Parliamentary Joint Committee on Human Rights

Human rights scrutiny report

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

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Committee information

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

The committee assesses legislation against the human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as five other treaties relating to particular groups and subject matter.[1] A description of the rights most commonly arising in legislation examined by the committee is available on the committee's website.[2]

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

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

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

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

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

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

More information on the committee's analytical framework and approach to human rights scrutiny of legislation is contained in *Guidance Note 1*, a copy of which is available on the committee's website.[3]

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

Chapter 1

New and continuing matters[1]

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

- bills introduced into the Parliament between 14 October and 5 December 2019;
- legislative instruments registered on the Federal Register of Legislation between 20 September and 3 December 2019;[2] and
- one bill previously deferred.[3]

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

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

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

Response required

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

Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019[4]

Purpose	This bill seeks to amend a number of Acts in relation to combatting of money laundering and financing of terrorism to: • expand the circumstances in which reporting entities may rely on customer identification and verification procedures undertaken by a third party; • prohibit reporting entities from providing a designated service if customer identification procedures cannot be performed; • increase protections around correspondent banking; • expand exceptions to the prohibition on tipping off to permit reporting entities to share suspicious matter reports and related information with external auditors, and foreign members of corporate and designated business groups; • amend the framework for the use and disclosure of financial intelligence; • create a single reporting requirement for the cross-border movement of monetary instruments including physical currency and bearer negotiable instruments; • amend the Criminal Code to deem money or property provided by undercover law enforcement as part of a controlled operation to be the proceeds of crime for the purposes of prosecution; • expand the rule-making powers of the Chief Executive Officer of AUSTRAC; and • make it an offence for a person to dishonestly represent that a police award has been conferred on them
Portfolio	Home Affairs

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

Introduced	House of Representatives on 17 October 2019
Right	Fair hearing
Status	Seeking additional information

Anti-money laundering and terrorism financing

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

Preliminary international human rights legal advice

Right to a fair trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee view

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

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019[1]

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

Lowering threshold to issue a disclosure notice

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

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

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

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

of the national anti-doping scheme, and three members of the Anti-Doping Rule Violation Panel agree with that belief.[4]

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

Preliminary international human rights legal advice

Right to privacy

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

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

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

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

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

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

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

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

9 Statement of compatibility, pp. 5-6.

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

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

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

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

10 Statement of compatibility, p. 5.

11 Statement of compatibility, p. 6.

12 Statement of compatibility, p. 6.

13 Statement of compatibility, p. 6.

14 Statement of compatibility, pp. 5-6.

15 Statement of compatibility, p. 8.

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

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

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

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

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

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

18 Statement of compatibility, p. 6.

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

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

21 See section 13A of the ASADA Act.

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

Committee view

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

Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019[1]

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

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

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

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

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

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

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

3 Schedule 1, item 12.

4 Schedule 2, item 23.

notifying the breach would be likely to prejudice one or more enforcement related activities conducted by, or on behalf of, the enforcement body;[5]

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

Preliminary international human rights legal advice

Right to privacy

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

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

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

7 APP 6.2(e).

8 APP 9.2(e).

9 APP 8.2(f).

10 APP 12.3(i).

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

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

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

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

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

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

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

14 Statement of compatibility, pp. 4-5.

15 Statement of compatibility, p. 4.

16 Statement of compatibility, p. 4.

17 Statement of compatibility, pp. 4-5.

18 Statement of compatibility, p. 5.

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

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

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

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

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

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

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

Committee view

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

Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248][1]

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

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

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

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

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

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

1.36 The penalty for this offence is 30 penalty units (currently $6,300).[2]

Preliminary international human rights legal advice

Rights to freedom of expression and assembly

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

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

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

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

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

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

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

6 ICCPR, articles 19(3) and 21.

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

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

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

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

Committee view

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

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

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

Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019[1]

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

Disqualification of individuals from holding office in a union

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

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

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

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

3 Explanatory memorandum, p. 2.

ground, the circumstances and any other matters the court considers relevant. Under proposed section 223[4] the grounds for the disqualification include:

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

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

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

Preliminary international human rights legal advice

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

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

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4 Schedule 1, item 11, proposed section 223.

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

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

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

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

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

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

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

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

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

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

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

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

12 See ILO Convention N.87 article 3.

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

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

15 Statement of compatibility, p. 8.

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

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

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

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

16 Statement of compatibility, p. 8.

17 Statement of compatibility, p. 10.

18 Statement of compatibility, p. ix.

19 Statement of compatibility, p. ix.

20 Statement of compatibility, p. ix.

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

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

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

comparatively lesser focus on trivial or otherwise minor matters,'[24] which may operate as a safeguard to the expanded powers of the Commissioner under this bill.

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

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

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

24 Explanatory memorandum, p. 45.

25 Statement of compatibility, p. vi.

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

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

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

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

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

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

Committee view

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

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

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

Cancellation of registration of registered organisations

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

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

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

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

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

29 Schedule 2, item 4, proposed section 28.

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

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

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

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

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

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

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

Preliminary international human rights legal advice

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

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

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

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

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

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

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

38 Statement of compatibility, p. 10.

39 Statement of compatibility, p. 12.

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

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

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

40 Statement of compatibility, p. xi.

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

42 Schedule 6, item 2.

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

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

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

Committee view

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

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

Placing unions into administration

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

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

43 Statement of compatibility, p. 12.

44 Schedule 3, item 4, proposed section 232.

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

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

Preliminary international human rights legal advice

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

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

1.81 The statement of compatibility states that the measure has:

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

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

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

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

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

47 Statement of compatibility, p. xiii.

48 Statement of compatibility, p. xiii.

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

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

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

Committee view

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

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

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49 Statement of compatibility, p. xiii.

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

Introduction of a public interest test for amalgamations of unions

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

Preliminary international human rights legal advice

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

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

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

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

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

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

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

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

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

the rule of law" that has been identified in some registered organisations.'[57] The statement of compatibility states that this addresses a pressing and substantial concern as required to constitute a legitimate objective for the purposes of international human rights law.

1.90 In relation to whether the measure is likely to be effective to achieve its stated objectives, the statement of compatibility states that 'it will reduce the risk of an adverse effect of an amalgamation of existing organisations,' and that the 'application of the public interest test to mergers of organisations with a substantial history of breaking workplace laws will curtail the potential spread of lawbreaking culture from one organisation to another.'[58] The statement of compatibility argues that the measure is reasonable and proportionate, and that 'it is sufficiently circumscribed in that it will not to apply to amalgamations of law abiding organisations.'[59] Further, it is noted that there is a safeguard in the requirement that a full bench of the Federal Court consider whether a proposed amalgamation should be subject to the public interest test in the bill.

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

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

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

57 Statement of compatibility, p. xv.

58 Statement of compatibility, p. xv.

59 Statement of compatibility, p. xv.

Committee view

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

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

Legislation (Deferral of Sunsetting—Sydney Harbour Federation Trust Regulations) Certificate 2019 [F2019L01211][1]

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

Extension of prohibition on public assembly

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

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

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

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

Preliminary international human rights legal advice

Rights to freedom of expression and assembly

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

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

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

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

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

3 ICCPR, article 21.

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

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

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

7 Statement of compatibility.

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

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

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

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

Committee view

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

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

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

National Museum of Australia Regulations 2019 [F2019L01273][1]

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

Removal from Museum

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

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

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

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

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

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

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

Preliminary international human rights legal advice

Right to freedom of expression and assembly

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

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

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

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

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

6 ICCPR, article 21.

7 ICCPR, article 12(3).

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

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

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

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

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

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

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

10 Statement of compatibility, p. 31.

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

Committee view

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

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

Taking photographs and collecting personal information

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

Preliminary international human rights legal advice

Right to privacy

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

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

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

interferences with an individual's privacy and attacks on reputation.[13] 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.[14]

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

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

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

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

13 ICCPR, article 17.

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

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

Committee view

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

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

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

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

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

Participation in the National Redress Scheme for Institutional Child Sexual Abuse

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

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

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

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

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

Preliminary international human rights legal advice

Rights of the child and right to an effective remedy

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

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

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

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

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

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

6 Redress Act, s. 107.

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

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

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

10 Statement of compatibility, pp. 5-6.

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

Committee view

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

Native Title Legislation Amendment Bill 2019[1]

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

Majority default rule in applicant decision-making

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

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

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

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

3 Proposed section 251BA.

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

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

'native title party' for the purpose of the process through which agreements are made under section 31 of the NTA.[6]

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

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

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

7 Explanatory memorandum, p. 32.

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

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

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

11 This included deceased members of the applicant.

12 Explanatory memorandum, p. 32.

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

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

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

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

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

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

15 See Schedule 1, item 23.

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

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

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

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

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

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

Preliminary international human rights legal advice

Right to culture

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

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

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

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

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

22 Statement of compatibility, pp. 9 and 14.

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

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

25 Statement of compatibility, p. 9.

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

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

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

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

26 Statement of compatibility, pp. 9-10.

27 Statement of compatibility, p. 8.

28 Statement of compatibility, p. 14.

29 Statement of compatibility, pp. 14-15.

30 Statement of compatibility, pp. 9-10.

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

this respect, the measures may be a proportionate limitation on the right to culture.[32]

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

Right to self-determination

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

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

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

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

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

right of peoples to freely determine their political status and to freely pursue their economic, social and cultural development.[34]

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

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

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

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

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

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

37 Statement of compatibility, pp. 16-17.

38 Statement of compatibility, p. 17.

39 Statement of compatibility, p. 17.

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

Committee view

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

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

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

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

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

Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019[1]

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

Prohibition of academic cheating services

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

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

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

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

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

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

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

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

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

Preliminary international human rights legal advice

Right to equality and non-discrimination

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

4 Schedule 1, item 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Right to a fair trial

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

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

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

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

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

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

19 Explanatory memorandum, pp. 4, 15.

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

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

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

Freedom of expression

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

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

20 Explanatory memorandum, p. 15.

21 Explanatory memorandum, p. 18.

22 Explanatory memorandum, p. 15.

23 Proposed section 127A.

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

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

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

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

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

1.183 The explanatory memorandum provides further detail as to the prevalence of academic cheating services and the need for the measures.[30] However, further

24 ICCPR, article 19(2).

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

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

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

28 Statement of compatibility, p. 8.

29 Statement of compatibility, p. 8.

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

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

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

Concluding observations

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

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

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

32 Statement of compatibility, p. 8.

33 Proposed subsection 127A(7).

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

Committee view

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

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 and related bills[1]

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

Collection and disclosure of personal information

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

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

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

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

2 Statement of compatibility, p. 63.

3 Explanatory memorandum, p. 6.

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

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

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

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

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

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

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

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

7 Commonwealth Registers Bill, Part 4.

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

9 Proposed section 16.

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

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

Preliminary international human rights legal advice

Right to privacy

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

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

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

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

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

14 Statement of compatibility, pp. 69-72.

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

legitimate objective and be rationally connected and proportionate to achieving that objective.[16]

Legitimate objective and rational connection

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

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

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

> These disclosures achieve a number of legitimate objectives, and ensure that the new registry regime can be effectively administered.
>
> In relation to disclosure within Government, registry information that is required for the administration of other Australian laws is made available for that purpose. Disclosure with consent achieves the benefit of allowing data to be used for other purposes with a public benefit so long as each person to whom the data relates consents to the disclosure.
>
> Disclosure in accordance with the disclosure framework is intended to provide the registrar with flexibility that will provide broader public benefits in the future. It is envisaged that the ability to make a disclosure framework will provide the registrar with flexibility regarding the release of registry information. For example, the framework could allow a trusted user (for instance a university whose IT systems, processes and staff have been vetted) to access information that may not be appropriate for wider

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

17 Statement of compatibility, p. 70.

18 Statement of compatibility, p. 71.

> dissemination where a social benefit exists and appropriate undertakings are made.[19]

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

Proportionality

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

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

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

19 Statement of compatibility, pp. 71-72.

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

21 Statement of compatibility, p. 70.

22 Commonwealth Registers Bill 2019, section 5.

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

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

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

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

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

23 Commonwealth Registers Bill, subsection 17(1).

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

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

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

Committee view

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

Advice only[1]

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

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

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

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

Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019 [F2019L01397][2]

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

Permitting the disclosure of spent, quashed and pardoned convictions

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

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

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

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

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

International human rights legal advice

Rights to privacy and work

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

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

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

5 Statement of compatibility, p. 10.

6 Statement of compatibility, pp. 8-9.

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

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

9 ICESCR, articles 6 and 2(1).

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

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

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

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

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

11 Statement of compatibility, p. 8.

12 Statement of compatibility, p. 9.

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

14 Statement of compatibility, p. 9.

15 Statement of compatibility, p. 10.

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

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

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

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

Committee view

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

17 Statement of compatibility, pp. 8-9.

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

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

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

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

Discrimination Free Schools Bill 2018[1]

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

Removal of anti-discrimination exemptions for religious schools

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

Employment

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

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

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

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

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

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

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

Education or training

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

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

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

3 Fair Work Act, section 195(1).

4 Fair Work Act, section 351(1).

5 Fair Work Act, section 772(1).

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

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

8 Proposed section 12.

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

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

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

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

International human rights legal advice

Removing exemptions for religious schools in connection with employment

Freedom of religion, right to equality and non-discrimination

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

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

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

10 Statement of compatibility, p. 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Schedule 1, item 3.

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

Removing exemptions for religious schools in connection with education or training

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

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

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

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

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

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

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

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

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

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

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

Committee view

Employment

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

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

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

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

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

Education or training

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

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

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

26 Schedule 1, item 3.

Health Legislation Amendment (Data-matching and Other Matters) Bill 2019[1]

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

Use of personal medical information for data-matching purposes

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

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

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

3 Explanatory memorandum, p. 7.

4 Schedule 1, item 5.

International human rights legal advice

Right to privacy

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

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

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

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

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

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

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

7 Statement of compatibility, pp. 4-5.

8 Statement of compatibility, p. 4.

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

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

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

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

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

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

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

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

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

Committee view

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

Student Identifiers Amendment (Higher Education) Bill 2019[1]

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

Use and disclosure of student identifiers

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

International human rights legal advice

Right to privacy

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

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

2 Schedule 1, item 12.

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

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

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

Committee view

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

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

4 Statement of compatibility, pp. 6-8.

5 Statement of compatibility, p. 7.

6 Statement of compatibility, p. 7.

7 Statement of compatibility, pp. 7-8.

Transport Security Amendment (Serious Crime) Bill 2019[1]

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

Aviation and maritime security identification card schemes

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

International human rights legal advice

Right to work

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

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

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

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

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

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

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

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

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

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

5 Statement of compatibility, p. 1.

6 Explanatory memorandum, p. 2.

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

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

Committee view

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

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

Bills and instruments with no committee comment[1]

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

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

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

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

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

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

- Wine Australia Amendment (Label Directory) Bill 2019.

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

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

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

Dissenting Report by Labor and Greens members[1]

1.1 Australian Labor Party and Australian Greens members (dissenting members) of the Parliamentary Joint Committee on Human Rights (committee) seek to issue dissenting remarks in relation to three bills on which the committee has concluded, namely the:

- Australian Citizenship Amendment (Citizenship Cessation) Bill 2019;
- Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019; and
- Social Services Legislation Amendment (Drug Testing Trial) Bill 2019.

1.2 The dissenting members consider it regrettable that it has again become necessary to prepare yet another dissenting report for this previously non-partisan committee.

1.3 However, the important mandate of this committee to examine bills for compatibility with the rights and freedoms recognised or declared by the seven core international human rights treaties that Australia is a signatory to must be discharged by its members.

1.4 As members of this committee, we must never lose sight of the committee's important mandate. This committee does not exist to be partisan; and it does not exist to rubber-stamp government policy, irrespective of the political party occupying the Treasury benches. The legislation scrutinised in this report deserves to be properly considered by this committee through a human rights framework, that appropriately applies international human rights law.

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

1.5 This bill seeks 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 broad circumstances. As set out in the international human rights legal advice contained in the concluding comments of the report, 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, the dissenting members consider 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.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Advice Only, *Report 1 of 2020;* [2020] AUPJCHR 26.

1.6 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, the dissenting members consider it has not been established that the measures are strictly necessary as a matter of international human rights law, 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.

1.7 The dissenting members consider that 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 dissenting members note that permanently ceasing the citizenship of a child as young as 10 or 14[2] would subject the child to an irrevocable decision, which could adversely impact their short to long term development and heighten their vulnerability. The dissenting members consider 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. The dissenting members also consider the measures 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.

1.8 In addition, 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. As set out in the international human rights law advice, pursuant to Australia's non-refoulement obligations under international law,[3] 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.[4] 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

2 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.

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

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

effective remedy require an opportunity for independent, effective and impartial review of decisions to deport or remove a person.[5] 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. 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.[6] As set out in the international human rights law advice, 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,[7] 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.

1.9 As such, the dissenting members consider 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, the dissenting members consider there is a significant risk that the rights of the child and the protection of the family will not be adequately protected.

1.10 The dissenting members also consider that the 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 dissenting members consider the measures may not be consistent with Australia's non-refoulement obligations and the right to an effective remedy. The dissenting

5 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].

6 Australian Citizenship Act, section 52.

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

members consider 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).

1.11 We draw these human rights concerns to the attention of the minister and the Parliament.

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

1.12 This 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.[8] It also seeks to establish the Northern Territory and Cape York areas as Cashless Debit Card trial areas[9] (transitioning all current income management regime participants in those areas to the Cashless Debit Card scheme).[10]

1.13 This bill engages and limits the rights to privacy, social security, and equality and non-discrimination. As set out in the international human rights legal advice contained in the concluding comments of the report, 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 First Nations People.[11]

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

9 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.

10 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.

11 As set out in the Parliamentary Joint Committee on Human Rights, *Report 6 of 2019* (5 December 2020), pp. 39-53, 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 *Report 6 of 2019*, (5 December 2019) p. 43.

1.14 While the expansion of the cashless debit card trial appears to seek to achieve a number of legitimate objectives,[12] the dissenting members consider 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.[13] Additionally, the dissenting members consider 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 dissenting members consider 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.

1.15 As such, the dissenting members consider 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 or, to the extent that the trial has a disproportionate impact on First Nations People, that it is a reasonable and proportionate measure and therefore not discriminatory.

1.16 We draw these human rights concerns to the attention of the minister and the Parliament.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

1.17 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.[14] If the medical professional recommends treatment, the recipient would be required to complete

12 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.

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

14 Explanatory memorandum, p. 29.

certain treatment activities, such as counselling, rehabilitation or ongoing drug testing, as part of their employment pathway plan.[15] 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.

1.18 As set out in the international human rights law advice contained in the concluding comments of the report, 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.

1.19 The dissenting members consider that 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, as no evidence was provided from any international trials to indicate if the drug-testing of welfare recipients is likely to be effective to achieve the stated objectives. 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,[16] demonstrates that a person is likely to have barriers to employment or dependency.[17] 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.

1.20 The dissenting members also consider that it has not been demonstrated that the measures are a proportionate means of achieving the stated objectives. The dissenting members note that the government has not explained 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

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

16 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.

17 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.

the obligation to provide an adequate standard of living.[18] It also appears that the process to remove income quarantining where it is not necessary or appropriate to an individual's circumstances is limited, as is the availability of independent review. It is also 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.

1.21 Consequently, the dissenting members consider 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.

1.22 We draw these human rights concerns to the attention of the minister and the Parliament.

Graham Perrett MP

Deputy Chair

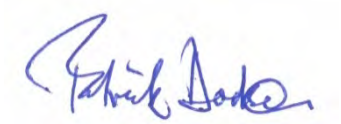
Member for Moreton

Steve Georganas MP

Member for Adelaide

Senator Nita Green

Senator for Queensland



Senator Pat Dodson

Senator for Western Australia

Senator Nick McKim

Senator for Tasmania

18 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.