriminatory manner.<sup>17</sup>

1.230 The exemptions provided under the Fair Work Act currently protect religious institutions from unlawful discrimination claims on a number of grounds, including religious belief. By removing these exemptions entirely, in so far as they apply to educational institutions, this bill would not allow discrimination by religious educational institutions in relation to the hiring of teachers or others on the grounds of religious belief.

1.231 By prohibiting discrimination by religious educational institutions on grounds that include religious belief, including institutions established to educate religious leaders (such as seminaries training priests), these measures may engage and limit the right to freedom of religion.

1.232 The statement of compatibility does not acknowledge that the bill engages the right to freedom of religion, but it does state that the bill promotes the right to equality and non-discrimination. As noted at paragraph [1.9] above, the protection of the fundamental rights and freedoms of others is considered to be a legitimate

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13 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* [4].

14 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* [4].

15 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [1].

16 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]. See also, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

17 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].



objective under article 18(3) of the ICCPR. This bill, in expanding the operation of discrimination laws, does appear to engage and promote the right to equality and non-discrimination. As such, it is necessary to consider the balance between this right and the right to freedom of religion.

1.233 The right to equality and non-discrimination provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law. Discrimination under articles 2 and 26 of the ICCPR encompasses a distinction based on a personal attribute (such as sex, marital status, or sexual orientation)<sup>18</sup> which has either the *purpose* ('direct' discrimination), or the *effect* ('indirect' discrimination), of adversely affecting human rights.<sup>19</sup>

1.234 In removing the legislative exemptions that currently prevent people from taking unlawful discrimination complaints against persons who discriminate against them in the context of their employment by, or contract work for, religious educational institutions, this bill appears to promote the right to equality and non-discrimination. As such, the measures do appear to be rationally connected to the achievement of the legitimate objective of promoting human rights.

1.235 However, it is less clear that the measure is proportionate to the achievement of this objective, in that there may be less rights restrictive means available to achieve this objective. The definition of 'educational institution' that this bill proposes to insert into section 12 of the Fair Work Act is so broad as to potentially include places of education for religious leaders or members of a religious order, as it applies to any 'school, college, university or other institution at which education or training is provided'.<sup>20</sup> This may make the measures inconsistent with the specific exemption provided under paragraph 37(1)(b) of the Sex Discrimination Act (and which this bill does not seek to amend) for the 'training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order' (religious leaders). It may be that a more appropriate balance between the right to freedom of religion and the right to equality and non-discrimination could be achieved by providing a higher level of protection to freedom of religion in relation to the training or education of religious leaders. As such, it may be appropriate that the proposed definition of 'educational institution' in the Fair Work Act be narrowed to ensure that institutions, when providing training

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

19 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

20 Schedule 1, item 3.

or education of religious leaders, remain exempt from the anti-discrimination requirements of the Fair Work Act.

### ***Removing exemptions for religious schools in connection with education or training***

#### *Rights to equality and non-discrimination, and freedom of religion*

1.236 As acknowledged in the statement of compatibility, this bill, in expanding the operation of discrimination laws, does appear to engage and promote the right to equality and non-discrimination, and to promote non-discrimination in relation to the right to education.<sup>21</sup> The right to equality and non-discrimination is set out in paragraph [1.13] above.

1.237 By removing the legislative exemptions that currently prevent students from taking unlawful discrimination complaints against persons who discriminate against them on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy in the context of the provision of education by religious educational institutions, this bill may engage the right to freedom of religion. It is not clear, however, whether this would constitute a limitation on that right.

1.238 The right to freedom of religion is set out in paragraphs [1.8] and [1.9] above, and protects the rights of all persons to manifest their religion or belief through a range of activities.<sup>22</sup> While this might allow religious schools to discriminate so as to accept only students who practise the same religion, it is unclear that this extends to the practice of discriminating against students on the grounds of inherent characteristics such as sexual orientation, gender identity, marital or relationship status or pregnancy. Furthermore, the freedom to have or to adopt a religion or belief protected under article 18(2) of the ICCPR applies equally to holders of all beliefs of a non-religious nature, and bars any coercion that might compel non-believers to adhere to religious beliefs.<sup>23</sup> This includes policies or practices that restrict access to education or employment.<sup>24</sup>

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21 Statement of compatibility, p. 3. The right to education is protected by article 13 of the ICESCR. Articles 2(1) and 2(2) of the ICESCR protect the non-discriminatory application of these rights. The bill also appears to engage and promote the right of the child, including the right of the child to have his or her best interests taken as a primary consideration (Convention on the Rights of the Child (CRC), article 3(1)); UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013)). By providing access to a remedy for any breach of the right to equality and non-discrimination, the bill also appears to engage and promote the right to an effective remedy (ICCPR, article 2(3)).

22 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [4].

23 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [5].

24 UN Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [5].

1.239 Nonetheless, if the measure were to be construed as a limit, it would need to conform to article 18(3) of the ICCPR, which permits restrictions on the freedom to manifest religion or belief only if the limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Such measures must also be rationally connected (that is, effective to achieve) and proportionate to one or more of these listed legitimate objectives.

1.240 The statement of compatibility explains that the objective of these measures is to promote the right to equality and non-discrimination.<sup>25</sup> As such, by protecting the fundamental rights and freedoms of others, these measures would appear to promote a legitimate objective for the purposes of international law and be rationally connected to that objective.

1.241 In terms of proportionality, it is relevant that, unlike the measures that apply to the Fair Work Act (discussed above at paragraphs [1.5] to [1.18]), these measures do not affect the capacity of educational institutions to discriminate on the basis of religion (for example, a catholic school could continue to require that new students subscribed to the tenets of the catholic faith). Nor do they affect the current exemptions in paragraphs 37(1)(a) and 37(1)(b) of the Sex Discrimination Act which allow religious educational institutions to discriminate in relation to the ordination, appointment, training, and education of religious leaders. As such, if they were to be construed as a limitation on the right to freedom of religion, these measures would appear to be a proportionate limitation on that right, given these safeguards.

## Committee view

### *Employment*

**1.242 The committee notes that the bill seeks to remove the current exemptions from the discrimination provisions in the *Sex Discrimination Act 1984* and the *Fair Work Act 2009* which allow religious schools to discriminate in an employment context. The committee notes that the legal advice suggests that this measure may engage and promote the rights to equality and non-discrimination, but may engage and limit the right to freedom of religion. The committee considers that in determining the proportionality of the measures, it is necessary to consider the balance between these rights.**

**1.243 The committee notes, that as currently drafted, this bill would appear to prohibit religious educational institutions from engaging in discriminatory employment practices, even where those institutions are training or educating persons seeking ordination or appointment as priests, ministers of religion or**

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25 Discrimination under articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) encompasses a distinction based on a personal attribute (such as on the basis of sex, marital status, or sexual orientation) which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.

members of a religious order (religious leaders), and even where the discrimination was on the grounds of religious belief. This is of considerable concern. In this respect, the committee considers that these measures are not a proportionate limitation on the right to freedom of religion.

1.244 The committee considers it may be appropriate to amend the proposed definition of 'educational institution'<sup>26</sup> to ensure that institutions that train or educate religious leaders are able to discriminate on the grounds of religious belief in relation to the employment of teachers.

#### *Education or training*

1.245 The committee notes that the bill seeks to remove the current exemptions from the discrimination provisions in the *Sex Discrimination Act 1984* which allow religious schools to discriminate in an educational context. The committee notes the legal advice that this measure engages and promotes the rights to equality and non-discrimination.

1.246 The committee also notes the legal advice that this measure may engage the right to freedom of religion, and that if the measure were construed to be a limitation on the right to freedom of religion, this would be a permissible limitation in so far as it promotes the rights to equality and non-discrimination, noting the safeguards that would remain in the *Sex Discrimination Act*.

1.247 As such the committee makes no further comment in relation to this matter.

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26 Schedule 1, item 3.

## Health Legislation Amendment (Data-matching and Other Matters) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill amends the <i>National Health Act 1953</i> and the <i>Health Insurance Act 1973</i> to enable information held by the Chief Executive Medicare to be used for data-matching purposes for Medicare compliance and related purposes
<b>Portfolio</b>	Health
<b>Introduced</b>	House of Representatives on 23 October 2019
<b>Right</b>	Privacy
<b>Status</b>	Advice only

### Use of personal medical information for data-matching purposes

1.248 The bill provides for the collection, disclosure and matching of certain information, including medical information. Section 132C enables the secretary of the Department of Health to disclose certain therapeutic goods administration information to the Chief Executive Medicare for the purposes of data matching. Similarly, section 132D permits private health insurers to disclose information about hospital or general treatment to the Chief Executive Medicare for data matching purposes.<sup>2</sup> Section 132B permits the Chief Executive Medicare to match certain health data for compliance related purposes, and subsection 132B(2) allows the Chief Executive Medicare to authorise a Commonwealth entity to match information on their behalf, which would enable the disclosure of such information to those Commonwealth entities to facilitate matching.<sup>3</sup> The bill also amends section 6 of the *National Health Act 1953* (National Health Act) so that all or any of these powers may be delegated by the Chief Executive Medicare to 'a person'.<sup>4</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Health Legislation Amendment (Data-matching and Other Matters) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 17

2 The Chief Executive Medicare may request such information under proposed subsection 132D(2) or the private health insurer may do so on their own initiative.

3 Explanatory memorandum, p. 7.

4 Schedule 1, item 5.

## International human rights legal advice

### **Right to privacy**

1.249 The collection and disclosure of information, particularly including personal medical information, engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>5</sup>

1.250 The right to privacy may be subject to permissible limitations that are provided by law and not arbitrary. In order for limitations not to be arbitrary, the measure must pursue a legitimate objective and be rationally connected to and proportionate to achieving that objective.<sup>6</sup> In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and should be accompanied by appropriate safeguards.

1.251 The statement of compatibility acknowledges that the measures engage the right to privacy.<sup>7</sup> It states that the objective of the bill is to support the integrity of Australia's medicare programs by providing:

additional mechanisms by which the Chief Executive Medicare can ensure whether payments that have been made under the program were made correctly, facilitating recoveries where appropriate and to identify potential inappropriate practice. This means that more money will be able to be reinvested in new services and medications for the Australian community, which will improve access to medicare programs for a greater number of Australians.<sup>8</sup>

1.252 Protecting the financial integrity of Medicare in order to promote the right to health is likely to be a legitimate objective for the purposes of international human

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5 The right to privacy is protected by article 17 of the International Covenant on Civil and Political Rights (ICCPR), article 16 of the Convention on the Rights of the Child (CRC), and article 22 of the Convention on the Rights of Persons with Disabilities (CRPD). See also, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10], and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

6 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

7 Statement of compatibility, pp. 4-5.

8 Statement of compatibility, p. 4.

rights law, and collecting and disclosing relevant medical information<sup>9</sup> for the purposes of facilitating data-matching appears to be rationally connected to this objective. However, noting the breadth of the information that is being collected and disclosed, and that the Chief Executive Medicare is authorised to delegate all or any of these powers to any person, it is less clear that the measure is a proportionate limitation on the right to privacy.

1.253 The statement of compatibility addresses the issue of proportionality by providing that:

Restrictions on the use of information are provided by law to ensure that the information is only used for data matching for specific compliance-related permitted purposes. This means information will only be disclosed when necessary for matching, and only matched when necessary for a permitted purpose. The Bill sets out a number of safeguards in relation to the use of information, including providing the Australian Information Commissioner with oversight and the ability to conduct an assessment. Further, the Minister will be required to make principles dealing with governance of matched data. These principles will be a legislative instrument and will be subject to consultation and scrutiny obligations under the *Legislation Act 2003*.

1.254 Proposed section 132E of the bill also provides that a breach of one of the proposed new provisions would be covered by section 13 of the *Privacy Act 1998*. This means that an individual who believes their privacy has been interfered with can make a complaint to the Australian Information Commissioner.

1.255 These safeguards are important and welcome. However, without further information, such as the details of the minister's principles relating to the governance of matched data, and the criteria that will be used by the Chief Executive Medicare when determining whether to delegate these powers, there is not enough information available to assess whether the bill represents a proportionate limitation on the right to privacy.

1.256 In summary, the collection and disclosure of personal medical information engages and limits the right to privacy.

1.257 In order to fully assess the proportionality of these measures, more information would be required as to the availability of safeguards to protect the right to privacy, including:

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9 Including information that is held or had been obtained by the Chief Executive Medicare for the purposes of a Medicare program (proposed paragraph 132B(1)(a)); therapeutic goods information (proposed paragraph 132B(1)(b) and subsection 132C(1)); information relating to hospital treatment or general treatment provided to a person who is insured under an insurance policy (proposed paragraph 132B(1)(c) and subsection 132D(1)); and other information disclosed to the Chief Executive Medicare (proposed paragraph 132B(1)(f)).

- how the information collected or disclosed under the bill will be handled (including how long it will be retained);
- what safeguards will be in place to prevent on-disclosure of the information collected or disclosed under the bill; and
- what criteria will be used by the Chief Executive Medicare when determining whether to delegate all or any of their powers to 'a person', under the proposed amendment to subsection 6 of the National Health Act.

### **Committee view**

**1.258** The committee notes that this bill enables information held by the Chief Executive Medicare to be used for data-matching purposes for Medicare compliance and related purposes. The committee notes the legal advice that the collection and disclosure of personal medical information engages and limits the right to privacy, however, it also considers that such collection of information which is important in the context of the proper administration of Medicare is underpinned by important safeguards. However, as this bill has now passed both houses of Parliament the committee makes no further comment in relation to this matter.



## Student Identifiers Amendment (Higher Education) Bill 2019<sup>1</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Student Identifiers Act 2014</i> to: enable the Student Identifiers Registrar to assign a unique student identifier to all higher education students; require that a registered higher education provider not confer a regulated higher education award unless a person has been assigned a student identifier; enable the assignment, collection, use, disclosure and verification of those identifiers; and authorise the minister to give directions to the Registrar about the performance of their functions in relation to higher education
<b>Portfolio</b>	Education
<b>Introduced</b>	House of Representatives, 4 December 2019
<b>Right</b>	Privacy
<b>Status</b>	Advice only

### Use and disclosure of student identifiers

1.259 Proposed subsection 18(3) of the bill<sup>2</sup> would authorise the Student Identifiers Registrar (the Registrar) to use or disclose a student identifier of an individual if it is for the purposes of research that relates directly or indirectly to the provision of higher education, and meets requirements which are to be specified in a legislative instrument.

### International human rights legal advice

#### ***Right to privacy***

1.260 Authorising the Registrar to use or disclose student identifiers for the purposes of research engages and may limit the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.<sup>3</sup>

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Student Identifiers Amendment (Higher Education) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 18.

2 Schedule 1, item 12.

3 International Covenant on Civil and Political Rights, article 17.

1.261 The statement of compatibility identifies that the bill engages the right to privacy.<sup>4</sup> It states that the legislative instrument which will set out the requirements that must be met prior to the use or disclosure of identifiers will ensure that 'appropriate limits' are placed around this power, and that the Registrar's power cannot be exercised prior to the development of this legislative instrument.<sup>5</sup> It states that the minister will set out 'robust requirements' in that instrument to 'ensure appropriate safeguards are in place', and will take into account 'community expectations surrounding privacy', as well as considering 'relevant requirements applicable to the use of student identifiers for research in the VET sector and whether they are applicable for higher education'.<sup>6</sup> It also gives examples of factors that the minister may consider including in the legislative instrument for the Registrar to take into account prior to exercising this proposed power.<sup>7</sup>

1.262 However, while this legislative instrument could operate as an effective safeguard with respect to the right to privacy, the instrument does not exist, and the bill does not, itself, specify matters to which the minister must have regard in its development. As such, it remains unclear whether the use and disclosure of student identifiers pursuant to proposed subsection 18(3) would impermissibly limit the right to privacy for the purposes of international human rights law.

### **Committee view**

**1.263 The committee notes that the bill would authorise the use or disclosure of individual student identifiers for the purposes of research. The committee notes the legal advice and considers it is unclear whether the legislative instrument required to be developed pursuant to subsection 18(3) of the bill would operate effectively as a safeguard to protect the right to privacy. The committee notes that if this bill passes, it will separately consider any legislative instrument made under the relevant act once it is tabled in the Parliament.**

**1.264 The committee draws this matter to the attention of the minister and the Parliament.**

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4 Statement of compatibility, pp. 6-8.

5 Statement of compatibility, p. 7.

6 Statement of compatibility, p. 7.

7 Statement of compatibility, pp. 7-8.

## Transport Security Amendment (Serious Crime) Bill 2019<sup>1</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Aviation Transport Security Act 2004</i> and the <i>Maritime Transport and Offshore Facilities Security Act 2003</i> to provide that the regulations may prescribe requirements for the purposes of preventing the use of aviation and maritime transport and offshore facilities in connection with serious crime
<b>Legislation proponent</b>	Home Affairs
<b>Introduced</b>	House of Representatives on 23 October 2019
<b>Right</b>	Work
<b>Status</b>	Advice only

### Aviation and maritime security identification card schemes

1.265 The bill seeks to amend the *Aviation Transport Security Act 2004* (Aviation Transport Act) and the *Maritime Transport and Offshore Facilities Security Act 2003* (Maritime Transport Act) to provide that regulations may prescribe requirements in order to prevent the use of aviation and maritime transport or offshore facilities in connection with 'serious crime'. Items 4 and 17 of the bill provide that regulations relating to both Acts may deal with access to areas or zones (including conditions of entry, the use and issue of security passes and other identification systems), and the security checking (including background checking) of persons who have access to areas or zones. The proposed amendments also provide that regulations may prescribe penalties of up to 200 penalty units (currently \$42,000) for offences against those regulations.

### International human rights legal advice

#### ***Right to work***

1.266 The proposed amendments would permit the alteration of the eligibility criteria for aviation and maritime security identification cards. As persons within designated areas or zones are required to display these identification cards<sup>2</sup> in order to work in these locations, these measures engage and may limit the right to work.

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Transport Security Amendment (Serious Crime) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 19.

2 See, Aviation Transport Security Regulations 2005, division 3.2, and Maritime Transport and Offshore Facilities Security Regulations 2003, division 6.1A.

1.267 The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work. The right to work also requires that states provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory way.<sup>3</sup> The right to work may be limited, provided the limitation pursues a legitimate objective, is rationally connected to (that is, effective to achieve) that objective and a proportionate means of achieving that objective.<sup>4</sup>

1.268 The statement of compatibility does not identify that the bill engages and may limit the right to work. In general terms, it states that the objective of the bill is to reduce criminal influence at Australia's security controlled airports, security regulated ports, and security offshore oil and gas facilities.<sup>5</sup> Seeking to reduce criminal activity is likely to be a legitimate objective for the purposes of international human rights law, and prescribing requirements for entry to such areas and zones may be rationally connected (that is, effective to achieve) that objective. However, much would depend on the detail of what is set out in the regulations (noting that the bill leaves the detail of how such requirements would be applied to the regulations).

1.269 It is noted that the bill itself does not define what would constitute a 'serious crime', nor is it defined in the Aviation Transport Act or the Maritime Transport Act. The explanatory memorandum states that the new eligibility criteria for the security identification card scheme, to be specified in the regulations:

will introduce new offence categories such as offences relating to: anti-gang or criminal organisation legislation; illegal importation of goods; interfering with goods under customs control; and foreign incursion and requirement.<sup>6</sup>

1.270 This would appear to leave the detail of when a person may be excluded from accessing a security identification card to the regulations, and it would appear that it is intended to apply to a broad range of conduct. It is also unclear whether the regulations, in prescribing matters 'in connection with serious crime' would relate only to convictions for criminal offences, or whether they could extend to charges or investigations for any relevant offences.

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3 International Covenant on Economic, Social and Cultural Rights, articles 2(1) and 6.

4 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

5 Statement of compatibility, p. 1.

6 Explanatory memorandum, p. 2.

1.271 Altering the eligibility criteria for persons to gain access to areas or zones relating to aviation, maritime transport or offshore facilities appears to engage and may limit the right to work (as persons denied access would be unable to be employed in such areas or zones). This is not acknowledged in the statement of compatibility.

1.272 The bill leaves to the regulations all of the detail as to when access to such areas or zones may be denied, including the definition of what constitutes 'serious crime'. Without these regulations it is not possible to assess whether the measure permissibly limits the right to work. Should the bill be passed, the regulations may be assessed for compatibility with human rights.

### **Committee view**

**1.273 The committee notes that this bill would provide for regulations, which may prescribe requirements for the purposes of preventing the use of aviation and maritime transport and offshore facilities in connection with serious crime. The committee notes the legal advice that altering the eligibility criteria for persons to gain access to areas or zones relating to aviation, maritime transport or offshore facilities may engage and limit the right to work (as persons denied access would be unable to be employed in such areas or zones), which has not been considered in the statement of compatibility. However, the committee considers that the limitation appears to pursue a legitimate objective, is rationally connected to that objective and a proportionate means of achieving that objective.**

**1.274 The committee notes that the bill leaves to the regulations all of the detail as to when access to such areas or zones may be denied, including the definition of what constitutes 'serious crime'. Without these regulations it is difficult to assess whether the measure permissibly limits the right to work. Should the bill be passed, the committee will assess the regulations for compatibility with human rights. The committee draws this matter to the attention of the minister and the Parliament.**

## Bills and instruments with no committee comment<sup>1</sup>

1.1 The committee has no comment in relation to the following bills which were introduced into the Parliament between 14 October 2019 and 5 December 2019. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:<sup>2</sup>

- Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019;
- Agriculture Legislation Amendment (Streamlining Administration) Bill 2019;
- Australian Banks (Government Audit) Bill 2019;
- Australian Business Growth Fund Bill 2019;
- Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019;
- Climate Change Authority Amendment (Impact of 3 Degrees of Global Warming on Australia) Bill 2019;
- Coal Prohibition (Quit Coal) Bill 2019;
- Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2019;
- Commonwealth Electoral Amendment (Lowering the Disclosure Threshold) Bill 2019;
- Commonwealth Electoral Amendment (Transparency Measures-Lowering the Disclosure Threshold) Bill 2019
- Commonwealth Electoral Amendment (Transparency Measures-Real Time Disclosure) Bill 2019;
- Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019;
- Crimes Legislation Amendment (Age of Criminal Responsibility) Bill 2019;
- Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019;
- Customs Amendment (Growing Australian Export Opportunities Across the Asia-Pacific) Bill 2019;

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1 The section can be cited as: Parliamentary Joint Committee On Human Rights, Bills and instruments with no committee comment, *Report 1 of 2020*, [2020] AUPJCHR 20.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Customs Tariff Amendment (Growing Australian Export Opportunities Across the Asia-Pacific) Bill 2019;
- Education Legislation Amendment (2019 Measures No. 1) Bill 2019;
- Export Control Bill 2019;
- Export Charges (Imposition—Customs) Amendment Bill 2019;
- Export Charges (Imposition—Excise) Amendment Bill 2019;
- Export Charges (Imposition—General) Amendment Bill 2019;
- Export Control (Consequential Amendments and Transitional Provisions) Bill 2019;
- Fair Work Amendment (Restoring Penalty Rates) Bill 2018 [No. 2];
- Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019;
- Farm Household Support Amendment (Relief Measures) Bill (No. 1) 2019;
- Farm Household Support Amendment (Relief Measures) Bill (No. 2) 2019;
- Federal Circuit and Family Court of Australia Bill 2019;
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019;
- Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019;
- Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Bill 2019;
- Foreign Acquisitions and Rakeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019;
- Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019;
- Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019;
- Live Animal Export Prohibition (Ending Cruelty) Bill 2019;
- Maritime Safety (Domestic Commercial Vessel) National Law Amendment (Improving Safety) Bill 2019;
- Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019;
- Migration Amendment (Regulation of Migration Agents) Bill 2019;
- National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019;
- National Self-exclusion Register (Cost Recovery Levy) Bill 2019;

- National Vocational Education and Training Regulator Amendment Bill 2019;
- Official Development Assistance Multilateral Replenishment Obligations (Special Appropriation) Bill 2019;
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Cross-boundary Greenhouse Gas Titles and Other Measures) Bill 2019;
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Miscellaneous Measures) Bill 2019;
- Private Health Insurance Legislation Amendment (Fairer Rules for General Treatments) Bill 2019;
- Productivity Commission Amendment (Addressing Inequality) Bill 2017;
- Protecting Australian Dairy Bill 2019;
- Public Governance Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019;
- Public Governance, Performance and Accountability Amendment (Waiver of Debt and Act of Grace Payments) Bill 2019;
- Refugee Protection Bill 2019;
- Saving Australian Dairy Bill 2019;
- Special Recreational Vessels Bill 2019;
- Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019;
- Telecommunications Amendment (Repairing Assistance and Access) Bill 2019;
- Telecommunications (Interception and Access) Amendment (Assistance and Access Amendments Review) Bill 2019;
- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019;
- Telecommunications (Regional Broadband Scheme) Charge Bill 2019;
- Trade Support Loans Amendment (Improving Administration) Bill 2019;
- Transport Security Amendment (Testing and Training) Bill 2019;
- Treasury Laws Amendment (2019 Measures No. 3) Bill 2019;
- Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019;
- Treasury Laws Amendment (Research and Development Tax Incentive) Bill 2019;
- Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019; and



- Wine Australia Amendment (Label Directory) Bill 2019.

1.2 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 20 September and 3 December 2019.<sup>3</sup> The committee has reported on 5 legislative instruments from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

