Chapter 2

Concluded matters

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

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

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019[2]

Purpose	This bill seeks to amend the *Australian Citizenship Act 2007* to provide that, at the discretion of the Minister for Home Affairs, a person who is a national or citizen of a country other than Australia ceases to be an Australian citizen if the person acts inconsistently with their allegiance to Australia by engaging in terrorist offences. It also seeks to make consequential amendments to the *Independent National Security Legislation Monitor Act 2010* and the *Intelligence Services Act 2001*.
Portfolio	Home Affairs
Introduced	House of Representatives, 19 September 2019
Right[s]	Obligations of non-refoulement; rights to an effective remedy, fair trial and fair hearing, freedom of movement, liberty, protection of the family; and rights of children
Status	Concluded examination

2.3 The committee requested a response from the minister in relation to the bill in *Report 6 of 2019*.[3]

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

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Australian Citizenship Amendment (Citizenship Cessation) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 21.

3 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019), pp. 2-19.

Ministerial determination to cease Australian citizenship

2.4 The bill seeks to amend Division 3 of Part 2 of the *Australian Citizenship Act 2007* (the Australian Citizenship Act) to provide the Minister for Home Affairs (the minister) with the discretionary power to determine that a person ceases to be an Australian citizen in certain circumstances. The minister would have this discretionary power where the minister is satisfied that, by doing any of the following, a person has demonstrated that they have 'repudiated their allegiance to Australia':

- by engaging in specified terrorism-related conduct (proposed section 36B);[4] or
- by being convicted since 29 May 2003[5] for a specified terrorism offence, for which a sentence of imprisonment of at least three years (or periods totalling at least three years) has been handed down (proposed section 36D).[6]

2.5 Under the bill the minister would not be permitted to make a citizenship cessation determination if the minister is 'satisfied' that the person would, if the minister were to make the determination, 'become a person who is not a national or citizen of any country'.[7] This is in contrast to the existing provisions of the Australian Citizenship Act which states that the determination can only be made if, as a matter of objective fact, 'the person is a national or citizen of a country other than Australia' at the time when the minister makes the determination.[8]

2.6 In all instances, the minister must be satisfied that it would be contrary to the 'public interest' for the person to remain an Australian citizen.[9] Proposed

4 Proposed sections 36B and 36C would replace existing sections 33AA, 35 and 35AA of the *Australian Citizenship Act 2007* (Australian Citizenship Act), which were introduced in 2015, which provides for the automatic cessation of citizenship for certain conduct. The 2015 changes were introduced by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015.*

5 Currently, only convictions from 12 December 2015 which resulted in a sentence of six years or more, or convictions in the ten years prior to this date resulting in a sentence of at least 10 years imprisonment, can be considered.

6 Explanatory memorandum, p. 1. Proposed section 36D seeks to replace an existing provision, section 35A of the Australian Citizenship Act, which provides for conviction of the same listed offences as in this bill, but that the person has been sentenced to at least six years imprisonment (or periods totalling six years), and only for convictions from 12 December 2015 (or convictions in the ten years prior this date resulting in a sentence of at least 10 years imprisonment, can be considered).

7 Proposed subsections 36B(2) and 36D(2).

8 Australian Citizenship Act, subsection 33AA(1) and paragraph 35A(1)(c).

9 Proposed paragraphs 36B(1)(b) and 36D(1)(d).

section 36E sets out a range of matters to which the minister must have regard in considering the public interest in this context.[10]

2.7 Under the proposed amendments, the rules of natural justice would not apply in relation to making a decision or exercising a power in relation to a citizenship cessation determination.[11] The bill does not provide for merits review of the determinations, leaving only judicial review available. The power to make a determination under proposed section 36B would apply to persons aged 14 or over, while under proposed section 36D it would apply to persons convicted of specified offences, which would apply to anyone over the age of criminal responsibility (10 years of age).[12]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of movement and liberty, rights of the child and the protection of the family

2.8 The citizenship cessation arrangements outlined in this bill engage and limit a number of rights, including the rights to freedom of movement, liberty, rights of the child and the protection of the family. It limits the right to freedom of movement as, for those whose citizenship ceases when they are outside Australia, they will lose the entitlement to return to Australia. If they are in a country in which they do not hold nationality, the right to leave that other country may be restricted in the absence of any valid travel documents. For those who are present in Australia at the time their citizenship ceases, the statement of compatibility notes that these individuals will be entitled to an ex-citizen visa.[13] The right to freedom of movement includes a right to leave a country, and to enter, remain in, or return to one's 'own country'.[14] 'Own country' is a concept which encompasses not only a country where a person has citizenship but also one where a person has strong ties, such as long standing

10 Pursuant to proposed subsection 36E(2), these include: the severity of the conduct to which a determination relates, the sentence or sentences to which the determination relates (if relevant), the degree of threat posed by the person to the Australian community, the person's age (including the best interests of the child as a primary consideration if the person is aged under 18), whether the person is being or likely to be prosecuted in relation to conduct to which the determination relates, the person's connection to the other country of which they are a national or citizen, Australia's international relations, and any other matters of public interest.

11 Proposed subsections 36B(11), 36D(9).

12 Under clause 7.2 of the *Criminal Code*, a child aged between 10 and 14 years of age can only be criminally responsible for an offence if the child knows that his or her conduct is wrong.

13 Statement of compatibility, p. 10.

14 International Covenant on Civil and Political Rights, article 12.

residence, close personal and family ties and intention to remain, as well as the absence of such ties elsewhere.[15]

2.9 Expanding the circumstances in which the minister may determine that a person's citizenship ceases engages and may limit the right to liberty. As set out above, a person in Australia whose citizenship ceases will automatically be afforded an ex-citizen visa allowing them to reside in Australia. However, an ex-citizen visa may be subject to cancellation on character grounds,[16] including mandatory cancellation in the case of a person with a 'substantial criminal record' (which includes a sentence of imprisonment of 12 months or more).[17] Additionally, where a person has served a period of less than 12 months a visa may still be cancelled on discretionary grounds. Such persons are also prohibited from applying for most other visas.[18] A person whose ex-citizen visa is cancelled would become an unlawful non-citizen and may be subject to mandatory immigration detention pending removal.[19]

2.10 The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.[20] The notion of 'arbitrariness' includes elements of inappropriateness, injustice and lack of predictability. Accordingly, any detention must not only be lawful, it must also be reasonable, necessary and proportionate in all of the circumstances. The right to liberty applies to all forms of deprivation of liberty, including immigration detention. The UN Human Rights Committee has held that Australia's system of mandatory immigration detention is incompatible with the right to liberty.[21]

2.11 As the power to make a determination under proposed section 36B would apply to persons aged 14 or over, and proposed section 36D could apply to those

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

16 Migration Act, section 501.

17 Migration Act, subsection 501(7).

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

19 Migration Act, sections 189, 198.

20 International Covenant on Civil and Political Rights, article 9.

21 See, *MGC v. Australia,* UN Human Rights Committee Communication No.1875/2009 (2015) [11.6]. See, also UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017) [37].

aged 10 or over, the measures also engage and limit the rights of the child.[22] Cessation of a child's citizenship on the basis of their conduct raises questions as to whether this is in accordance with accepted understandings of the capacity and culpability of children under international human rights law and adequately recognises the vulnerabilities of children. International human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.[23] A person whose Australian citizenship ceases may be prevented from returning to, or residing in, Australia, or travelling to another country, and thereby be prevented from reuniting with close family members. Children have a right to not be separated from their parents against their will, except where competent authorities determine that such separation is necessary for the best interests of the child,[24] and are to be protected from arbitrary interference with their family.[25] In addition, the enjoyment of a range of rights is tied to citizenship under Australian law, for example, such that the removal of citizenship may have a negative effect on the best interests of any affected children.

2.12 The separation of a person from their family may also engage and limit the right to protection of the family.[26] The family is recognised as the natural and fundamental group unit of society and, as such, is entitled to protection. This right protects family members from being involuntarily and unreasonably separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation, or forcibly remove children from their parents, will therefore engage this right.[27]

2.13 Limits on these rights may be permissible where a measure is prescribed by law, seeks to achieve a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to that objective. The initial analysis considered further information was required in order to assess whether the measure met all of these criteria, in particular:

- whether the criteria that a person has 'repudiated their allegiance to Australia', or has served in the armed forces of a country 'at war with

22 See, Convention on the Rights of the Child.

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

24 Convention on the Rights of the Child, article 9.

25 Convention on the Rights of the Child, article 16.

26 Convention on the Rights of the Child; International Covenant on Civil and Political Rights, articles 17 and 23; International Covenant on Economic, Social and Cultural Rights, article 10.

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

Australia' is sufficiently certain and accessible for people to understand the legal consequences of their actions;

- whether evidence establishes that the measures seek to achieve a legitimate objective, in particular, advice as to the necessity of the measures noting that any threat posed by non-dual national Australians is not proposed to be managed by depriving them of citizenship;
- how the measures are rationally connected to (that is effective to achieve) the stated objectives, in particular any evidence that demonstrates that the 2015 measures have been effective in protecting the community and acting as a deterrent;
- whether the measures are proportionate to achieve the stated objectives, in particular:
    - why proposed section 36E does not include an express requirement for the minister to consider a person's connection to Australia, including any impact on family members, before making a citizenship cessation determination;
    - when consideration is given to making a determination in relation to a person under 18, why the best interests of the chid is to be considered alongside a range of other factors and what 'as a primary consideration' means in this context;
    - why there is no independent merits review of the minister's discretionary powers; and
    - why the discretionary powers apply to conduct or convictions up to 16 years ago; why this date was chosen, and why the period in the existing provisions is insufficient.

2.14 The full initial legal analysis is set out at *Report 6 of 2019*.[28]

Committee's initial view

2.15 With respect to the rights of the child and protection of the family, the committee noted that section 36E of the bill requires the minister to have regard to the 'age of the person' and 'the best interests of the child as a primary consideration'.

2.16 With respect to the requirement that interferences with rights must be prescribed by law, the committee noted that the minister must be satisfied that the person engaged in specified terrorism conduct or has been convicted of a specified terrorism offence and the conduct engaged in demonstrates that the person has

28 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 39-51.

repudiated their allegiance to Australia and the minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

2.17 The committee noted concerns about certainty as to whether a person has demonstrated that they have 'repudiated their allegiance to Australia.' The committee noted, however, that the minister's discretion is limited by reason that ceasing a person's citizenship to persons is limited to persons who engaged in specified conduct or who have been convicted of a specified offence.

2.18 The committee stated that it was clear that cessation of citizenship can only occur if the minister is satisfied that the person is entitled to a nationality of another country, which is a most important limitation of the scope of the proposed law. With respect to the question as to why the minister could not treat dual citizens in the same manner as those who do not possess dual citizenship, the committee was of the view that removing a person's citizenship, where this is possible, is a legitimate objective in that it ensures that there is less prospect of a person engaging in conduct which harms the Australian community.

2.19 The committee noted the legal advice on the bill and considered that these measures may engage and limit a number of human rights, including the rights to freedom of movement and liberty, and the rights of the child and to protection of the family. In order to assess whether these are permissible limitations under international human rights law, the committee requested the minister's more detailed advice as to the matters set out at paragraph [2.13].

Minister's response[29]

2.20 The minister advised:

> **Whether the criteria that a person has 'repudiated their allegiance to Australia', or has served in the armed forces of a country 'at war with Australia' is sufficiently certain and accessible for people to understand the legal consequences of their actions**
>
> There is no standalone criterion that a person has repudiated their allegiance to Australia. The relevant criterion requires the Minister to be satisfied that the terrorism-related conduct the person engaged in demonstrates that the person has repudiated their allegiance to Australia.
>
> This reflects the purpose clause in the Bill which states that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared values of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. When

29 The minister's response to the committee's inquiries was received on 6 January 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

people engage in terrorism-related behaviour, they demonstrate that they have rejected the values and interests that are fundamental to Australian citizenship.

An exhaustive list of the specific conduct and convictions that give rise to the operation of the terrorism-related citizenship cessation provisions is contained in the Bill in sections 36B and 36D (and in current sections s33AA, 35 and 35A).

The conduct specified in proposed paragraph 36B(5)(j), relating to where an individual serves in the armed forces of a country at war with Australia, reflects a long standing provision dating back to the Australian Citizenship Act 1948. That provision provided that an Australian citizen who is a national or citizen of that country and serves in the armed forces of a country at war with Australia shall, upon commencing so to serve, cease to be an Australian citizen. The provision does not apply to such service engaged in by a person before they became an Australian citizen. By making it clear that engaging in such activity is opposed to the responsibilities and values central to Australian citizenship, the legislation clearly notifies citizens that engaging in such activity will have the consequences provided for in the Bill.

The Bill also provides adequate safeguards. First, the Minister's satisfaction that a person's conduct demonstrates a repudiation of their allegiance to Australia must be reasonable. The High Court has said 'satisfaction' is a state of mind, which must be formed reasonably and on a correct understanding of the law. Second, the Bill provides an affected person the opportunity to apply for revocation of the determination to cease their citizenship. This enables the person to set out reasons that the decision should be revoked, including representations that they were not aware of the gravity or consequences of their actions. The Minister is required to consider that application. Third, the Minister may revoke the determination on the Minister's own initiative, if satisfied that doing so would be in the public interest. Fourth, the affected person can also apply for judicial review of the determination, in which the Court can consider whether there has been an error of law in the making of the decision.

Whether evidence establishes that the measures seek to achieve a legitimate objective, in particular, advice as to the necessity of the measures noting that any threat posed by non-dual national Australians is not proposed to be managed by depriving them of citizenship.

The Government does not propose to manage all dual-national Australians that meet the relevant thresholds using citizenship cessation, only where it is the most effective, proportionate, and appropriate tool to manage the specific risks. The amendments will enable citizenship cessation to be chosen from amongst other administrative measures when it is considered the most appropriate and proportionate response for managing an Australian of counter-terrorism interest. The provisions will apply to those who have engaged in terrorism-related activities and where the relevant

thresholds are met. As the Committee has noted, 'removing a person's citizenship, where this is possible, is a legitimate objective in that it ensures that there is less prospect of a person engaging in conduct which harms the Australian community'.

The Government's first priority is to keep the Australian community safe. Since their introduction, the citizenship cessation provisions have been effective in removing from the Australian community those who, through their conduct, have repudiated their allegiance to Australia and limited membership in the community to those who uphold and embrace Australian values.

Australia's national security and counter-terrorism laws are under constant review to ensure law enforcement and intelligence agencies have the powers required to counter the threat environment. It is appropriate that the Minister of the day make decisions about citizenship cessation based on all available information and with regard to certain criteria. The Bill's objective is to improve the effectiveness and flexibility of the framework of Australia's national security laws. The amendments will ensure the best outcomes are achieved for Australia's national security.

How the measures are rationally connected to (that is effective to achieve) the stated objectives, in particular any evidence that demonstrates that the 2015 measures have been effective protecting the community and acting as a deterrent.

The stated objective of the Bill is contained within the purpose clause at section 36A. It details that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain conduct incompatible with the shared valued of the Australian community, demonstrate that they have severed that bond and repudiated their allegiance to Australia. This is consistent with the objectives of the citizenship cessation provisions that have been in effect since 2015, and the provisions have been effective in protecting the integrity of Australian citizenship and the Australian community since then.

It is the view of the Australian Government, supported by commentary from the Department of Home Affairs, the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) that the existing provisions have been effective in conjunction with other counter-terrorism tools and mechanisms available to Australian national security agencies. The provisions will allow citizenship cessation to sit alongside other available measures, thereby making citizenship cessation part of the suite of Australia's counter-terrorism measures, rather than something that occurs automatically through a person's own conduct.

These amendments strengthen the utility of the provisions by enabling the Minister to take into account a broader picture of a person's conduct and the degree of threat posed by the person and, where relevant, a broader appraisal of the seriousness of terrorism-related convictions. The

measures in this Bill will enhance the safety of the Australian community by enabling the revocation of Australian citizenship in circumstances where such a person poses a threat to the community and has repudiated their allegiance to Australia.

ASIO has stated that it is too early to determine any direct deterrent effects or other security outcomes among the individuals whose citizenship has ceased under the current citizenship cessation provisions. However, they also note that the practical outcome of the provisions is to locate such individuals offshore, rendering them unable to physically execute an attack, or any face-to-face radicalisation activities, in Australia. ASIO concludes that citizenship cessation is a measure that works alongside a number of other measures to protect Australia and Australians from terrorism. ASIO has stated their support for a move to a Ministerial decision-making model, as such a model enables all of the relevant security factors to be weighed against broader national interests.

AFP has likewise supported citizenship cessation as a mechanism that sits alongside a number of legislative and other measures to assist in addressing the risk of terrorism in Australia. The AFP acknowledges the complexity of managing the terrorist threat to Australia, and that authorities need a range of mechanisms in order to manage that threat, one of which is citizenship cessation. The AFP has stated their support for the amendments in the Bill, noting that citizenship cessation contributes to mitigating the risk posed to Australians.

Whether the measures are proportionate to achieve the stated objectives, in particular:

- **why proposed section 36E does not include an express requirement for the minister to consider a person's connection to Australia, including any impact on family members, before making a citizenship cessation determination;**

The Government's first priority is to keep the Australian community safe. In making a citizenship cessation determination, the Minister must be satisfied that it is not in the public interest for the person to remain an Australian citizen having regard to a number of factors which may include the person's connection to Australia and any other matters of public interest. This may extend to the consideration of any potential impact on family members. There are a range factors that the Minister must have regard to under the public interest criteria in considering whether to cease a person's Australian citizenship. As such, section 36E is not exhaustive because cases will vary on an individual basis; the provision is, however, appropriately flexible in allowing the Minister to take into account any other matters of public interest.

As noted in the explanatory memorandum to the Bill, the Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and as

to whether it would be contrary to the public interest for the person to remain an Australian citizen. As an extension of this, it is appropriate that the Minister should determine the weight that different considerations should be given, noting that this will vary from case to case.

The requirement to consider and balance the various factors is intended to ensure that any interference with the family, the right to re-enter one's own country, or the right to freedom of movement, is not arbitrary, since cessation will occur where the national security risks and threats to the Australian community are such that it is not in the public interest for the person to remain a citizen. The Minister must take into account the individual circumstances of the case in determining whether to exercise the power to cease a person's citizenship. Any limitation of a person's rights in an individual case would be proportionate to the legitimate goal of ensuring the security of the Australian community.

- **when consideration is given to making a determination in relation to a person under 18, why the best interests of the child is to be considered alongside a range of other factors and what 'as a primary consideration' means in this context;**

When making a citizenship cessation determination, the Minister is required to take into account the best interests of the child as a primary consideration. As the Committee is aware, this is consistent with Article 3(1) of the Convention on the Rights of the Child. Article 3(1) does not state more than that the best interests of the child are to be a primary consideration, not the only, or the only primary, consideration. The best interests of the child may be balanced by other relevant public interest considerations to which the Minister must have regard. This will vary from case to case, and it is not possible or appropriate to pre-empt the considerations, or the balancing of those considerations, that the Minister will take into account in any given decision, including those that involve a person under 18 years of age.

As mentioned above and in the explanatory memorandum to the Bill, the Minister is well placed to make an assessment of public interest as an elected member of the Parliament. The Minister represents the Australian community and has a particular insight into Australian community standards and values and if it would be contrary to the public interest for the person to remain an Australian citizen. As an extension of this, it is appropriate that the Minister determine the weight different considerations are given, noting that this will vary from case to case.

- **why there is no independent merits review of the minister's discretionary powers;**

Avenues for review exist in the Bill, many of which are in addition to those provided for in the existing legislation. Consistent with the approach in the *Migration Act 1958* (Migration Act), it is not appropriate for the Administrative Appeals Tribunal to review a decision made personally by

the Minister in relation to the public interest, as the Minister is responsible to the Parliament.

Judicial review is an appropriate form of independent review, and an affected person will have the right to seek judicial review of the basis on which the citizenship cessation determination was made. Specifically, the Federal Court and High Court will have original jurisdiction over matters including whether or not the requisite conduct was engaged in by the person, and whether or not the person was a dual citizen at the time of the conduct. If a court finds either of these conditions are not satisfied, the cessation of citizenship will be automatically revoked under the provisions in the Bill.

The Bill also contains several safeguards so that, following a cessation determination, an affected person or their delegate can challenge the grounds of the Minister's satisfaction.

- First, once notice of cessation is provided, the person may apply to the Minister for a revocation of the determination (section 36H). The Minister must review an application and must revoke the determination if satisfied the person did not engage in the conduct to which the determination relates, or that the person was not a national or citizen of another country at the time the determination was made. The Minister must observe the rules of natural justice in this process.
- Second, the Minister may, on the Minister's own initiative, revoke a determination if satisfied this is in the public interest (section 36J).
- Third, the Minister's determination is automatically overturned and the person's citizenship taken never to have ceased if a court finds that the person did not engage in the conduct to which the determination relates (section 36K).

Furthermore, merits review of the relevant ASIO Qualified Security Assessment is available in the Security Appeals Division of the Administrative Appeals Tribunal.

- **why the discretionary powers apply to conduct or convictions up to 16 years ago; why this date was chosen, and why the period in the existing provisions is insufficient.**

The Bill proposes that section 36B(5)(a)-(h) and 36D apply from 29 May 2003 as this was the date the offences referenced in 36D were fully enacted in the *Criminal Code Act 1995* by the *Criminal Code Amendment (Terrorism) Act 2003*. Providing for both 36B and 36D to apply in respect of conduct (s36B) or convictions (s36D) to the same date ensures legislative consistency between the two provisions.

By adopting a Ministerial decision-making model, not everyone who has engaged in conduct or was subject to a terrorist-related conviction from 29 May 2003 onwards will necessarily have his or her citizenship ceased. Under the proposed model, the Minister must consider a range of factors

including the severity of the conduct and the degree of threat currently posed by the person at the time of consideration. This requires the Minister to weigh up a number of public interest considerations in deciding whether a person's citizenship should cease. Further, once the Minister makes a cessation determination, the person's citizenship is taken to have ceased from the date of that determination.

Extending the period to 29 May 2003 increases the effectiveness of the provisions as it enables a broader picture of a person's conduct to be taken into account when determining whether to cease a person's Australian citizenship. It also recognises that past terrorist conduct is conduct that all Australians would view as repugnant and in contradiction of the values that define our society.

Concluding comments

International human rights legal advice

Rights to freedom of movement and liberty, rights of the child and the protection of the family

2.21 As set out in the initial analysis, the rights to freedom of movement and liberty, and the rights of the child and the protection of the family are engaged and limited by this bill. Human rights which are not absolute may be subject to permissible limitations providing the measures limiting these rights meet certain 'limitation criteria'; namely, that they are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective and are a proportionate means of achieving that objective.

Prescribed by law

2.22 The requirement that interferences with rights must be prescribed by law includes the condition that laws must satisfy the 'quality of law' test. This means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.[30]

2.23 The minister's power to make a determination ceasing a person's citizenship requires the minister to be satisfied that the conduct engaged in 'demonstrates that the person has repudiated their allegiance to Australia'.[31] In contrast, the Australian Citizenship Act currently provides that citizenship will cease if a person engages in specified conduct 'with the intention of advancing a political, religious or ideological cause' and with the intention of coercing or influencing by intimidation the

30 *Pinkney v Canada,* UN Human Rights Communication No.27/1977 (1981) [34].

31 Item 9, proposed paragraphs 36B(1)(b) and 36D(1)(c).

government or the public.[32] It is unclear on the face of the bill what acts would demonstrate that a person has repudiated their allegiance to Australia.

2.24 In response to whether the criteria that a person has 'repudiated their allegiance to Australia' is sufficiently certain for people to understand the legal consequences of their actions, the minister advised that that there is no standalone criteria that a person has repudiated their allegiance, and that it requires the minister to be satisfied a person has engaged in specified terrorism related conduct, which is exhaustively set out in proposed section 36B and 36D. The minister also advised that this reflects the purpose clause in the bill, that through conduct 'incompatible with the shared values of the Australian community' citizens may demonstrate that they have severed the common bond of citizenship and 'repudiated their allegiance to Australia'. However, it is still unclear whether the criteria that a person has 'repudiated their allegiance to Australia' is sufficiently certain such that people would understand the circumstances under which the minister may restrict the exercise of their rights. The minister has advised that the government does not intend to manage all those that meet the relevant thresholds using the citizenship cessation provisions and that not everyone who is considered to have engaged in the relevant conduct 'will necessarily have his or her citizenship ceased'. As such it remains unclear when it will be determined that a person has repudiated their 'allegiance' to Australia, noting that while the minister must be satisfied that a person has engaged in specified conduct, the additional criterion that they have 'repudiated their allegiance to Australia' is based on broad, uncertain and essentially subjective terms. As such, it is not clear that this criterion meets the 'quality of law' test.

2.25 In addition, under proposed paragraph 36B(5)(j) the minister may make a determination that a person ceases to be a citizen if the person engaged in the conduct of serving in the armed forces of 'a country at war with Australia. As noted in the initial analysis, without a proclamation or declaration of war it is unclear if persons serving in the armed forces of another country would know that the country is formally at war with Australia. The minister has advised that this relates to a provision that dates back to the *Citizenship Act 1948*, but provides no answer as to whether this measure is sufficiently certain such that people would understand the circumstances under which the minister may restrict the exercise of their rights. As such, it also remains unclear whether this measure would satisfy the quality of law test.

Legitimate objective

2.26 As set out in *Report 6 of 2019*,[33] the statement of compatibility for the bill identifies the objective of the bill as being to safeguard national security and to

32 Australian Citizenship Act, subsection 33AA(3).

ensure that citizenship is limited to those who 'embrace and uphold Australian values'.[34] The initial analysis raised questions as to whether the cessation of citizenship as a means of protecting national security is strictly necessary, noting that the bill does not apply to non-dual-citizens, and so if the threat posed to Australia by such citizens can be managed without depriving them of citizenship, it is unclear why similar measures could not adequately address any threat posed by dual-citizens. In response, the minister advised that the government does not propose to manage all dual-national Australians through citizenship cessation, only where it is the most effective, proportionate and appropriate tool to manage specific risks. The minister also advised that the government's first priority is the safety of the Australian community, and that the objective of the bill is to improve the effectiveness and flexibility of the framework of Australia's national security law to ensure the best outcomes are achieved for Australia's national security. Improving the effectiveness of Australia's national security is likely to be considered to be a legitimate objective under international human rights law. However, the fact that the government considers it can adequately deal with any threat posed by Australian citizens who are not dual nationals without the need to cease their Australian citizenship calls into question whether the measures are strictly necessary. In light of the minister's reassurance that there is a whole suite of other measures available to deal with any threat to national security, that citizenship cessation may not be applied even in cases where a person meets the criteria, and that non-dual nationals are dealt with without cessation of citizenship, it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law.

Rational connection

2.27 The minister was also requested to provide information on how the measures are rationally connected to (that is effective to achieve) the stated objectives, particularly, any evidence that demonstrates that the 2015 measures have been effective in protecting the community and acting as a deterrent. The minister advised that the citizenship cessation provisions that have been in force since 2015 have 'been effective in protecting the integrity of the Australian community since then'. As evidence, the minister states the 'view of the Australian Government, supported by commentary from the Department of Home Affairs, the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO) that the existing provisions have been effective in conjunction with other counter-terrorism tools and mechanisms available to Australian national security agencies'. However, the minister notes a contrary view by ASIO, which 'stated that it is too early to determine any direct deterrent effects or other security outcomes among the individuals whose citizenship has ceased under the current citizenship

33 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019), pp. 2-19.

34 Statement of compatibility, p. 3.

cessation provisions'. ASIO has expressed this view in its submission on the bill to the Parliamentary Joint Committee on Intelligence and Security, where it states that 'ASIO considers citizenship cessation to be a legislative measure that works alongside a number of other tools to protect Australia and Australians from terrorism, but it does not necessarily eliminate the threat posed by those who are subject to citizenship cessation'.[35] Further, ASIO adds that citizenship cessation:

> may also have unintended or unforeseen adverse security outcomes—potentially including reducing one manifestation of the terrorist threat while exacerbating another. There may be occasions where the better security outcome would be that citizenship is retained, despite a person meeting the legislative criteria for citizenship cessation.[36]

2.28 In light of the minister's response, and the comments by ASIO on the efficacy of citizenship cessation in the current bill, questions remain as to whether the measures are necessarily rationally connected to the stated objectives.

Proportionality

2.29 A range of further information was sought in order to assess the proportionality of the proposed measures.

2.30 In particular, there are questions as to whether the measures are sufficiently circumscribed, noting in particular the breadth of the minister's discretionary powers, contain sufficient safeguards; and are the least rights restrictive approach. In particular, the proposed measures provide the minister with a broad discretionary power to revoke a person's citizenship on the basis of a wide range of criteria, some elements of which are open to interpretation. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise. This is because there is a risk that, without sufficient safeguards, broad powers may be exercised in such a way as to impose unjustifiable limits on human rights.

35 'ASIO submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019' (14 October 2019) p. 2.

36 'ASIO submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019' (14 October 2019) p. 5.

2.31 Proposed section 36E sets out a range of matters that the minister must have regard to,[37] however it does not explicitly require the minister to consider the impact of the citizenship loss on the right to protection of the family and the right to freedom of movement. The requirement that the minister must consider individual circumstances before ceasing a person's citizenship assists with the proportionality of the measure, however, further information was sought as to why proposed section 36E does not include an express requirement for the minister to consider a person's connection to Australia, including any impact on family members, before making a citizenship determination. The minister advised that the government's first priority is to keep the Australian community safe and in determining if it is not in the public interest for a person to remain a citizen, the minister 'may include' the person's connection to Australia and any other matters of public interest. The minister adds that the requirement to consider and balance various factors is intended to ensure that any interference with rights is not arbitrary.

2.32 The minister further adds that as an elected member of parliament, the minister is 'well placed to make an assessment of public interest', and that 'it is appropriate that the Minister should determine the weight that different considerations should be given'. However, the compatibility of legislation must be assessed as drafted, rather than how it may or may not be implemented. As the UN Human Rights Committee has explained, '[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution'.[38] The claim that '[t]he minister represents the Australian community and has a particular insight into Australian community standards and values' is not a sufficient safeguard in the absence of an express provision to consider a person's connection to Australia, including any impact on family members and their right to freedom of movement, before making a citizenship determination.

2.33 In addition, where the minister is considering cancelling the citizenship of a child under 18 years of age, proposed section 36E requires the minister, in considering the public interest, to consider the best interests of the child as a primary consideration.

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37 Proposed section 36E provides that the minister, in determining whether it is in the public interest to make a determination to cease citizenship, must have regard to the severity of the relevant conduct; the degree of threat posed by the person; the age of the person; if the person is under 18, the best interests of the child as a primary consideration; whether the person is likely to be prosecuted for the relevant conduct; the person's connection to the other country of which they are (or may be) a national; Australia's international relations; and any other matters of public interest.

38 UN Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of movement)* (1999) [15].

2.34 International human rights law and Australian criminal law recognise that children have different levels of emotional, mental and intellectual maturity than adults, and so are less culpable for their actions.[39] In this context, cessation of a child's citizenship on the basis of their conduct raises questions as to whether this is in accordance with accepted understandings of the capacity and culpability of children under international human rights law and adequately recognises the vulnerabilities of children. International human rights law recognises that a child accused or convicted of a crime should be treated in a manner which takes into account the desirability of promoting his or her reintegration into society.[40]

2.35 In answering the question of when consideration is given to making a determination in relation to a person under 18, why the best interests of the child is to be considered alongside a range of other factors and what 'as a primary consideration' means in this context, the minister advised that the best interests of the child is only one of many other relevant public interest considerations. The minister also reiterated that the minister is well placed to make an assessment of the public interest as an elected member of parliament. The minister interprets article 3(1) of the Convention on the Rights of the Child as stating that the best interests of the child 'is not the only, or the only primary, consideration', and 'the best interests of the child may be balanced by other relevant public interest considerations'. However, this would appear to be a misconstruction of article 3(1) of the Convention on the Rights of the Child. Under the Convention the best interests of the child is a 'primary' consideration, as compared with other considerations—it is not just one primary consideration among other equally primary considerations. The UN Committee on the Rights of the Child has explained that:

> the expression 'primary consideration' [in article 3(1) of the Convention on the Rights of the Child] means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child.[41]

2.36 It follows that it may be inconsistent with Australia's obligations to treat other considerations as of equal weight to the obligation to consider the best interests of the child. Further, balancing the elements in the best interests assessment, should be carried out with full respect for all the rights contained in the

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

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

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

Convention[42] and in giving full effect to the child's best interests the 'universal, indivisible, interdependent and interrelated nature of children's rights, 'should be borne in mind'.[43] Importantly, the best interests assessment must be carried out in a way that respects the evolving capacities of the child:[44]

> In the best interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability in the child's present and future situation.[45]

2.37 Permanently ceasing the citizenship of a child as young as 10 or 14[46] would subject the child to an irrevocable decision, which could adversely impact their short to long term development and heighten their vulnerability. The UN Committee on the Rights of the Child has stated in their general comment on children's rights in the child justice system,[47] there are numerous cases of children being recruited and exploited by non-state armed groups, including those designated as terrorist groups, and 'when under the control of such groups, children may become victims of multiple forms of violations, such as conscription; military training; being used in hostilities and/or terrorist acts, including suicide attacks; being forced to carry out executions; being used as human shields' among others. Potentially subjecting these children to citizenship cessation can add to the list of already existing rights violations to which such children may have been subjected.

2.38 Furthermore, there does not appear to be any requirement for the minister to consider the best interests of any children who might be directly affected by a

42 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [32].

43 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [16(a)] and [82].

44 Article 5 of the Convention on the Rights of the Child, which introduced for the first time in an international human rights treaty, the concept of the 'evolving capacities' of the child. This principle has been described as a new principle of interpretation in international law. See Gerison Lansdown, Innocenti Insights Report No. 11, *The Evolving Capacities of the Child*, 2005, p. ix.

45 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [84].

46 As the power to make a determination under proposed section 36B would apply to persons aged 14 or over, and proposed section 36D could apply to those aged 10 or over.

47 UN Committee on the Rights of the Child, *General comment 24 on children's rights in the child justice system* (2019) [98].

citizenship cessation determination relating to, for example, one or both of their parents. In this regard, the statement of compatibility provides that '[c]essation of a parent's Australian citizenship under these provisions does not result in the cessation of the child's Australian citizenship'.[48] However, this does not provide a complete answer to the question of what impact the cessation of a parent's Australian citizenship will have on the rights of affected children. The minister's response did not address this.

2.39 The availability of review rights is also relevant to assessing the proportionality of these measures. The minister's discretionary power to cease citizenship includes express provisions stating that the rules of natural justice do not apply in relation to making a decision or exercising a power under most provisions in the bill.[49] There is no independent merits review available of the minister's decision—only a right to apply to the same person who made the decision (the minister) and ask that the decision be reconsidered.[50] In answering the question as to why there is no independent merits review of the minister's discretionary powers, the minister advised that it is not appropriate for the Administrative Appeals Tribunal to review a decision made personally by the minister as the minister is responsible to Parliament and that judicial review is an appropriate form of review.

2.40 However, the fact that the minister can reconsider their own decision cannot be considered to be a form of independent merits review and the availability of judicial review may not represent a sufficient safeguard in this context. Judicial review is only available on a number of restricted grounds and represents a limited form of review in that it only allows a court to consider whether the decision was lawful (that is, within the power of the relevant decision maker). Noting the broad discretionary power provided to the minister (and the exclusion of the rules of natural justice), this would likely be difficult to establish. The minister also advised that the bill contains other safeguards whereby an affected person can challenge the grounds of the minister's decision. However, the listed safeguards include that the minister could reconsider their own decision, or that if a court finds the conduct was never engaged in the minister's decision will be automatically overturned. While the involvement of a court in determining that the relevant conduct was never engaged in may assist in the proportionality of the measure, it is noted that this only applies after citizenship has already ceased, and only on the application of the affected person who would bear the burden of establishing, on the balance of probabilities, that they did not engage in the relevant conduct or were not a national or citizen of another country (noting that such persons may often not be in the country when seeking to make such a challenge). In addition, proposed subsection 36K(2) provides

48 Statement of compatibility, p. 13.

49 See proposed subsections 36B(11), 36D(9), 36F(7), 36G(8), and 36J(7).

50 Proposed section 36H.

that even if the minister's decision was later revoked, the validity of anything done in reliance on the determination before that event would not be affected. This calls into question its effectiveness as a safeguard. It is also noted that the bill provides that the minister must give a written notice of a determination to cease citizenship, but that notice need not contain certain information (e.g. if it is nationally sensitive or would be contrary to the public interest).[51] This broad power to restrict disclosure of the basis on which the determination was made would likely make review of the decision more difficult.

2.41 Further, the changes proposed by the bill as to whether a person is a dual citizen raises questions as to the proportionality of the measure. Currently it is a condition precedent for making a determination that a person is, as a matter of fact, a national or citizen of a country other than Australia. By proposing that the minister only need be 'satisfied' of this status, this may create a greater risk that a person is not actually a citizen of another country such that they may be unable to obtain travel documents and may be rendered stateless. This is because while the minister may be 'satisfied' about a person's citizenship, they may still be mistaken about this as a factual matter. This is particularly the case noting that questions of dual nationality can be highly complex.

2.42 While judicial review of the minister's decision is available, this is limited by the nature of the powers granted to the minister. In these circumstances, the court may determine that the minister was lawfully 'satisfied' of the relevant matters without being required to determine whether the considerations of the minister were factually correct, and the court would not necessarily be required to make a factual finding as to whether a person is a national or citizen of a foreign country. The minister did not address this issue in his response.

2.43 Finally, questions also remain as to whether ceasing a person's citizenship, with all the serious consequences for human rights that flow from such a decision, is the least rights restrictive way to achieve the stated objectives. For example, it is unclear why less rights restrictive approaches such as regular law enforcement techniques or criminal justice processes (e.g. arrest, charge and prosecution including for preparatory acts) are insufficient to protect the community. Further, the ability to impose conditions on an individual under a control order in a range of circumstances is already a coercive tool aimed at addressing such objectives. In addition, as noted above at paragraph [2.26], as such measures are not applied to persons who do not possess, or are not entitled to, dual nationality, and as other measures are presumably applied to such persons as may be necessary to protect the Australian community, it is not clear that these measures are the least rights restrictive approach.

51 See proposed subsection 36F(6).

2.44 In addition, the retrospective application of provisions under the bill to conduct occurring over 16 years ago raises further concerns that the measures may not be the least rights restrictive approach. Information was therefore sought as to why the discretionary citizenship cancellation powers apply to conduct or convictions up to 16 years ago; why this date was chosen and why the period in the existing provisions is insufficient. The minister's response outlines that the date of 29 May 2003 was chosen because it was the date the relevant offences were fully enacted. The minister argues that retroactively extending the period back to 2003 'increases the effectiveness of the provision as it enables a broader picture of a person's conduct to be taken into account when determining whether to cease a person's Australian citizenship'. The minister also reiterates that by adopting a ministerial decision-making model, not everyone who has engaged in the relevant conduct or was convicted of relevant offences will necessarily have his or her citizenship ceased. Again, this raises concerns about the breadth of the minister's powers and whether the law is sufficiently certain and clear for persons to understand when it will apply. It is noted that this would allow the minister to cease the citizenship of a person who allegedly engaged in conduct over 16 years ago (although no criminal charges have been brought) and to persons who have served any sentence as the result of a conviction dating over 16 years ago, noting that the cessation of citizenship was not a consequence that applied at the time of the relevant conduct. In addition, this could apply to those who were children at the time of the commission of the offence. It would appear that applying citizenship cessation retrospectively to conduct that may have occurred over 16 years ago, is not likely to be the least rights restrictive approach to achieving the stated objective.

Concluding remarks

2.45 Citizenship cessation engages and limits the rights to freedom of movement and liberty and the rights of the child and the protection of the family. While these rights may be subject to permissible limitations under international human rights law, it has not been demonstrated that these proposed measures are sufficiently certain such that people would understand the circumstances under which the minister may restrict the exercise of their rights. In addition, noting that the government considers it can adequately deal with any threat posed by Australian citizens who are not dual nationals without the need to cease their Australian citizenship, it has not been established that the measures are strictly necessary, and as such, on the information provided by the minister, it is not possible to conclude that the measures pursue a legitimate objective for the purposes of international human rights law. Questions also remain as to whether the measures are necessarily rationally connected to the stated objectives, or are a proportionate means of achieving those objectives. In particular, it does not appear that the measures are sufficiently circumscribed, noting in particular the breadth of the minister's powers. Nor do they appear to contain sufficient safeguards, particularly to ensure adequate consideration is given to the best interests of the child and protection of the family and to ensure adequate rights of review. The measures also do not appear to

constitute the least rights restrictive approach to achieve the stated objectives, noting that there already exist a range of other methods to protect national security and the amendments apply retrospectively.

2.46 As such, there is a significant risk that the cessation of citizenship provisions as set out in the bill, as currently drafted, could result in a person being denied their right to freedom of movement, including their right to enter, remain in, or return to their 'own country'. There is also a risk that the cessation of a person's citizenship, making them a non-citizen, could result in them being placed in mandatory immigration detention, which could result in an impermissible limitation on their right to liberty. Further, as the bill would allow the minister to cease the citizenship of a child as young as 10 or 14, with the best interests of the child only to be considered alongside a list of other considerations, and without any specific requirement that the minister consider the importance of protecting the right to family, there is a significant risk that the rights of the child and the protection of the family will not be adequately protected.

Committee view

2.47 The committee thanks the minister for this response. The committee notes the legal advice these measures may engage and limit a number of human rights, including the rights to freedom of movement and liberty, and the rights of the child and protection of the family.

Prescribed by law

2.48 With respect to the requirement that interferences with rights must be prescribed by law, the committee notes that the minister must be satisfied that the person engaged in specified terrorism conduct or has been convicted of a specified terrorism offence and the conduct engaged in demonstrates that the person has repudiated their allegiance to Australia and the minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

2.49 The committee notes concerns about certainty as to whether a person has demonstrated that they have 'repudiated their allegiance to Australia.' The committee notes, however, that the minister's discretion is limited by reason that ceasing a person's citizenship to persons is limited to persons who engaged in specified conduct or who have been convicted of a specified offence. As such, the committee considers the provisions are sufficiently certain so as to meet the 'quality of law' test.

Legitimate objective

2.50 It is clear that cessation of citizenship can only occur if the minister is satisfied that the person is entitled to a nationality of another country. This is a most important limitation of the scope of the proposed law. With respect to the question as to why the minister could not treat dual citizens is the same manner as those who do not possess dual citizenship, the committee is of the view that

removing a person's citizenship, where this is possible, is a legitimate objective in that it ensures that there is less prospect of a person engaging in conduct which harms the Australian community.

Rational connection

2.51 The committee notes the minister's advice, as supported by the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO), that the existing citizenship cessation provisions have been effective, in conjunction with other counter-terrorism tools and mechanisms, in protecting the integrity of Australian citizenship and the Australian community. The committee therefore considers the measures are likely to be effective to achieve (that is, rationally connected to) the legitimate objective of protecting the Australian community.

Proportionality

2.52 The committee notes the minister's advice that the ministerial decision-making model means that individual circumstances will be considered in assessing the public interest in whether a person should remain an Australian citizen, which is intended to ensure that any interference with the family, the right to re-enter one's own country, or the right to freedom of movement, is not arbitrary. The committee is therefore satisfied that the measures are proportionate to the aims sought to be achieved. In addition, the committee considers the breadth of the minister's powers is sufficiently constrained through the safeguard of judicial review and the minister's ability to reconsider his or her own decision. As such, the committee considers the cessation of citizenship provisions are compatible with the rights to freedom of movement and liberty and the rights of the child and protection of the family.

Summary of initial assessment

Preliminary international human rights legal advice

Obligations of non-refoulement and right to an effective remedy

2.53 The citizenship cessation determination outlined in this bill could cause a person, whose ex-citizen visa would be cancelled on character grounds, to be classified as an unlawful non-citizen and liable for removal from the country. As such, the measures engage Australia's obligations of non-refoulement and the right to an effective remedy.

2.54 Thus, further information was requested in order to fully assess the compatibility of these measures with the obligation of non-refoulement and the right to an effective remedy. It was noted that it would assist with the compatibility of the measure if section 36E included a requirement that the minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm.

Committee's initial view

2.55 The committee noted the legal advice on the bill and noted that the availability of review rights is limited but that this is consistent with existing citizenship loss provisions which the bill proposes to amend. The committee sought the minister's advice in relation to the matters set out at paragraph [2.54].

Minister's response[52]

2.56 The minister advised:

> The provisions of the Bill are compatible with Australia's non-refoulement obligations. Australia is committed to its international obligations and does not seek to resile from or limit its non-refoulement obligations.
>
> The Minister's discretionary power to cease a person's citizenship where the person is in Australia will not result directly in them being liable for removal from Australia. Any such liability would arise only after the person's lawful status in Australia was rescinded and the person was detained under the Migration Act as an unlawful non-citizen.
>
> Upon the Minister's determination to cease a person's citizenship, the person will be granted an ex-citizen visa by operation of law, i.e. automatically, under section 35 of the Migration Act. The ex-citizen visa is a permanent visa allowing the holder to remain in, but not re-enter Australia. Any action in relation to the cancellation of this visa on character grounds involves a separate process under the Migration Act. Whether the person engages one of Australia's non-refoulement obligations would be considered as part of any cancellation process. A visa cancellation decision by the Minister's delegate will be subject to merits review, and a cancellation decision by the Minister personally would be subject to judicial review.
>
> The Committee has commented that consideration should be given to amending section 36E of the Bill to include a requirement that the Minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm. Prior to making a determination to cease a person's citizenship, the Minister must consider the person's connection to the other country of which the person is a national or citizen, and any other matters of public interest. Matters relating to any possible risk facing a person in the other country could be considered as part of this assessment.

52 The minister's response to the committee's inquiries was received on 6 January 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Concluding comments

International human rights legal advice

2.57 Pursuant to Australia's non-refoulement obligations under international law,[53] Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.[54] Non-refoulement obligations are absolute and may not be subject to *any* limitations. In addition, the obligation of non-refoulement and the right to an effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[55] The types of conduct captured by proposed sections 36B and 36D, including engagement with a declared terrorist organisation, or service in the armed forces with a foreign country, may well be the same activities which risk placing an individual at risk of torture or cruel treatment in another country. As such, it is not clear how the minister would consider the absolute prohibition against non-refoulement in the context of these determinations, noting that such consideration is not currently included in the matters to which the minister must have regard pursuant to proposed section 36E.

2.58 The minister advised that prior to making a determination to cease citizenship the minister 'must consider the person's connection to the other country of which the person is a national or citizen, and any other matters of public interest'; and that 'matters relating to any possible risk facing a person in the other country *could* be considered as part of this assessment'. The minister also advises that the minister's power to cease a person's citizenship will not result 'directly' in them being liable for removal from Australia, as such a person if in Australia, would be granted an ex-citizen visa, and any action to cancel that visa on character grounds involves a separate process, at which point non-refoulment obligations would be considered.

2.59 While it is noted that the decision to cease citizenship would not, in itself, result in a person being sent to a country where they could be at risk of persecution, it could be the first step in a process by which a person may be subject to refoulement. On a number of previous occasions, the committee has raised serious concerns about the adequacy of protections against the risk of refoulement in the

53 International Covenant on Civil and Political Rights; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

55 International Covenant on Civil and Political Rights, article 2 (the right to an effective remedy). See, for example*, Singh v Canada*, UN Committee against Torture Communication No.319/2007 (30 May 2011) [8.8]-[8.9]; *Alzery v Sweden*, UN Human Rights Committee Communication No. 1416/2005 (20 November 2006) [11.8].

context of the existing legislative regime.[56] In this respect it is noted that the *Migration Act 1958* specifically states that for the purposes of exercising removal powers, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. [57]

2.60 The minister also advised that any decision to cancel a person's ex-citizen visa made by the minister's delegate is subject to merits review and a decision made by the minister is subject to judicial review. However, there is no right to merits review of a decision that is made personally by the minister to refuse or cancel a person's visa on character grounds, or of the original decision to cancel the person's citizenship.[58] Judicial review in the Australian context is not likely to be sufficient to fulfil the international standard required of 'effective review' of non-refoulement decisions,[59] as judicial review is only available on a number of restricted grounds and represents a limited form of review. Accordingly, the availability of merits review would likely be required to comply with Australia's obligations under international law.

2.61 As such, measures which provide the minister with the discretionary power to cease a person's citizenship, resulting in a loss of a right to remain in Australia (noting that any ex-citizen visa is highly likely to be cancelled on character grounds), risk resulting in such persons being subject to removal to countries where they may face persecution. As such, the measures may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy. This risk may be reduced if proposed section 36E included a specific requirement that the minister must consider whether the person, if removed from Australia following loss of citizenship, would be at risk of persecution or other forms of serious harm (and independent merits review of this decision were available).

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56 See, for example, the committee's analysis of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 in Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (October 2014) pp. 77-78. The UN Human Rights Committee in its Concluding observations on Australia recommended '[r]epealing section 197(c) of the *Migration Act 1958* and introducing a legal obligation to ensure that the removal of an individual must always be consistent with the State party's non-refoulement obligations': CCPR/C/AUS/CO/6 (2017), [34]. See, also, Parliamentary Joint Committee on Human Rights*, Report 1 of 2019* (12 February 2019) pp. 14-17; *Report 12 of 2018* (27 November 2018) pp. 2-22; *Report 11 of 2018* (16 October 2018) pp. 84-90; *Thirty-sixth report of the 44th Parliament* (16 March 2016) pp. 196-202; *Report 12 of 2017* (28 November 2017) p. 92 and *Report 8 of 2018* (21 August 2018) pp. 25-28.

57 See section 197C of the *Migration Act 1958*.

58 Australian Citizenship Act, section 52.

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

Committee view

2.62 The committee thanks the minister for this response. The committee notes that the cessation of a person's citizenship would result in a person located in Australia being granted an ex-citizen visa, and as this visa could be subject to cancellation on character grounds, the person may become an unlawful non-citizen and liable for removal from the country. The committee notes the legal advice that this therefore engages Australia's obligations of non-refoulement and the right to an effective remedy.

2.63 The committee notes that the availability of review rights of decisions to cease citizenship and cancel visas is limited but that this is consistent with existing citizenship loss provisions which the bill proposes to amend.

2.64 Noting the minister's advice that the power to cease a person's citizenship where the person is in Australia will not directly result in them being liable for removal from Australia, the committee does not consider that the measures directly engage the obligations of non-refoulement and a right to an effective remedy. The committee welcomes the minister's commitment to comply with Australia's non-refoulement obligations.

Civil Aviation Order 48.1 Instrument 2019 [F2019L01070][1]

Purpose	The instrument provides a new framework for the management of fatigue risk in aviation operations. It replaces Part 48 of the Civil Aviation Orders
Portfolio	Infrastructure, Transport, Cities and Regional Development
Authorising legislation	*Civil Aviation Act 1988*
Last day to disallow	15 sitting days after tabling (tabled in the Senate and the House of Representatives on 9 September 2019).
Right	Privacy
Status	Concluded examination

2.65 The committee requested a response from the minister in relation to the instrument in *Report 6 of 2019*.[2]

Collection, use, storage and disclosure of physiological and other data

2.66 The instrument provides a regulatory framework for the management of fatigue risk in aviation operations. Section 10 of the instrument requires holders of Air Operators' Certificates to comply with a number of limits and requirements for flight crew members,[3] including a requirement, in Appendix 7 of the instrument, to apply to the Civil Aviation Safety Authority for approval to use an individualised Fatigue Risk Management System. This system is to be 'tailored to the specific fatigue-relevant circumstances of an individual pilot'.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Civil Aviation Order 48.1 Instrument 2019 [F2019L01070], *Report 1 of 2020*; [2020] AUPJCHR 22.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 20-23.

3 As set out in Table 10.1 of the instrument which includes requiring 'any operation' to comply with Appendix 7.

4 Statement of compatibility, p. 20. See also: https://www.casa.gov.au/safety-management/fatigue-management/casas-approach-fatigue-management.

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.67 The potential collection and use of a person's physiological information in compliance with a Fatigue Risk Management System 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. It also includes the right to control the dissemination of information about one's private life.[5] Limitations on this right will be permissible where they pursue a legitimate objective, are rationally connected to that objective, and are a proportionate means of achieving that objective.

2.68 Neither the statement of compatibility nor the explanatory statement appears to provide any specific information as to the type of 'physiological and other data' that might be collected in compliance with Appendix 7 of the instrument, the method of collection, how such data will be stored, and who such data might be disclosed to. This raises concerns as to whether the measures are sufficiently circumscribed. Questions also arise as to the nature and adequacy of any safeguards in place, noting that compliance with the *Privacy Act 1988* (Privacy Act) and the Australian Privacy Principles (APPs) does not necessarily provide an adequate safeguard for the purposes of international human rights law. The full initial human rights analysis is set out in *Report 6 of 2019*.[6]

2.69 In order to assess whether any limitation on the right to privacy is proportionate, further information would be required as to:

- what type of 'physiological and other data' might be collected in compliance with Appendix 7 of the instrument, the method of collection, how such data will be stored, and who such data might be disclosed to; and
- the adequacy and effectiveness of any relevant safeguards, including whether the *Privacy Act 1988* (Privacy Act) will act as an adequate and effective safeguard, noting the various exceptions to the collection, use and disclosure of information under the Privacy Act.

Committee's initial view

2.70 The committee noted the legal advice on the bill, and in order to assess whether any limitation on the right to privacy is proportionate, the committee sought the minister's advice in relation to the matters set out at paragraph [2.5].

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

6 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 20-23.

Minister's response[7]

2.71 The minister advised:

> In raising your concerns about the Order, as set out in the Committee's Human Rights Scrutiny Report No. 6 of2019 (the Report), you requested further information as to what type of physiological and other data might be collected about individual pilots; how this data will be stored; and who such data may be disclosed to. You also requested further information on the adequacy and effectiveness of any relevant safeguards, including whether the *Commonwealth Privacy Act 1988* (the Privacy Act) will be an adequate and effective safeguard.
>
> I am advised by the Civil Aviation Safety Authority (CASA) that the kind of physiological and other data to be collected by an Air Operator's Certificate (AOC) holder would relate to an individual pilot's sleep and wake patterns. This data can be collected through self reporting, written diaries or via portable electronic monitoring devices. In the course of electronic collection, other physiological data may be incidentally collected, for example, heart rate and body movements. The collected data can be applied to biomathematical fatigue models to produce predictions of alertness, performance, or risk of impairment for given work/rest or wake/sleep schedules.
>
> The collected data is understood to be stored by AOC holders on each individual's personal file, electronically or in hard copy, and resides there along with other private and personal information related to employment history. Where third parties are used to collect data, for example medical practitioners or through the use of recording devices, the data is also stored on electronic files pertaining to that individual pilot. Both AOC holders and those third parties must observe the requirements of the Privacy Act.
>
> CASA presumes that an individual's sleep data may be accessed only in accordance with the AOC holder's requirements and procedures which must be in conformity with the Privacy Act. In practice, it is assumed that such access is by the relevant AOC holder's flight rostering managers for the purpose of evaluating the actual fatigue impact of duty scheduling practices that have been based on a predictive algorithm, for example, a biomedical model.
>
> The Privacy Act does not permit any other legitimate access not authorised by law, nor does it permit use of the data for other purposes. All such information, including that collected by the use of third party electronic

7 The minister's response to the committee's inquiries was received on 6 January 2020. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

devices, is protected by the Privacy Act and may not be used for purposes other than those for which it was collected. CASA has no legal control over how an AOC holder deals with pilot sleep-data collected by the AOC holder for the AOC holder's purposes.

When an AOC holder applies to CASA for an interim or final approval of their proposed Fatigue Risk Management System (FRMS), a number of strict CASA procedures and standards come into play. AOC holders are notified in advance by CASA FRMS assessors that only de-identified sleep data may be supplied to CASA with the application. Electronic information received by CASA is stored on CASA's information system which is subject to both external IT security protections and internal security access protocols. The latter limits access to relevant recorded sleep-data to only those CASA officers involved in advising on, or actually taking, assessment decisions. That data is only evaluated as aggregated or 'grouped' and no individual information is accessed or used by CASA. The restrictions imposed by the Privacy Act also apply to CASA.

CASA is satisfied that, under the current law, the Privacy Act protects relevant pilot sleep related data, collected for the purposes of an AOC holder's aviation FRMS, to the standard that is the prevailing standard acceptable to the Australian Parliament.

In so far as the international right to privacy is limited by the Privacy Act, both CASA and I consider that, in the specific context of the collection and use of pilot sleep-related data for the purposes of an aviation FRMS, any such limitation is reasonably proportionate to the risks, dangers, and goal to be achieved. The risks and dangers are to life, both in the air and on the ground. The goal is individual pilot fatigue risk management in those areas of aviation where the absence or failure of such management may have catastrophic effects in relation to passenger transport, heavy and other cargo carriage, and aerial work operations.

Concluding comments

International human rights legal advice

2.72 The minister has advised that the type of physiological and other data to be collected by an Air Operator's Certificate holder would relate to an individual pilot's sleep and wake patterns, which may include the collection of other incidental physiological data, and this data would be held on an individual's personal file, and be subject to *Privacy Act 1988* restrictions. The minister has also advised that only de-identified sleep information will be provided to CASA. In light of this information, it would appear that the collection of de-identified data by CASA does not engage the right to privacy. Any limitation on the right to privacy by virtue of the information collected by holders of Air Operator's Certificates would be for the legitimate objective of the protection of aviation safety and, noting the applicable safeguards in the *Privacy Act 1988*, would likely be considered reasonably proportionate to achieving that objective.

Committee view

2.73 The committee thanks the minister for this response. The committee notes the legal advice and in light of the information provided by the minister as to the types of physiological information to be collected and how it will be used and stored, considers that any limitation on the right to privacy is reasonably proportionate to the legitimate objective of protecting aviation safety.

Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019[1]

Purpose	This bill seeks to extend the end date for existing Cashless Debit Card trial areas by one year, establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas and transition income management participants there to the Cashless Debit Card, remove the cap on the number of Cashless Debit Card trial participants, enable the Secretary to advise a community body where a person has exited the trial, and amend the trial evaluation process
Portfolio	Social Services
Introduced	House of Representatives, 11 September 2019
Rights	Privacy, social security, equality and non-discrimination
Previous report	Report 6 of 2019
Status	Concluded examination

2.74 The committee requested a response from the minister in relation to the bill in *Report 6 of 2019*.[2]

Cashless welfare trial

2.75 The bill seeks to extend the date for existing Cashless Debit Card trials (currently in Ceduna, East Kimberly, the Goldfields, and the Bundaberg and Hervey Bay region) to 30 June 2021.[3] It also seeks to establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas[4] (transitioning all current income management regime participants in those areas to the Cashless Debit Card scheme).[5]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 23.

2 Parliamentary Joint Committee on Human Rights, Report 6 of 2019 (5 December 2019) pp. 39-53

3 Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the bill), item 17.

4 Items 10, 11 and 15 of the bill. The minister would be granted the power to make a notifiable instrument to exclude any part of the Northern Territory from the trial area, reflecting the power the minister also has to make such a notifiable instrument in relation to Cape York.

5 The Cashless Debit Card would be trialled in the Northern Territory to 30 June 2021 and in the Cape York area until 31 December 2021, see item 17 of the bill.

More than 23,000 income management participants in the Northern Territory and Cape York area would be transitioned to the cashless welfare trial pursuant to these amendments.[6] The bill would also create, or continue, different eligibility criteria for trial participants in the different trial areas.[7]

2.76 The bill originally provided that the minister may, by notifiable instrument, vary the percentage of restricted welfare payments for a group of participants in the Northern Territory to a rate of up to 100 per cent,[8] although this has since been revised to 80 per cent.[9] The secretary would also have the power to vary the amount up to 100 per cent for individuals.[10]

2.77 Lastly, the bill seeks to amend the process by which reviews of the cashless welfare trial are subsequently evaluated, removing the requirement that the evaluation be completed within six months, and be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy, who must consult trial participants and make recommendations.[11]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy, social security, and equality and non-discrimination

2.78 The cashless welfare arrangements outlined in this bill engage and limit a number of rights, including the right to privacy, social security, and to equality and non-discrimination. It limits the rights to privacy and social security as it significantly intrudes into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. Further, the measure appears to indirectly limit the right to

6 Explanatory memorandum, p. 4. In addition, the bill would permit persons with a welfare payment nominee receiving their payments to also participate in the cashless welfare scheme, provided their payment nominee is also a participant: see items 19, 21, 23, 25, and 27A which would permit participation by an individual with a 'part 3B payment nominee,' defined in section 123TC of the *Social Security (Administration) Act 1990* to include a person to whom another person's payments are made.

7 Item 26 of the bill sets out the categories of welfare payment which would be subject to the trial.

8 Proposed subsection 124PJ(2C) clarifies that where the Secretary has made an individual determination that one person's restricted rate of payment will be varied, a broader determination by this Minister varying rates of restriction for cohorts of participants would not impact that individual.

9 Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019, third reading of the bill.

10 See items 41 and 42 of the bill.

11 Item 51 of the bill.

equality and non-discrimination—the right to enjoy human rights without discrimination of any kind—noting the disproportionate impact on Indigenous Australians.

Limits on these rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to that objective. While the stated objectives of the proposed measures appear to constitute legitimate objectives for the purposes of international human rights law,[12] it is not clear that the measures are rationally connected with those objectives or that they would be a proportionate means of achieving the objectives of the bill. The full initial legal analysis is set out at *Report 6 of 2019.*[13]

2.79 The initial analysis stated that in order to fully assess the proportionality and likely effectiveness of the proposed measures, further information is required as to:

- why these measures propose to expand the cashless welfare trial to the Northern Territory and the Cape York area before the completion of the trial reviews, which are currently in-progress;
- what consultation was undertaken with affected communities, seeking their views as to whether they wanted the trials to continue or the cashless debit cards to be introduced, prior to this bill being presented to Parliament;
- whether consideration has been given to applying the cashless welfare measures trial on a voluntary basis and otherwise only taking into account individual circumstances;
- why the existing legislative requirement for the evaluation of trial reviews under section 124PS of the Act is proposed to be amended, noting that no trial review evaluation has been completed to date; and
- why it is necessary to give the minister the power to alter the component of a restrictable welfare payment up to 100 per cent with no parliamentary oversight and no legislative criteria as to when such a change could be made (and whether the bill could be amended to include legislative criteria as to when such a change may be made, and require such change to be made by a disallowable legislative instrument).

12 The stated objectives of the Cashless Debit Card are set out in Part 3D of the *Social Security (Administration) Act 1999*. See also the objectives outlined in the statement of compatibility, pp. 20-21.

13 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 39-51.

Committee's initial view

2.80 The committee noted the preliminary international human rights legal advice in relation to the bill, and noted that the rights to privacy, social security and equality and non-discrimination were engaged. It also noted its concern that where a bill both interferes with and also promotes human rights, it is important to expressly identify these 'positive human rights', including the rights of the child, the right to protection of the family, the right to dignity and the right to health. Accordingly, it noted that it considered that the cashless welfare measures contained in the bill include a number of positive human rights by reason that they provide welfare payment recipients with the ability to ensure that a higher portion of their payments are directed to essential living costs such as food and household bills, whilst prohibiting expenditure on alcohol and gambling.

2.81 The committee requested that the minister provide further information as to the matters set out at paragraph [2.79].

Minister's response[14]

2.82 The minister advised:

> *Transition*
>
> The Government announced the transition of Income Management to the Cashless Debit Card (CDC) in the Northern Territory (NT) and Cape York region as part of the 2019-20 Budget to offer a more streamlined approach with improved technology for the participant. The CDC has been informed by the experience of Income Management and has been consistently improved. The CDC is being introduced in these regions to offer greater flexibility and consumer choice for these participants. For example, the CDC is accepted at over 900,000 EFTPOS terminals nationally compared to the BasicsCard, which is accepted at fewer than 17,000 merchants.
>
> As the CDC operates as a standard Visa Debit Card, it places fewer restrictions on purchases that allow participants to shop from a wide variety of sellers that accept EFTPOS, including on line retailers via BPAY. Participants in the Northern Territory should not have to wait to have access to the improved technology offered by the CDC.
>
> *Consultation*
>
> My department has been engaging with communities and stakeholders in the Barkly region of the NT since August 2018 and has continued engaging

14 The minister's response to the committee's inquiries was received on 20 December 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

with broader NT and Cape York communities and stakeholders since late September 2019 to support the transition.

My department has conducted community information sessions in 43 locations across the NT with nearly 1500 community members and in four locations across Cape York with over 65 community members. Further community sessions will continue up to and throughout the transition to the CDC.

Voluntary Measures

The purpose of the CDC is to limit the amount of welfare payments being spent on products that can harm the broader community. The evidence demonstrates that the CDC is most effective when most people in a community who receive a welfare payment participate in the program. Individuals on a welfare payment but who are not on the CDC program can volunteer for the program in the Ceduna, East Kimberley and Goldfields trial sites. The Bill also enables volunteers from the Bundaberg and Hervey Bay region, NT and Cape York sites.

Evaluation

The Bill amends section 124PS to improve the workability of the evaluation process. It does not remove any requirements for a review of the evaluation process to be undertaken. The amendments simplify the requirements on an independent expert reviewing the evaluation to directly consult trial participants who may have already participated in an evaluation. This appropriately reduces repeat contact with vulnerable CDC participants and reduces respondent burden on this cohort.

Ministerial Power

The Government has amended the Bill to reduce the scope of the Ministerial power to vary the restricted portion placed on the CDC in the Northern Territory from 100 per cent to 80 per cent. This power does not extend to participants in the Cape York region.

As outlined in the Explanatory Memorandum, this will only be considered in response to a request from a community. When moving these amendments, consistent with the approach taken in *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010*, it was not considered appropriate to specify the requirements for exercising this power in the legislation itself. This decision was made to ensure the format of community requests and the nature of any necessary engagement with the community following a request, is flexible to respond to the specific circumstances of that community.

Given that this power will only be used in response to a community request, making the determination by notifiable instrument is appropriate to respect the autonomy of the community making the request.

Concluding comments

International human rights legal advice

2.83 As set out in Report 6 of 2019, the cashless welfare arrangements outlined in this bill engage and limit the right to privacy,[15] social security,[16] and equality and non-discrimination.[17] Limits on these rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is proportionate to that objective.[18] While the stated objectives of the proposed measures appear to constitute legitimate objectives for the purposes of international human rights law,[19] it is not clear that the measures are rationally connected with those objectives.

Rational connection

2.84 The results of the trial evaluations cited in the statement of compatibility are a critical component of demonstrating a rational connection between the cashless welfare trial and its intended objectives. Further information was therefore sought as to why the decision was made to expand the cashless welfare trial *before* the most recent trial evaluation had been completed.[20] The minister has advised that as the cashless debit card is an improved technology when compared with the 'BasicsCard' (which is provided as part of the existing Income Management scheme), and is accepted more widely than the BasicsCard, so the cashless debit card is being introduced to offer greater flexibility and consumer choice for participants. However, this response does not address the mixed findings on the operation of the cashless

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

16 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9.

17 ICCPR, articles 2, 16 and 26 and ICESCR, article 2. It is further protected with respect to persons with disabilities by the Convention on the Rights of Persons with Disabilities, article 2.

18 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.

19 The stated objectives of the Cashless Debit Card are set out in Part 3D of the *Social Security (Administration) Act 1999*. See also the objectives outlined in the statement of compatibility, pp. 20-21.

20 The University of Adelaide is conducting a second impact evaluation in Ceduna, East Kimberley and Goldfields, as well as a baseline data collection in the Bundaberg and Hervey Bay region. See, statement of compatibility, p. 19.

debit card scheme as detailed in the two trial evaluations to date.[21] It also does not explain why access to an 'improved technology' associated with the cashless debit card would be effective to achieve the stated aims of the cashless welfare trial (including to reduce immediate hardship and deprivation, reduce violence and harm, encourage socially responsible behaviour, and reduce the likelihood that welfare recipients will remain on welfare).[22] Furthermore, information relating to the improved technology relates only to proposed geographical expansion of the cashless welfare trial into the Northern Territory. It does not address why the time frame for the trial is being extended in existing trial sites. It therefore remains unclear how the extension of these trials is rationally connected (that is effective to achieve) the stated legitimate objective.

2.85 Consequently, it remains unclear whether the proposed expansion of the cashless welfare scheme is rationally connected to, that is, effective to achieve, the stated aims of the trial.

Proportionality

2.86 The existence of adequate and effective safeguards, to ensure that limitations on human rights are the least rights restrictive way of achieving the legitimate objective of the measure, is relevant to assessing the proportionality of these limitations. In assessing whether a measure is proportionate, relevant factors to consider include whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the circumstances of individual cases.

2.87 Further advice was sought as to what consultation was undertaken with affected communities, seeking their views as to whether they wanted the trials to continue or the cashless debit cards to be introduced, prior to this bill being presented to Parliament. Information was also sought as to whether consideration had been given to applying the cashless welfare measures trial on a voluntary basis and otherwise only taking into account individual circumstances.

21 These include evidence of 'workarounds' to circumvent the cashless welfare restrictions, including: trading the card to purchase alcohol; trading the card for cash of lesser value; harassing elderly relatives for money; pooling resources to make purchases; and consuming cheaper forms of alcohol such as methylated spirits. Concerns have also been raised as to: the inability of participants to participate in the second-hand goods market; the inability to make small cash-based transactions at places like school canteens; concerns regarding the lack of targeting in the application of the trial; and perceptions among participants that the widespread application of the trial is racist, patronising and discriminatory. See, University of Adelaide Future of Employment and Skills Research Centre, *Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings*, February 2019; and ORIMA, *Cashless Debit Card Trial Evaluation – Final Evaluation Report*, August 2017.

22 See, statement of compatibility, p. 19.

2.88 The minister explained that their department has been 'engaging with communities and stakeholders' to 'support the transition' to cashless welfare, and has conducted a number of 'community information sessions' across the Northern Territory. However, in assessing whether consultation of this nature constitutes a safeguard such that it would assist in the proportionality of the measure, it is relevant that the process being described does not appear to involve a two-way deliberate process of dialogue in advance of a decision being made to progress the scheme. Rather, the process appears to be one of informing individuals of a decision that has already been made. Consequently, the value of the consultation process as a safeguard as described appears to be limited.[23]

2.89 As to whether consideration was given to voluntary participation in the scheme, as opposed to blanket participation based on geographical location, the minister notes that individuals who are not part of the cashless welfare trial in these geographical areas can still volunteer to participate. This information is not, however, relevant to the question of whether consideration was given to participation in the scheme being only on a voluntary basis. The minister also explains that the purpose of the cashless welfare trial is to limit the amount of welfare payments which can be spent on products which harm the broader community, and that 'evidence demonstrates that the [cashless welfare trial] is most effective where most people in a community who receive a welfare payment participate in the program'. However, in assessing whether this constitutes a safeguard, such that it would assist in the proportionality of the measure, it is noted that the formal evaluation of the cashless welfare trials indicate perceptions that the scheme should in fact be more targeted.[24]

2.90 Further information was also sought as to why the existing legislative requirement for the independent evaluation of trial reviews[25] is proposed to be

23 The UN Committee on Economic, Social and Cultural Rights has explained that it is a core obligation of state parties to 'allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them' See, UN Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, [55]. See also, the Declaration on the Rights of Indigenous Peoples, article 19.

24 Including for people with existing mental health problems (who are reported to have exacerbated negative health impacts as a result of the scheme); people with disabilities; and to protect the elderly. See, University of Adelaide Future of Employment and Skills Research Centre, Cashless Debit Card Baseline Data Collection in the Goldfields Region: Qualitative Findings, February 2019; and ORIMA, Cashless Debit Card Trial Evaluation – Final Evaluation Report, August 2017.

25 *Social Security (Administration) Act 1990,* section 124PS. This requires that an evaluation be completed within six months, and be conducted by an independent evaluation expert with significant expertise in the social and economic aspects of welfare policy, who must consult trial participants and make recommendations.

amended,[26] noting that no trial review evaluation has been completed to date. The minister explained that the proposed amendment would not remove the requirement for a review of the evaluation process to undertaken, but rather that the 'workability' of the evaluation process would be improved. The minister also stated that the amendments 'simplify the requirements on an independent expert reviewing the evaluation to directly consult trial participants who may have already participated in an evaluation', and that this 'appropriately reduces repeat contact with vulnerable [cashless welfare] participants'. The proposed amendment to section 124PS of the *Social Security (Administration) Act 1990* would significantly alter the existing legislative requirement that trial reviews be subsequently evaluated by an expert within six months of the trial results being published, despite the fact that this legislative requirement has not been triggered to date. It would also reduce the capacity for affected individuals to provide feedback to an independent expert in relation to the trials themselves, and in relation to the evaluation of those trials. As such, the proposed amendments to the evaluation process would appear to limit the capacity of affected individuals to engage in the process of evaluating the trial.

2.91 Additionally, further information was sought as to why it is necessary to give the minister the power to alter the component of a restrictable welfare payment up to 100 per cent with no parliamentary oversight and no legislative criteria as to when such a change could be made.[27] The minister explained that the bill has now been amended to reduce the minister's power to vary the restricted portion of cashless welfare in the Northern Territory to 80 per cent.[28] The minister stated that the decision to vary a restricted portion in this way will only be considered 'in response to a request from a community', but that 'it was not considered appropriate to specify the requirements for exercising this power in the legislation itself' in order to ensure that the 'format' of community requests and the 'nature of any necessary engagement' consequent to such a request, 'is flexible to respond to the specific circumstances'. The exercise of the power in the manner described may be capable of operating as a safeguard, however it is noted that none of this is outlined in the legislation itself. In particular, item 31 of Schedule 1 does not require that the minister only act in response to a request from the community. As such, as a matter

26 Item 51 of the bill.

27 Under existing cashless welfare arrangement rules, 80 per cent of participants' welfare payments are restricted. Under these amendments, participants in the Cape York area would be subject to a 50 per cent restriction of payments unless the Queensland Commission has otherwise set a restriction in their case. Participants in the Northern Territory would be subject to restrictions of 50 to 70 per cent (those referred by child protection). It is proposed that participants transitioning from income management to the cashless welfare scheme would keep their existing rate at which welfare payments are restricted (which are between 50 to 70 per cent).

28 See the third reading of the bill (as agreed to on 27 November 2019 in the House of Representatives), schedule 1, item 39.

of law, the minister would retain the ability to vary the restricted portion of participants in the Northern Territory other than in response to a request from a community. Additionally, even if the portion is restricted following a 'request from the community', it is not clear how the 'voice' of a community would be ascertained, noting that communities can often have divergent views.

Concluding observations

2.92 The bill, which seeks to expand Cashless Debit Card trials in multiple geographical areas, engages and limits the rights to privacy, social security, and equality and non-discrimination. The measures associated with this bill significantly intrude into the freedom and autonomy of individuals to organise their private and family lives by making their own decisions about the way in which they use their social security payments. They also appear to have a disproportionate impact on Indigenous Australians.[29]

2.93 While the expansion of the cashless debit card trial appears to seek to achieve a number of legitimate objectives,[30] it is unclear whether the proposed cashless welfare scheme expansion is rationally connected with (that is, effective to achieve) those objectives, noting the mixed results outlined in the trial evaluations completed to date.[31] Additionally, it does not appear that the proposed measures are proportionate to the objectives sought to be achieved. In particular, there appears to be extremely limited capacity for flexibility to treat different cases differently, as the scheme applies to all persons on particular welfare payments in trial locations, and not only those deemed to be at risk. A human rights compliant approach requires that any such measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community. The current approach, with its apparent lack of genuine consultation, amendments to the evaluation process and lack of legislative requirement to respect community wishes before amending the amount of restrictable income, falls short of this standard. As such, it has not been clearly demonstrated that the extension of the cashless debit card trial is a justifiable limit on the rights to social security and privacy

29 As set out in the initial analysis, at March 2017, 75 per cent of participants in the Ceduna trial area, and 80 per cent of participants in the East Kimberley, were Aboriginal and/or Torres Strait Islander. In 2019, 43 per cent of participants in the Goldfields trial site were Indigenous. In 2016, approximately 90 per cent of people subject to income management in the Northern Territory were indigenous. See Parliamentary Joint Committee on Human Rights, *Report 6 of 2019*, (5 December 2019) p. 43.

30 The statement of compatibility lists the objectives as: 'reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time', statement of compatibility, p. 19.

31 The full analysis of these trial evaluations are outlined in the preliminary international human rights legal advice.

or, to the extent that the trial has a disproportionate impact on Indigenous Australians, that it is a reasonable and proportionate measure and therefore not discriminatory.

Committee view

2.94 The committee thanks the minister for this response. The committee notes that this bill seeks to extend the end date for existing cashless debit card trial areas by one year, establish the Northern Territory and Cape York areas as such trial areas, amend the trial evaluation process and enable the minister to amend the amount that may be restricted.

2.95 The committee notes the legal advice. The committee considers the bill seeks to achieve a number of legitimate objectives, including reducing immediate hardship and deprivation, reducing violence and harm, encouraging socially responsible behaviour and reducing the likelihood that welfare payment recipients will remain on welfare and out of the workforce for extended periods of time. The committee believes it is important to reiterate the engagement of 'positive human rights' in the bill including the rights of the child, the right to protection of the family, the right to dignity and the right to health, and considers that the cashless welfare measures contained in the bill include a number of positive human rights by reason that they provide welfare payment recipients with the ability to ensure that a higher portion of their payments are directed to essential living costs such as food and household bills, while prohibiting expenditure on alcohol and gambling.

2.96 The committee therefore considers that the minister's advice demonstrates that any limitation on human rights are justifiable, noting the important outcomes sought to be achieved by the cashless debit card trial.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2019[1]

Purpose	This bill seeks to provide for the trialling of mandatory drug testing for new recipients of Newstart Allowance and Youth Allowance in three geographical locations over two years
Portfolio	Social Services
Introduced	House of Representatives, 11 September 2019
Rights	Privacy; social security and adequate standard of living; equality and non-discrimination
Previous report	Report 6 of 2019
Status	Concluded examination

2.97 The committee requested a response from the minister in relation to the bill in *Report 6 of 2019*.[2]

Drug testing of welfare recipients

2.98 The bill seeks to establish a two year trial of mandatory drug-testing in three regions, involving 5,000 new recipients of Newstart Allowance and Youth Allowance. Under this scheme, recipients who test positive would be subject to income management for 24 months and be subject to further random drug tests. Recipients who test positive to more than one test during the 24 month period would be referred to a contracted medical professional for assessment.[3] If the medical professional recommends treatment, the recipient would be required to complete certain treatment activities, such as counselling, rehabilitation or ongoing drug testing, as part of their employment pathway plan.[4]

2.99 Recipients who do not comply with their employment pathway plan, including drug treatment activities, would be subject to a participation payment compliance framework, which may involve the withholding of payments. Recipients

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Drug Testing Trial) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 24.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 54-63.

3 Explanatory memorandum, p. 29.

4 An employment pathway plan sets out particular activities certain recipients must do in order to receive their Newstart Allowance or Youth Allowance payments.

would not be exempted from this framework if the reason for their non-compliance is wholly or substantially attributable to drug or alcohol use.[5]

2.100 Recipients who refuse to take the test would have their payment cancelled on the day they refuse, unless they have a reasonable excuse. If they reapply, their payment would not be payable for 4 weeks from the date of cancellation, and they would still be required to undergo random mandatory drug-testing.[6]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to privacy, social security, adequate standard of living and equality and non-discrimination

2.101 The mandatory drug testing of social security recipients, and subjecting those who test positive to income management and mandatory treatment activities, engages and limits a number of human rights, including the, right to privacy;[7] right to social security;[8] right to an adequate standard of living;[9] and right to equality and non-discrimination.[10]

2.102 The bill appears to engage and limit the right to privacy, by:

(a) making it mandatory for trial participants to undergo drug testing, requiring them to provide samples of their saliva, urine or hair to a contracted provider;[11]

(b) requiring the collection and storage of samples and drug test results, and the divulging of private medical information to a contracted drug testing provider (as a person may need to provide evidence of their prescriptions and/or medical history to the contracted provider to avoid false positives that, for example, detect prescribed opioids);[12]

5 Explanatory memorandum, p. 26.

6 Explanatory memorandum, p. 4.

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

8 International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9.

9 ICESCR, article 11.

10 ICCPR, articles 2, 16 and 26, and ICESCR, article 2. It is further protected with respect to persons with disabilities by the Convention on the Rights of Persons with Disabilities, article 2.

11 This is acknowledged in the statement of compatibility, p. 32.

12 Note that Schedule 1, item 3, proposed section 38FA of the *Social Security Act 1991* would enable the minister to make rules providing for the giving and taking samples of persons' saliva, urine or hair; dealing with such samples; carrying out drug tests; confidentiality and disclosure of results of drug test and keeping; and destroying records relating to samples or drug tests.

(c) imposing income management (which imposes conditions on how welfare payments can be spent) on those who test positive (on the advice of the contractor who carried out the test);[13] and

(d) requiring those who have had two or more positive drug tests to undergo a medical, psychiatric or psychological examination,[14] and requiring those, who have been assessed as needing treatment, to receive that treatment in order to access social security.[15]

2.103 The measure also appears to engage the right to social security and an adequate standard of living. The bill engages and limits these rights by imposing income management on those who test positive to drugs and allowing for welfare payments of those who does not comply with their employment pathway plans to be cut (a measure which would be imposed on those who have had two or more positive drug tests).

2.104 Finally, the measure also engages the right to equality and non-discrimination. The statement of compatibility recognises that the drug testing trial may involve a direct or indirect distinction on the basis of disability or illnesses associated with drug or alcohol dependency.[16] It also notes that the trial may have a disproportionate impact on Indigenous people, due to higher levels of drug and alcohol use.[17]

2.105 Limits on the above rights may be permissible where a measure seeks to achieve a legitimate objective, is rationally connected to (that is effective to achieve) that objective, and is proportionate to that objective. The initial analysis found that pursuing the objectives of the early treatment of harmful drug use to prevent drug dependency, and addressing barriers to employment created by drug dependency,[18] are likely to constitute legitimate objectives under international human rights law. However, it raised a number of concerns as to whether the measure is rationally connected to (that is effective to achieve) and proportionate to these legitimate objectives. The full initial legal analysis is set out at *Report 6 of 2019.*[19]

13 See, *Social Security (Administration) Act 1999, s*chedule 1, item 28, proposed new subsection 123UFAA(1A).

14 In compliance with a notice given under *Social Security (Administration) Act 1999*, subsection 63(4). See Schedule 1, items 4 and 7 of the bill.

15 See Schedule 1, items 4 and 7 of the bill.

16 Statement of compatibility, p. 30.

17 Statement of compatibility, p. 31.

18 See, statement of compatibility, p. 27.

19 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 54-63.

2.106 The initial analysis stated that in order to fully assess the proportionality and likely effectiveness of the proposed measures, further information was required as to:

- what evidence was relied on to indicate that the trial is likely to achieve its stated objectives;
- what evidence was relied on to choose the three trial sites, in particular whether there is evidence and data about a high prevalence of drug use in these locations;
- how subjecting a person to income management for two or more years, or reducing the payments of persons who fail to undertake treatment activities, will be likely to be effective in removing a person's barriers to employment and ensuring they get the necessary support to address any drug dependency issues;
- what safeguards are in place to ensure a person is able to meet their basic needs if their payments are suspended for failure to comply with their employment pathway plan;
- whether there is a process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances (but where it doesn't reach the threshold of posing a 'serious risk' to a person's mental, physical or emotional wellbeing);
- whether independent merits review of the contractor's decision to issue a notice referring a person to income management will be available, and whether there will be an independent process to review the accuracy of any drug test results;[20] and
- whether other, less rights restrictive, methods have first been trialled to improve a job-seeker's capacity to find employment or participate in education or training and receive treatment.

Committee's initial view

2.107 The committee noted the legal advice on the bill. In order to fully assess the proportionality and likely effectiveness of the proposed measures, the committee sought the minister's advice as to the matters set out at paragraph [2.10].

20 Having regard to the comments made by the Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017* (6 September 2017) pp. 85-91.

Minister's response[21]

2.108 The minister advised:

> **What evidence was relied on to indicate that the trial is likely to achieve its stated objectives**
>
> The Drug Testing Trial (the trial) is designed to identify job seekers who may have ongoing drug dependency issues and may benefit from treatment. The aim of the trial is to improve the capacity of job seekers with illicit drug use issues to find employment or participate in education or training to improve their work readiness, by assisting them to access appropriate treatment and overcome their barriers to work. The trial will test the effectiveness of drug testing as a means of identifying people with drug use issues, as well as intervention strategies including income management, medical assessment and treatment.
>
> This model has not been tested before in Australia or internationally. This is why comparable evidence for this approach does not exist and the measure has been designed as a trial. The trial will evaluate the effectiveness of drug testing job seekers in the Australian social security context and will help to identify where illicit drug use may be a barrier to work. The trial will also evaluate the efficacy of income management and supporting people to undertake appropriate treatment. The evaluation of the trial will help to establish an evidence base for this type of intervention.
>
> **What evidence was relied on to choose the three trial sites, in particular whether there is evidence and data about a high prevalence of drug use in these locations**
>
> The trial will be conducted in the local government areas of Canterbury-Bankstown (New South Wales), Logan (Queensland) and Mandurah (Western Australia). These locations were selected by considering a range of available evidence and data, including social security administrative data, crime statistics, drug use statistics and drug and alcohol treatment information.
>
> The average inflow of new claimants of Newstart Allowance and Youth Allowance (other) was considered in the first instance. In order for the drug testing to be random, sites needed to have sufficient new claimant inflow to enable 5,000 new recipients to be tested across the three trial sites, while ensuring that not all new job seekers would be selected for testing.
>
> Other factors considered included:

21 The minister's response to the committee's inquiries was received on 20 December 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

- the Australian Criminal Intelligence Commission's National Wastewater Drug Monitoring Program Report 2017;
- the Australian Institute of Health and Welfare's 2013 National Drug Strategy Household Survey;
- state/territory government crime statistics in relation to drug use and possession;
- state/territory hospitalisation data;
- administrative data from the Department of Human Services (Services Australia) on job seekers with identified drug dependency issues; and
- the location of drug and alcohol treatment services.

The evidence and data was considered holistically during site selection rather than hierarchically.

How subjecting a person to income management for two or more years, or reducing the payments of persons who fail to undertake treatment activities, will be likely to be effective in removing a person's barriers to employment and ensuring they get the necessary support to address any drug dependency issues

The trial is not about penalising job seekers who are drug dependent. Rather, job seekers who are likely to have more serious drug dependency issues, as evidenced by more than one positive drug test result, will be supported to seek treatment for their dependency through a medical assessment and referral to appropriate treatment options.

Job seekers who test positive to a first test will be placed on income management for a 24 month period. The use of income management is intended to help job seekers identified through the trial to manage their drug use by restricting the amount of their income support payment that is available to them as cash. Income management helps people to budget their social security payments and helps make sure they are getting the basic essentials of life, such as food and housing. Improved control of their finances helps people to stabilise their lives so they can better care for themselves and their children. It can also support job seekers to become work ready and to seek or take up work.

Once on income management, the job seeker will have access to a range of support services. These services include the income management phone line and the ability to check their income management and BasicsCard balance using a range of channels including on line, phone or in person. Financial support services and referrals are also available.

Job seekers who test positive to a second test and are considered likely to have more serious ongoing drug dependency issues will be referred for medical assessment and supported by a local case manager to access treatment and rehabilitation services.

The Government considers that these are appropriate means to encourage job seekers to get the support they need to address drug dependency issues. The trial will be comprehensively evaluated to determine whether this kind of intervention is an effective means of achieving this result.

What safeguards are in place to ensure a person is able to meet their basic needs if their payments are suspended for failure to comply with their employment pathway plan

If a job seeker does not participate in the treatment activity included in their Job Plan, they may face temporary payment suspension or penalty under the Targeted Compliance Framework (TCF). However, job seekers will not face compliance action if they have a reasonable excuse. From 1 July 2018, job seekers are no longer able to repeatedly use drug or alcohol dependency as a reasonable excuse for failing to meet their mutual obligation requirements if they refuse to participate in available or appropriate treatment.

To better identify job seekers who are having difficulty meeting their mutual obligation requirements, including treatment, employment service providers will assess a job seeker's capability and requirements after their third demerit under the TCF, and Services Australia will do so after their fifth demerit. At either point, if a job seeker is found to be unable to meet the terms of their Job Plan because of an underlying issue (for example homelessness or mental health issues), their requirements will be adjusted appropriately.

This will help to make sure that any capability issues or vulnerabilities that a job seeker may have are identified and taken into account before they face temporary payment suspension.

Whether there is a process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances (but where it doesn't reach the threshold of posing a 'serious risk' to a person's mental, physical or emotional wellbeing)

Job seekers who test positive to a first drug test will be placed on income management for a 24 month period. The use of income management is intended to help job seekers identified through the trial as using illicit drugs to manage their drug use by restricting the amount of their income support payment available as cash. Income management is an established method of welfare quarantining applied to help vulnerable job seekers and is currently operating in a number of locations across Australia.

The trial includes safeguards to ensure vulnerable individuals are not adversely affected by having their payment income managed. A person may be taken off income management if it is assessed that being on income management may seriously risk the person's mental, physical or emotional wellbeing. Where required, this assessment would be undertaken by a Services Australia social worker based on all the facts,

which may include documentary evidence provided by suitably qualified professionals.

Whether independent merits review of the contractor's decision to issue a notice referring a person to income management will be available, and whether there will be an independent process to review the accuracy of any drug test results

It is intended that job seekers undergoing a drug test will be screened by the drug testing provider to identify any legal medications they are taking which may cause a positive test result. If a job seeker provides evidence that they are taking legal medications, such as a valid prescription, the drug testing provider will take this into account and will record a negative test result, subject to no other illicit drugs being identified in the drug test.

The drug testing will be conducted under applicable Australian drug testing standards. It is intended that the sample taken by the drug testing provider will be split into two samples. This is a common practice with other forms of testing used in Australia. Job seekers who dispute an initial positive test result will be able to request a re-test, using the second sample.

If the re-test is again positive, the job seeker will have to repay the cost of the re-test and will remain on income management. This is designed to discourage job seekers from requesting frivolous re-testing where they know they have used an illicit drug. If a job seeker requests a re-test and the result is negative, they will not have to pay the cost of the re-test.

In addition, job seekers will have access to existing review and appeal processes, if they disagree with a decision Services Australia has made as a result of a positive drug test. For example, if Services Australia makes a decision to place a job seeker on income management following a positive drug test result, the job seeker may request an administrative review under Social Security law. Under these processes, job seekers can request a review of any administrative decision by an Authorised Review Officer (ARO) and if they disagree with the result of the ARO review, they may appeal to the Administrative Appeals Tribunal for independent merits review of the decision.

The drug testing provider may also withdraw or revoke a referral to income management. If a re-test is conducted and the result is negative, or if the provider becomes aware of circumstances that lead them to believe that the positive result which triggered the referral is not valid, for example if the job seeker provided evidence of legal medications which could have caused the result, the referral may be withdrawn. However, it should be noted that the purpose of income management being applied if a person tests positive to a drug test is to limit their access to cash to purchase illicit substances.

Whether other, less restrictive, methods have first been trialled to improve a job seeker's capacity to find employment or participate in education or training and receive treatment

The 2017-18 Budget included a suite of measures designed to prevent income support payments from being used to fund drug and alcohol addictions and to assist people to overcome drug dependency issues that prevent them from finding work.

From 1 July 2018, job seekers have no longer been able to be exempt from mutual obligation requirements solely due to drug or alcohol dependency. Instead, they are actively supported through their employment services provider to undertake tailored activities as part of their Job Plan. which may include drug or alcohol treatment.

Also from 1 July 2018, job seekers have no longer been able to repeatedly use drug or alcohol dependency as a reasonable excuse for failing to meet their mutual obligation requirements, unless they agree to seek treatment.

These measures were complemented by another change made on 1 January 2018, allowing job seekers in all jobactive streams to undertake drug or alcohol treatment as an approved activity in their Job Plan to meet their Annual Activity Requirement. Previously, this was only available to Stream C job seekers. This change recognises that undertaking recovery or rehabilitation programs for drug dependency is a necessary step to reduce barriers to employment and towards finding work.

Concluding comments

International human rights legal advice

Rights to privacy, social security, adequate standard of living and equality and non-discrimination

2.109 The minister provided advice in relation to whether the measure is likely to be effective to achieve its stated objective. In relation to the evidence relied on to choose the three trial sites, the minister advised that the locations were selected by considering a range of evidence and data, including social security administrative data, crime statistics, drug use statistics and drug and alcohol treatment information, and gave some particulars as to these. While this information assists in the consideration of whether these proposed sites were selected based on evidence of drug use at these locations, no information has been provided comparing the prevalence of drug use at these specific locations with other parts of Australia.[22]

22 Furthermore, no information is provided as to what other barriers to attaining employment exist in these locations, including a lack of available jobs. See, Sue Olney, 'Should Love Conquer Evidence in Policy-Making? Challenges in Implementing Random Drug-Testing of Welfare Recipients in Australia', *Australian Journal of Public Administration,* vol. 77, no. 1, 2017, pp. 114-119.

2.110 In relation to what evidence was relied on to indicate that the trial is likely to achieve its stated objectives, the minister advised that the drug testing trial as set out in the bill has not been tested before and therefore no comparable evidence for this proposed approach exists, and that this measure has been designed as a trial, which will itself help to establish an evidence base for this type of intervention. However, it is noted that there appear to be a number of international examples of drug testing of welfare recipients,[23] which while not identical to the trial proposed by this bill would likely provide some information as to whether drug-testing welfare recipients is likely to be effective to achieve the objectives of providing early treatment to prevent dependency and address barriers to employment.[24]

2.111 Following the minister's response, it remains unclear that the testing for the single use of an illicit drug, which does not measure a person's level of impairment, abuse or dependency,[25] demonstrates that a person is likely to have barriers to employment or dependency.[26]

2.112 It also remains unclear whether income management and, in certain circumstances, reducing the payments of persons who fail to undertake treatment activities, would be an effective or proportionate means of ensuring job seekers get the support they need to address drug dependency issues. The minister advised that job seekers would be placed on income management for two years in order to help those people to manage their drug use by restricting the amount of their income support which is available to them as cash. The minister stated that income management helps people to budget and stabilise their lives, and can support job seekers to become work ready and to seek or take up work. However, a number of

23 Drug-testing of welfare recipients has been undertaken in New Zealand; and legislation providing for such testing has been passed in the United States in: Alabama, Arkansas, Arizona, Florida, Georgia, Kansas, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Utah, West Virginia and Wisconsin. Additionally, welfare-related drug-testing programs have previously been considered in the United Kingdom and Canada.

24 See, for example, Robert Crew and Belinda Creel, 'Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits', *Journal of Health and Social Policy*, vol 17, no. 1, 2003, pp. 39;53; and US Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Drug testing welfare recipients: recent proposals and continuing controversies*, 2011. See also, Economic and Social Research Council, *Welfare conditionality project 2013-2018 – Final findings report*, 2018; Think Progress, *What 7 states discovered after spending more than $1 million drug testing welfare recipients*, 2015; Michelle Price, 'Only 12 test positive in Utah welfare drug screening', *KSL*, 23 August 2013.

25 See the definition of 'positive drug test' in Schedule 1, item 1, which relevantly means an indication by a drug test that a testable drug was present in a sample of the person's saliva, urine or hair.

26 See, Scott Macdonald et al, 'Drug testing and mandatory treatment for welfare recipients', *International Journal on Drug Policy*, vol. 12, 2001, pp. 249-257. See also, Australian National Council on Drugs, 'Position Paper: Drug Testing', August 2013, p. 2.

human rights concerns have been raised in relation to the application of income management, including questions as to whether it is rationally connected (that is, effective to achieve) its stated objectives.[27] It is also not clear why income management would be imposed for two years, as no information was provided as to why this period of time was chosen.

2.113 The minister further explained that, once on income management, job seekers will have access to support services including an income management phone line and the ability to check their account balance in a range of ways. However, such services do not appear to provide any additional support to job seekers, particularly with regard to the identified problem of drug use. It is also noted that the committee had requested advice as to how reducing the payments of persons who fail to undertake treatment activities will be likely to be effective in removing a person's barriers to employment and ensuring they get the necessary support. The minister's response did not address this question.

2.114 It therefore remains unclear as to whether the proposed measures are rationally connected to achieve the stated objectives of the measure.

Proportionality

2.115 A range of further information was sought in order to assess the proportionality of the proposed measures.

2.116 In relation to any safeguards that are in place to ensure that a person is able to meet their basic needs if their payments are suspended for failure to comply with their employment pathway plan, the minister advised that while job seekers will not face compliance action if they have a reasonable excuse for failing to meet their mutual obligation requirements, drug or alcohol dependency is not available as a reasonable excuse. The failure to include drug and alcohol dependency as a basis on which a drug addicted person may fail to comply with their obligation requirements, reduces this measure as a safeguard.

2.117 The minister also outlined procedures that can identify job seekers who are having difficulty meeting their mutual obligation requirements. These include an assessment by an employment services provider of a job seeker's capability and requirements after their third demerit under the 'Targeted Compliance Framework', and a similar assessment by Services Australia following a person's fifth demerit. The minister explained that at either point, if a person is found to be unable to meet the requirements of their job plan 'because of an underlying issue (for example homelessness or mental health issues), their requirements will be adjusted appropriately'. However, it appears that these procedures only apply *after* a person's payments have been suspended. Under the Targeted Compliance Framework, every

27 See, for example, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures Measures* (16 March 2016) pp. 60-61. See also *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) pp. 45-62.

failure to meet requirements will result in income support payments being suspended (how long they remain suspended and whether they result in a permanent loss depends on a number of factors).[28] As such, while considerations of whether a person is unable to meet the terms of their job plan because of an underlying issue such as homelessness or mental health issues could constitute a safeguard to ensure the proportionality of the measure, this is limited in its effectiveness given payments will be suspended before such information is considered. As such, the minister's response does not address the question as to how individuals who have their payments suspended will be able to meet their basic needs for food and housing, which raises questions as to whether this measure would comply with the obligation to provide an adequate standard of living.[29]

2.118 In relation to whether there is a process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances (but where it does not reach the threshold of posing a 'serious risk' to a person's mental, physical or emotional wellbeing), the minister did not indicate that there is any process, other than that which applies because of a serious risk to mental, physical or emotional wellbeing.

2.119 In relation to whether independent merits review of the contractor's decision to issue a notice referring a person to income management will be available, and whether there will be an independent process to review the accuracy of any drug test results, the minister stated that job seekers will have access to 'existing review and appeal processes' if they disagree with a decision Services Australia has made following a positive drug test, and that the drug testing provider 'may withdraw or revoke' a referral to income management. However, Services Australia (formerly known as the Department of Human Services) is not the body that determines whether a person has tested positive to a drug test. Under the bill the drug testing will be done by a contracted service provider, likely to be a private body. As such, it appears that the decision of this private contractor is not reviewable as a matter of administrative law and the only recourse a person has to contest such a decision is to apply to the private contractor asking it to carry out a new test (with none of the detail as to how this would operate currently set out in any legislation).

2.120 In addition, under proposed paragraph 123UFAA(1A)(c) of the bill a person will be subject to income management if the contractor who carried out the test gives notice 'saying that the person should be subject to the income management

28 See Guides to Social Policy Law, Social Security Guide, version 1.260, released 2 January 2020, 3.1.14.40, available at: https://guides.dss.gov.au/guide-social-security-law/3/1/14/40

29 The right to an adequate standard of living is set out in article 11(1) of the International Covenant on Economic, Cultural and Social Rights. It requires that the State party take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in its jurisdiction.

regime'.[30] As such, it is the private contractor's decision to place a person on income management and, as set out by the Senate Standing Committee for the Scrutiny of Bills, the availability of administrative review of this decision is very limited.[31] Therefore, it would appear that the availability of review rights is extremely limited, and as such, does not operate as a safeguard to improve the proportionality of the measure.

2.121 Finally, information was sought as to whether other, less rights restrictive, methods have first been trialled to improve a job-seeker's capacity to find employment or participate in education or training and receive treatment. The minister advised that changes were made in 2018 to allow all job seekers to undertake drug or alcohol treatment as an approved activity to meet their annual activity requirements. This measure may assist in considering the proportionality of the bill, however, no information has been provided as to whether such drug and alcohol treatments were readily available and provided free of charge to such participants, only that such treatment would count as an 'approved activity' if a participant engaged in it. The minister's response also outlines the background of some measures designed to prevent income support payments from being used to fund drug and alcohol addictions, and helping people to overcome drug dependency issues that prevent them from finding work. However, no information is provided as to the effectiveness of those measures, and such measures themselves mean that persons with drug dependency will no longer have that dependency taken into account in relation to their mutual obligation requirements (leading potentially to greater sanctions). Consequently, it is not clear that other, less rights restrictive, methods have been trialled to improve a job seeker's capacity to find employment, participate in education or training, and receive medical treatment.

Concluding remarks

2.122 The mandatory drug testing of welfare recipients, subjecting persons to income management and suspending welfare payments, engages and limits a number of human rights, including the rights to privacy, social security, adequate standard of living and equality and non-discrimination. While the measures seek to achieve the legitimate objectives of the early treatment of harmful drug use to prevent drug dependency and to address barriers to employment created by drug dependency, it has not been demonstrated that the proposed measures are rationally connected (that is, effective to achieve) those objectives, or are a proportionate means of achieving those objectives.

2.123 Consequently, there is a significant risk that the measures proposed by the bill would unjustifiably limit the rights to privacy, social security, adequate standard of living and equality and non-discrimination.

30 Schedule 1, item 28, proposed paragraph 123UFAA(1A) (c).

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2017*, pp. 89-91.

Committee view

2.124 The committee thanks the minister for this response. The committee notes that this bill seeks to provide for the trialling of mandatory drug testing for new recipients of Newstart Allowance and Youth Allowance in three geographical locations over two years.

2.125 The committee notes the legal advice that the measures in this bill engage and limit a number of human rights, including the rights to privacy, social security, adequate standard of living and to equality and non-discrimination. The committee reiterates that this is a world first trial and accepts that there is some inevitable uncertainty as to whether the proposed measures are a proportionate means of achieving the legitimate objectives of the bill.

2.126 The committee also reiterates the important objective of the drug testing trial, which is intended to identify and support individuals who may have drug dependency issues, and to assist those persons into securing employment.

Treasury Laws Amendment (International Tax Agreements) Bill 2019[1]

Purpose	This bill seeks to amend the *International Tax Agreements Act 1953* to give force to the Australia-Israel Convention and to amend the *Income Tax Assessment Act 1997* to introduce a new deemed source of income rule (intended to eliminate double taxation and prevent tax avoidance)
Portfolio	Treasury
Introduced	House of Representatives, 19 September 2019
Right	Privacy
Previous report	Report 6 of 2019
Status	Concluded examination

2.127 The committee requested a response from the minister in relation to the bill in *Report 6 of 2019*.[2]

Exchange of taxpayer information between Israel and Australia

2.128 The bill seeks to amend the *International Tax Agreements Act 1953* to give force to the Israel-Australia Convention (the Convention) signed on 28 March 2019. The Convention seeks to remove double taxation of income and improve administrative cooperation in tax matters to help reduce tax evasion and avoidance.[3] Article 26 of the Convention provides that Israeli and Australian taxation authorities shall exchange taxpayer information to the extent that it is 'foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of domestic laws concerning the taxes covered by the Convention'.[4]

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (International Tax Agreements) Bill 2019, *Report 1 of 2020*; [2020] AUPJCHR 25.

2 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 64-66.

3 Explanatory memorandum, p. 5.

4 Explanatory memorandum, p. 43.

Summary of initial assessment

Preliminary international human rights legal advice: right to privacy

2.129 The exchange of taxpayer information, which would include personal 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. It also includes the right to control the dissemination of information about one's private life.[5] Limitations on this right will be permissible where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective.

2.130 The statement of compatibility identifies some safeguards for the protection of a taxpayer's privacy, but it does not provide further information about how information is currently obtained under domestic taxation laws and does not specify what reasonable measures the authorities must take to protect confidential information from unauthorised disclosure. The full initial human rights analysis is set out in in *Report 6 of 2019*.[6]

2.131 Therefore, further information is required as to:

- what legislative provisions in both Australia and Israel protect the confidentiality of taxpayer information, including what safeguards are in place to protect confidential information from unauthorised disclosure; and
- what processes exist, if any, to inform a taxpayer if there has been an unauthorised disclosure of their information.

Committee's initial view

2.132 The committee noted the legal advice on the bill. In order to assess the proportionality of this measure, the committee sought the minister's more detailed advice as set out at paragraph [2.131].

Treasurer's response[7]

2.133 The Treasurer advised:

> **Issue 1: Provisions which protect the confidentiality of taxpayer information**

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

6 Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2019) pp. 64-66.

7 The minister's response to the committee's inquiries was received on 18 December 2019. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Paragraph 2 of Article 26 of the Israel-Australia Convention (the Convention) obliges both Australia and Israel to treat any information obtained under Article 26 as being secret in the same manner as information obtained under their respective domestic laws. Paragraph 2 also prohibits the disclosure of such information except where it is to be used for the purposes of assessment, collection, enforcement, prosecution, or determination of appeals in relation to tax. Both Australia and Israel's domestic laws are consistent and support the obligations in paragraph 2 of Article 26.

In the case of Australia, the confidentiality of taxpayer information is protected by Division 355 in Schedule 1 to the *Taxation Administration Act 1953*, which imposes strict obligations on taxation officers and others who acquire protected tax information. The main protection for taxpayer's confidentiality is contained in Subdivision 355-B, which makes it an offence, punishable by imprisonment for up to 2 years, for taxation officers to make a record or disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances. These specified circumstances include disclosure of publically available information and disclosures in the course of performing duties (for example, for the purposes of administering a taxation law, disclosures to a Court or for the purposes of exchanging information under an international agreement).

Subdivision 355-C also makes it an offence, punishable by imprisonment for up to 2 years, for a person who is not a taxation officer to record or disclose taxpayer information, except in specified circumstances. This offence extends the prohibition on disclosure to third-parties who receive protected taxpayer information that was allowed to be disclosed to them.

In the case of Israel, sections 231 to 233 of the Income Tax Ordinance 5721-1961 requires officials, taxpayers and third parties to keep as a 'secret matter and as a personal confidence' any information concerning another person that has been obtained for tax purposes. A person who breaches this confidentiality requirement is liable to six months imprisonment or to a fine of ILS12,900 (approximately AU$5,400). Consistent with Australia's approach to taxpayer information, information obtained for tax purposes in Israel can also be used for specified purposes (these include disclosures in tax related court proceedings and for statistical purposes).

While this approach is consistent with Israel's obligations under the Convention, section 196 of the Income Tax Ordinance 5721-1961 also provides that information received from other jurisdictions under an agreement providing for relief from double taxation (such as the Convention) is to be treated in line with the agreement. This ensures that in the event of any inconsistency between Israel's domestic laws and its international obligations under the Convention, the provisions of the

Convention protecting the confidentiality of taxpayer's information will prevail.

Issue 2: Procedures for taxpayers to be informed of an unauthorised disclosure

In the case of Australia, Part IIIC of the *Privacy Act 1988* contains requirements to contact impacted individuals where it has reasonable grounds to believe there has been an 'eligible data breach'. This occurs where personal information that an entity holds is subject to unauthorised access or disclosure and is likely to result in serious harm to any of the individuals to whom the information relates. The *Privacy Act 1988* also enables individuals to make complaints about the handling of their information, including tax information, by specified Australian government agencies and private sector organisations.

I am not aware of any provisions of Israel's domestic law requiring a taxpayer to be informed if there has been an unauthorised disclosure of their information. However, Israel requires taxation officers to notify taxpayers within 14 days of a request for their information to be shared under an international agreement, unless the requesting jurisdiction specifically requests that the taxpayer not be notified. This means that taxpayers will generally be aware of any disclosures of their information that Israel makes in accordance with Article 26 of the Convention.

Concluding comments

International human rights legal advice

2.134 The minister has advised that legislative provisions in both Australia and Israel protect the confidentiality of taxpayer information, including protecting confidential information from unauthorised disclosure. The minister has also advised that legislative requirements exist in Australia to notify individuals where there are reasonable grounds to believe that there has been an unauthorised disclosure or data breach. However, there do not appear to be equivalent legislative provisions in Israel.

2.135 In light of this information, there appear to be safeguards in place to adequately protect the confidentiality of taxpayer information.

Committee view

2.136 The committee thanks the minister for this response. The committee notes the legal advice and in light of the information provided by the minister the committee considers there are adequate safeguards in place to protect the confidentiality of taxpayer information.

2.137 The committee notes that the bill has now passed both Houses of Parliament.

Senator the Hon Sarah Henderson

Chair